IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket Nos. 18-2012, 18-2225, 18-2249, 18-2253, 18-2281,
18-2332, 18-2416, 18-2417, 18-2418, 18-2419, 18-2422,
18-2650, 18-2651, 18-2661, 18-2724, and 19-1385

In re National Football League Players' Concussion Injury Litigation

---

JOINT APPENDIX
Volume XIII of XIII, Pages JA9073-end

On appeal from Orders of the United States District Court for
the Eastern District of Pennsylvania (Hon. Anita B. Brody),
in No. 2:14-md-02323-AB and MDL No. 2323

Tobias Barrington Wolff
3501 Sansom Street
Philadelphia, PA 19104
(215) 898-7471
Counsel for the Locks Law Firm

Gene Locks
Michael Leh
Locks Law Firm
The Curtis Center
601 Walnut Street, Suite 720 East
Philadelphia, PA 19106
(866) 562–5752

Additional counsel representing Appellants:

Steven F. Molo
Eric R. Nitz
Rayiner I. Hashem
MOLOLAMKEN LLP
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556–2000
Counsel for the Faneca Objectors

Michele D. Hangley
William T. Hangley
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square
18th & Cherry Streets, 27th Floor
Philadelphia, Pa 19103
Counsel for the Faneca Objectors

John J. Pentz
19 Widow Rites Lane
Sudbury, MA 01776
(978) 261–5725
Counsel for the Miller Objectors

Edward W. Cochran
COCHRAN & COCHRAN
20030 Marchmont Road
Shaker Heights, OH 44122
(216) 751–5546
Counsel for the Miller Objectors

Michael L. McGlamry
POPE MCGLAMRY KILPATRICK MORRISON & NORWOOD
3391 Peachtree Road, N.E., Suite 300
Atlanta, GA 30326
(404) 523–7706
Counsel for Pope McGlamry

Richard L. Coffman
THE COFFMAN LAW FIRM
505 Orleans Street, Suite 505
Beaumont, TX 77701
(409) 833–7700
Counsel for the Armstrong Objectors

Mitchell A. Toups
WELLER, GREEN, TOUPS & TERRELL
2615 Calder Street, Suite 400
Beaumont, TX 77702
(409) 838–0101
Counsel for the Armstrong Objectors

Mike Warner
THE WARNER LAW FIRM
101 Southeast 11th Avenue, Suite 301
Amarillo, TX 79101
(806) 372–2595
Counsel for the Armstrong Objectors

Jason C. Webster
THE WEBSTER LAW FIRM
6200 Savoy, Suite 515
Houston, TX 77036
(713) 581–3900
Counsel for the Armstrong Objectors

Charles L. Becker
KLINE & SPECTER
1525 Locust Street
Philadelphia, PA 19102
(215) 772–1000
Counsel for the Aldridge Objectors

Lance H. Lubel
Adam Voyles
LUBEL VOYLES LLP
675 Bering Drive
Houston, TX 77057
(713) 284–5200
Counsel for the Aldridge Objectors

Mickey L. Washington
WASHINGTON &
ASSOCIATES, PLLC
2109 Wichita Street
Houston, TX 77004
(713) 225–1838
Counsel for the Aldridge Objectors

Gaetan J. Alfano
Kevin E. Raphael
Alexander M. Owens
PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI
1818 Market Street
Philadelphia, PA 19103
(215) 320–6200
Counsel for Anapol Weiss, P.C.

Linda S. Mullenix
2305 Barton Creek Boulevard
Austin, Texas 78735
Counsel for Sean Considine

George W. Cochran
LAW OFFICE OF
GEORGE W. COCHRAN
1385 Russell Drive
Streetsboro, OH 44241
(330) 607–5600
Counsel for the Anderson Objectors

Craig R. Mitnick
MITNICK LAW OFFICE
35 Kings Highway East
Haddonfield, NJ 08033
(856) 427–9000
Counsel for Mitnick Law Office

J. Gordon Rudd, Jr.
Brian C. Gudmundson
Michael J. Laird
ZIMMERMAN REED LLP
1100 IDS Center, 80 S Eighth Street
Minneapolis, MN 55402
Counsel for Zimmerman Reed

Anthony Tarricone
KREINDLER & KREINDLER LLP
855 Boylston Street
Boston, MA 02116
(617) 424–9100
Counsel for Kreindler & Kreindler LLC

TABLE OF CONTENTS

[Pa.R.A.P. 30(d) listing of pages from Dkt. 10134 Transcript of May 15, 2018 Hearing, filed July 13, 2018: pages 1 - 124]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	12-MDL-2323-AB
Kevin Turner and Shawn Wooden, on behalf of themselves and others similarly situated, Plaintiffs, vs. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	Philadelphia, PA May 15, 2018 10:11 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ANITA B. BRODY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Kevin Turner, et al:	CHRISTOPHER S. SEEGER, ESQUIRE SEEGER WEISS, LLP 6th Floor 55 Challenger Road Ridgefield, NJ 07660
For Plaintiffs Ron Solt, et al.:	GENE LOCKS, ESQUIRE LOCKS LAW FIRM 37th Floor 747 Third Avenue New York New York 10017
For Plaintiffs Mravin Jones, et al.:	STEVEN C. MARKS, ESQUIRE PODHURST ORSECK, P.A. Sun Trust International Center STE 2300 One S.E. 3rd Avenue Miami, FLORIDA 33131

APPEARANCES: Continued

For Plaintiffs Charles R. Easterling, et al.:
LARRY E. COBEN, ESQUIRE
ANAPOL, SCHWARTZ, WEISS, COHAN, FELDMAN & SMALLEY, P.C.
1701 Spruce Street
Philadelphia, PA 19103

For Plaintiffs Jay Taylor, et al.:
SOL H. WEISS, ESQUIRE
ANAPOL, SCHWARTZ, WEISS, COHAN, FELDMAN & SMALLEY, P.C.
1701 Spruce Street
Philadelphia, PA 19103

For Plaintiffs Dorsey Levens, et al.:
MICHAEL McGLAMRY, ESQUIRE
POPE, MCGLAMRY, KILPATRICK, MORRISON, & NORWOOD, LLP
STE 300
Lenox Overlook
3391 Peachtree Road
Atlanta, GA 30326

BRUCE A. HAGEN, ESQUIRE
BRUCE A. HAGEN, P.C.
119 North McDonough Street
Decatur, GA 30030

For Plaintiffs Floyd Little, et al.:
J. GORDON RUDD, ESQUIRE
ZIMMERMAN REED, PLLP
1100 IDS Center
80 South 8th Street
Minneapolis, MN 55402

For the Plaintiffs Greg Landry, et al.:
CRAIG R. MITNICK, ESQUIRE
MITNICK LAW OFFICE, LLC
35 Kings Highway East
Haddonfield, NJ 08033

For the Plaintiffs George Adams, et al.:
ANTHONY TARRICONE, ESQUIRE
KREINDLER & KREINDLER
277 Dartmouth Street
3rd Floor
Boston, MA 02116

For the Plaintiffs Michael Brooks, et al.:
DERRIEL MCCORVEY, ESQUIRE
MCCORVEY LAW, LLC
102 Versailles Boulevard
Suite 620
P.O. Box 2473
Lafayette, LA 70502

APPEARANCES: Continued

For the Objectors Roderick Cartwright, et al.:	STEVEN F. MOLO, ESQUIRE MOLOLAMKEN, LLP 430 Park Avenue New York, NY 10022
For the Objectors Roderick Cartwright, et al.:	ERIC R. NITZ, ESQUIRE MOLOLAMKEN, LLP 600 New Hampshire Avenue, NW Suite 600 Washington, DC 20037
For the Alexander Objectors:	LANCE H. LUBEL, ESQUIRE LUBEL VOYLES, LLP 675 Bering Drive Suite 850 Houston, TX 77057
Audio Operator:	JAMES F.G. SCHEIDT
Transcribed by:	DIANA DOMAN TRANSCRIBING, LLC P.O. Box 129 Gibbsboro, New Jersey 08026 Office: (856) 435-7172 Fax: (856) 435-7124 Email: dianadoman@comcast.net

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

I N D E X

I N D E X Continued

(The following was heard at 10:11 a.m.)

THE COURT: Wow. Okay. I hope all of you don't expect to get paid. Okay. And I think I have a map. Okay. We're here in the matter In Re National Football League Players Concussion Injury Litigation, at 2012-2323, and -- that's it.

All right. Mr Seeger, why don't you begin?

MR. SEEGER: Thank you, Your Honor. Your Honor, I have a really short PowerPoint. And I expect my comments to probably go about 15 minutes.

THE COURT: Okay. That's fine. And I have it here, so I won't be looking at you.

MR. SEEGER: I'm going to also hand you a copy --

THE COURT: A hard copy?

MR. SEEGER: Yes.

THE COURT: Okay. Thank you. I'll be looking at -- I have a screen.

MR. SEEGER: No problem. And I think I've got a clicker working, so I'm going to go ahead and get started, Your Honor.

THE COURT: Good.

MR. SEEGER: Your Honor, I believe I speak for everybody when I say generally that this is a -- I'm really unaware of any other settlement that has -- that is more innovative, in the sense that it has created at 65-year

program.

It compensates injuries in living players who cannot be diagnosed during their lifetimes of certain injuries. More groundbreaking, has brought more social good in the term -- in terms of recognitions of mild traumatic brain injuries caused by concussions. And more transparent, which is incredibly important.

As you know, Your Honor, we have tried to put everything related to this settlement, the ground rules, everything out there, so class members who are represented by counsel, or anyone else, understands what's going on. I take a lot of pride in that, and I think I can speak for everybody in the courtroom who is involved in this, they take a lot of pride in that.

But, you know, we are here today, obviously, to discuss attorney's fees, so I am going to try to go through a very brief presentation on a little bit about the case, the context of the case, my thinking in terms of making the recommendations to Your Honor. Which, by the way, are merely recommendations. Obviously, I'm not the final word, the Court is on these.

So I will go ahead and begin with that. Your Honor, as you know we -- this MDL was formed in 2012. And there were a number of unique challenges that we faced early on. There were complex and evolving scientific issues. The science

surrounding CTE, and the brain injuries, and the disease sets that are associated with it.

THE COURT: I'm going to put this -- Jim, this is part of the record. Okay.

MR. SEEGER: There were significant legal issues, as Your Honor knows, because the first one that we confronted here was the issue of preemption, because many players were covered by a collective bargaining agreement. Had we lost that issue, many thousands of players would have been out.

There was substantial alternative causation issues and other defenses that could have been raised by the NLF, and Statute of Limitations issues.

Many of which -- almost all, except for players who died with CTE prior to 2006 have really been waived by the NFL in this settlement. It was a novel litigation course, and I point this out because it's very important to the way -- to the reason we're here today.

In many MDLs there were Bellwether trials, there are discovery committees, there are law and briefing committees. We usually form big PSCs, and a lot of that work is done because many of these things lead to trial.

And, in fact, had there been trials in this case, I can tell you there are a number of amazing trial lawyers n this courtroom that would have had a substantial amount of work, and would have done, no doubt, great work.

But it didn't go that way. Discovery was stayed in this case pending the preemption issue. Both sides had a lot at risk on preemption. The NFL did, and we did. Which sets the perfect conditions for a settlement. And that's where we were.

The circumstances of this case really dictated the early resolution, and the course that it took. Just to focus on the settlement, we had negotiated for many months before Your Honor appointed Layn Phillips, Judge Phillips to come in and assist us.

And after he assisted us, in August -- on August 29th, 2013, we came to terms on a term sheet. After the term sheet, we negotiated for many months to come up with a settlement agreement. And Your Honor's very aware of that settlement agreement, because it was presented to Your Honor, and you rejected that.

You sent us back to the negotiating table. And for many months around-the-clock negotiations tweaking the deal and trying to get the NFL to where they ultimately are, which is an uncapped settlement, which benefits the entire class.

I think we know, looking at the numbers and the awards that are paid out, that that was obviously the right move for the class. And then I've got some other benchmarks here. Final approval April 22nd, 2015, Third Circuit affirmed it. April 18th, 2016 and the United States Supreme Court

denied cert in December of 2016.

Now this is also important to the context of how the fees -- and my approach to fees. It was very clear early on that the way this case was going to settle was going to be a Rule 23 Class Action. The complicating factor there is that it was a personal injury MDL.

There were a number of cases out there that presented many challenges, for good reason. I'm not critical of AmChem or Ortiz, or the Court cases that came before it, but they dictated the way to do these things. And for many years lawyers had not been able to pull off personal injury class action settlements because of those cases.

Putting aside Diet Drugs. Diet Drugs in many ways laid the framework for this case. Now it presented also problems. Diet Drugs had a back-end opt out, which was not perceived by the plaintiffs as far as a problem, but by the defense Bar it was.

And defense lawyers for many years ran away from class action settlements and the concept that the only way to get around AmChem would be to allow people to opt out of the class action settlement years after it was approved.

We avoided that in this case by uncapping the deal. So there is no back-end opt out, there's a piece, but there's going to be more than enough money to compensate every player who is entitled to compensation.

The BAP program I'd like to talk about a little bit, is really groundbreaking in many respects. It's not just a medical monitoring program, it's more than that. We went out and created our own health management network of doctors, both for the BAP and the MAF. We recruited doctors around the country to be there for players, to do these BAP exams. And they're paid by the settlement. Thank you for that.

The whole idea of that was to catch impairment early. Obviously we knew people going through the BAP program may not have neurocognitive injuries that would be diagnosed that would lead to monetary compensation.

But the idea was that, if players were starting down that degenerative path, we would get to them early with the testing, and get them to counseling, and get them into the healthcare system.

And that included all kinds of things, not just neurocognitive, but mood, anxiety and depressions -- depression issues we were hoping would be caught in the BAP program, even though they may not rise to the level of a qualifying diagnosis.

Also, importantly, players have the option of volunteering the result of their neurocognitive tests in the BAP. That provides potentially a database of tens of -- you know, twelve, 13,000 players that will be eligible for the BAP, to make that available to science, so that something

really good comes out of this, that we understand more about CTE, more about brain injuries resulting from concussions.

These are all important things that you don't see in most class action settlements, but we have it here. We also have a lien resolution program that provides for substantial discounts.

And what we did there, is we took the power of the pot, this big pot we have for the settlement, we took all these claims that are aggregated in this class action, and we went to the Government and negotiated substantial discounts for every player who was going to get a monetary award, on their behalf. We've done that for them.

Now I understand from the time that an MAF award is granted and the time those liens are worked out, they're still -- still taking several weeks to do that. But we're picking up the pace, we're getting faster with it. It's a 65-year program, we're in the first year of the 65-year program.

And because it was an innovative -- you know, we needed an -- an innovative program that would survive muster under Rule 23 at the Third Circuit, and at the Supreme Court potentially. We knew there would be objectors.

Some objectors are here today seeking fees. I had -- I thought as lead counsel -- co-lead counsel, it was important, and there was no objection by anybody -- any of the class counsel at the time, to recruit to our team, and we had

a good team. I was on the team; Steve Marks, who has experience in class actions; Sol Weiss; Gene Locks; all fantastic lawyers. I don't criticize their skill in any respect. I have nothing but the utmost respect for them.

And they had experience in Rule 23, but I don't think, like the people we brought onto the team who all of us through would make a substantial contribution. Professor Sam Issacharoff, for example, who is a -- Bonnie and Richard Reiss, professor of constitutional law at NYU has argued numerous cases in the Third Circuit.

Sullivan v. DB Investments. He was involved in the BP litigation. He was involved in many of these things protecting settlements like this on appeal. He was a necessary component to this. And I don't think anybody in this courtroom disputes the quality and what he brought to the team.

Arnold Levin was lead counsel in the Diet Drugs litigation, and help craft that settlement. Very familiar -- and extensive experience in class actions. Arnold's here today, Your Honor. And was an invaluable member of the team.

Dianne Nast has substantial experience with Rule 23, antitrust, securities cases. She has substantial experience with personal injury cases. So these were people that we brought to the team that complemented what we had, and really helped advance.

And I think Your Honor has recognized this in your decisions. On the April 5th decision that you wrote, Your Honor, you mentioned:

"The performance of class counsel regarding this complex settlement agreement has been extraordinary."

And then you say:

"Perhaps the strongest factor weighing in favor of acceptance of class counsel's fee requests is the final factor that takes into account the innovative terms of this settlement."

And that was recognized by Your Honor.

THE COURT: I might add --

MR. SEEGER: Yeah.

THE COURT: -- that I was in on -- I was privy to many of these. And one of the issues was that if this did not get class certification, my evaluation was the NFL might never have gone along with it. So that -- that's something that I think you have to take into consideration. That the fact that you -- that you did what you did, and moved it the way you did, really was -- was a very, very substantial factor.

MR. SEEGER: And, Your Honor, just -- not to do too much brown-nosing here, but Your Honor took --

THE COURT: Oh, that's okay.

MR. SEEGER: It's okay? Your Honor took her responsibility as a fiduciary for the class very seriously

from day one. I believe it was the initial conference when you called the parties in the back and you said there were issues here, and you need to talk. And you sent people out to talk. And we reported to you, both sides did, and you were very much aware of what was going on.

You also have recruited highly experienced people to help you oversee this. You appointed Judge Phillips, who helped with the first version. You appointed then Perry Galkin (phonetic), who helped with the renegotiation that led to the uncapped settlement.

And the two Special Masters that are overseeing the settlement right now, Wendell Pritchett and JoAnn Verrier are doing outstanding work, and I'm sure that you would hear that from everybody in this courtroom.

The Third circuit also noted that the settlement will provide a billion dollars in value to the class of retired players. It's a testament to the players, researchers, and advocates who have worked to expose the true human costs of a sport so many love.

Which is true, and I agree with that, but it also points out a really interesting dynamic that this case is under a microscope, and rightfully so.

It involves probably the biggest sport in America. Players who become beloved figures in families who people grow up watching, and now they're in need of assistance. So just

to discuss the settlement participation, just really briefly again. It was obviously important, we had a registration period. Look, a settlement is a give and take. We didn't get everything we asked for, and the NFL didn't get everything they asked for.

There was a time line to get players registered. We had six months to make sure this class and the players participated in this settlement. Because, as you know, one of the criticisms of class actions, and it's legit, is that the class members sometimes don't participate.

We couldn't allow that to happen. We did -- we reviewed every case out there, and we saw relatively low participation rates in many class actions. So in this one, we were determined to get out there and make sure it didn't happen. We did town hall meetings, television and all kinds of radio interviews. Conference calls with hundreds of players.

Targeting of key market areas in advance of registration, where we would be able to go in and talk to, maybe sometimes ten players in the room, sometimes 200 players in the room. But they're such a cohesive group that they talk to each other.

Those results paid off. We have over 20,000 total registrations. 15,982 retired players, 3,200 representative claimants. So participation rates that are driving the

numbers that I'm going to talk about now. The monetary awards we have -- and -- and, Judge, I have to acknowledge we were off to a slow start.

I think many people in this room understand the issue. There were come claims that were coming in, you know, several hundred early on that were being marked for being sus -- with having suspicious activity.

I don't want to use the word fraud, because I'm not sure that's an appropriate word in this context. But there were some suspicious claims coming through. That really slowed down the scoring on the dementia claims. We picked up the pace on everything else, but we fell behind a little bit. Now that's back on track.

And I think we have over 100 dementia claims scored, and they're being scored -- every day we're seeing new MAF awards for dementia claims.

To date we have 411 monetary award fund notices totaling over $423 million that has been approved for payment. It is not all out the door, unfortunately. We have liens to reconcile. There are issues with attorney's fees that have to be held back.

But there are things -- it's starting to really move. But $423 million has been approved. Now the significance of that is that these awards have exceeded the projections of both sides for the first ten years. We had

projected around two hundred and something million in the first three years to be paid out. We've already approved for payment over $400 million.

That's a success, and it's a success in every respect. It could mean that these -- in the amount of time that the settlement was delayed because of the appeals, more players went out and got pre-effective date diagnoses. So maybe that's front-loaded a little bit, but we're encouraged that it's going to be much higher than we anticipated.

The BAP examinations are important, because we've got over 12,000 who are eligible. 4,000 are currently scheduled for an appointment.

2,400 NFL football players with reports from at least one examination, and we see the results of the BAP, not only paying off in terms of players finding out, and many of them getting the comfort of knowing that they're testing normal or above normal, but for ones where we're finding impairment, we already have 18 who've been identified as a level one neurocognitive impairment, 28 who should be receiving monetary awards, 1.5 neurocognitive impairment; and 16 also eligible for monetary awards for level two.

Also, and I'll do this quickly, the first year settlement results since the effective date. You know we've had a number of projects we had to deal with. There were a number of players and others who had been making

misrepresentations about the settlement. We were here with Your Honor getting corrective statements filed.

We have taken on, for better or worse, litigation funding abuses. As you know, Your Honor, we're very active with that. In addition to that, we have had to fight with the NFL on appeals, and in many of the ones that we won, we've won substantial concessions.

For example, for a favorable interpretations of the rules, the definition of generally consistent, which is the second bullet pont there, Your Honor, is very important. When we allowed for pre-effective date diagnoses, it was important that people could go to their own doctor, get that diagnosis, and have it be honored in the settlement.

We got some push-back from the NFL that wanted to interpret generally consistent as meaning you'd have the same outcome as if you were given a BAP test. But that's not what was intended.

It was intended that you'd be able to take the documentation from that doctor, and as long as it was close, the testing was close to what we had in the BAP, it would be honored. And we won that with the Special Masters. We briefed it, and the Special Masters ruled in our favor.

The definition of eligible season is a huge -- a huge point here. The NFL's position was the only players who would get credit for an eligible season were the 45 who suited

up on game day. But the night before, there were 53 players.

So we took the position that you practiced all week, you were getting hit in the head all week, you were playing hard, you should get credit for it.

And as Your Honor knows, we succeeded on that point, which has now opened up for hundreds of players the ability to get more credit for eligible seasons, more money, and that's very important.

The downgrading of claims. We had a situation in the settlement where somebody applied for a level two, the AAP doctors did not believe they could go ahead and downgrade them to a level 1.5, even though they would be entitled to a level 1.5. Obviously we pointed out the ridiculous nature of that, and have since had that corrected.

And with regard to the 88 plan, we've made it -- they are -- players are now allowed to take their testing results that they would have obtained from a doctor under the 88 plan, which is a plan covered by the collective bargaining agreement of the NFL, and they could take those test results and submit them to -- to the MAF.

THE COURT: Those are still -- that's still being worked out.

MR. SEEGER: That's -- we have issues that are still being worked out, because every time you think you've created a rule, there's something you didn't anticipate, but we are --

we're dealing with it and watching it very closely.

And we've provided constant support for players and the counsel. We've worked with many of the lawyers sitting in the courtroom, helping them navigate some of the issues in the settlement.

So I'll now turn to common benefit fees. Under CMO-5, (phonetic) which was an early CMO that Your Honor entered, we took it upon ourselves as co-lead counsel to collect all the time and expenses from all counsel who wanted to seek --

THE COURT: The expenses have been paid.

MR. SEEGER: The expenses have been paid, Your Honor. We audited that time. In some instances we've challenged it, and I understand there were people that are unhappy with those challenges, but we made a decision as to what time should be allowed and what expenses should be allowed, and we submitted it to Your Honor.

You approved the overall fee on April 5th, but you withheld decision on the five percent hold back. So we're not dealing with that today.

On the allocation of attorney's fees among counsel, I'd like to provide a little bit of my thinking. And, again, it was -- this is just my perspective on it, I am not the final decision-maker here, Your Honor is.

But you directed that recommendations be made by me. I did that. I -- I knew I believe first-hand everybody's

contributions and what they did. I read through the time entries, as you know, that we submitted with the fee application, the initial one, declarations that were signed by each and everybody seeking a fee that lays out their contribution as they saw it to the settlement.

And I created these three areas that I thought were important. But because it didn't follow the path of a typical MDL with a lot of discovery, and motions, and pretrial work, and trials, the buckets I created to be thought of were, if you were appointed by Your Honor to be on the PSE, if you had an appointed position, I thought that was important. Because Your Honor screened everybody, and you appointed them.

Then the value of the engagement in the litigation, which is obviously my opinion, but I -- I took that into account, and I -- in some ways more importantly contributions to the settlement.

Because when it became clear we were not going down the path of trials, we were heading down the path of settlement, then the issue became, what was the value of your contribution in contributing to the result that we got?

On the -- page 12, I think this is a point worth noting, and it's -- it's in our fee brief, and it's in Brian -- Professor Brian Fitzpatrick's declaration. I'll do this briefly. The range of multipliers that we have proposed goes as low as .75, which is less than a one.

And that was only applied to people who were not court-appointed, and had done some work in the case. And I can speak about each one and why I reduced it. And it goes up as high as 3.885, which I have asked for, for our firm, obviously.

THE COURT: That .75 has not been objected to?

MR. SEEGER: Well it's -- I don't want to say yes or no off the -- because people are saying they want more, so I don't know if the basis --

THE COURT: Okay.

MR. SEEGER: -- they want more -- so --

THE COURT: All right. Okay.

MR. SEEGER: What's important to point out here is that if you look at the brief -- the cases that we cite in the brief that deal with this issue of the spread between the lowest and the highest on counsel allocations, this is actually a very, very reasonable spread.

Frankly, Your Honor, I have been involved in a number of class actions on the -- where I haven't been lead counsel, and we have received far less than a .75 sometime on our time.

And as Professor Fitzpatrick points out, he cites to several cases, just two I picked. The TFT-LCD case where there was a range of .1 to 5.5 between lead counsel and the lowest allocation, for a spread of 54 to 1.

In Re Vitamins antitrust there was a spread of 11 to 1 between the lead counsel and the lower people on the tiering. So my point is that there was a five to one spread here. I really gave every effort, I understand people are not happy, but I did everything I could to be as fair as possible in this.

And, again, just some more of my thinking. If you received a two or more, it was my view that you were a leader in the litigation, but also that you devoted substantial efforts to securing and defending the settlement.

If you were a mid-tier, which was sort of over lodestar, but not a two, it was -- there were noticeable and important contributions, I don't want to minimize anything anyone has done. And these don't reflect my opinion that people were unimportant in this case.

But that in terms of how people should be paid. it was my view that that was worthy of less than a two. There were a number of people that did very important work and we gave straight lodestar to, which means they got paid their hourly time.

And just to point out that when we're talking about objections that relate to a two or a 2.5, we're talking about 2.5 times their hourly rate. So it's -- I thought those were -- my view was, I thought they were fair. And then I discussed, there were some people we gave less than one to.

And I -- I -- and if they get up and speak, I can address the specifics of what they --

THE COURT: You can -- you'll be heard after each person gets up.

MR. SEEGER: All right, Your Honor.

And then, last, my last slide on this would be available funds I just wanted you to be aware of. So the original amount was 112,500, interest has been earned on that amount since it's been sitting there for a few years now.

There were fees and taxes associated that have been paid. Court approved expenses which have been paid out that Your Honor approved for the counsel sitting in the courtroom.

Instead of awards for the outstanding work done by the three class representatives, and I really can't say enough about that, the class reps were the face of this case.

I mean, that's -- that was the way that the PR scheme was setup. That it was never going to be about the lawyers or their fees. It was always going to be about the clients.

Kevin Turner, who didn't see this case to completion, has passed away, you know, and in many respects I think everybody would agree is the face of this. Shawn Wooden, who has not been diagnosed, thankfully, with a problem, to this day I talk to him every other day, who's a class rep for the not yet diagnosed class, meets with people

in Miami, makes phone calls to people, sends those people to me when he doesn't have an answer for them.

And we assist. And he has been outstanding. And Corey Swinson, who was the class rep for the underclass, passed away from a heart attack. And you saw fit to grant our request for the awards for them for $100,000 each. And thank you for that, Your Honor. It was very important.

Also coming out of the account, and I think it's important for people sitting in the courtroom to know, were not just the incentive awards, but we've appointed an attorney to represent pro se's.

There was a portion of that that I have agreed would be covered from this account, setting up the rules and guidance regarding Statute of Limitations challenges, and he's billed to this as well, and through April he's billed the 208,000, which leaves the balance that I show, and a total available funds -- oh, I just need to point this out, it's in our brief, but it's important. On the escrowed funds we had a $4 million expense account with the NFL to do notice and all those things.

If money was left over, it could be rolled over to this account. And that's what the 1.3 million is at the bottom. So the total amount that's available in the QSF for fees is $180,442,700.12.

That's all I have for now, Your Honor.

THE COURT: Okay.

MR. SEEGER: Thank you.

THE COURT: Thank you very much. Okay. I think the first person I'm going to recognize, the first firm is going to Anapolis.

And, Jim, I have set ten minutes, and I'd like very much to be sure that -- that that's accurately recorded. Thank you very much.

MR. WEISS: Good morning, Your Honor.

THE COURT: Good morning.

MR. WEISS: Sol Weiss. Glad to see you again, Your Honor.

THE COURT: Yes.

MR. WEISS: And thank you for giving us 10 minutes. Would you like to hear from Mr. Coben as part of my presentation, or not?

THE COURT: Whoever -- he's part of your firm?

MR. WEISS: Yes.

THE COURT: Oh, sure. Whoever you' like to speak is fine from your firm.

MR. WEISS: So I will leave some time for Mr. Coben.

THE COURT: Okay. Good.

MR. WEISS: I'd like to start the presentation by referring back to what Mr. Seeger pointed out. And Chris did have three buckets, roles in leadership, point at which the

firm's claimed common benefit contributions were made, and contribution to the settlement. And I will tell you that Anapol Weiss fits in every one of those three buckets.

And so I would like to again talk about with Chris Seeger wrote about us. We were appointed to the PEC and I was elected, and then appointed by you as co-lead counsel.

Larry Coben, my partner, was a member of the PEC. And we contributed to the organization of the PEC and some of its committees. I attended many, many settlement meetings and mediations with the NFL. Mr. Coben and I were very active in negotiating the battery of tests for the BAP.

And dealt with other matters relating to the medical issues undertaken in settlement.

THE COURT: Okay. As I understand it, the recommendations to you is 2.5 multiplier, isn't that correct?

MR. WEISS: Correct. It is.

THE COURT: Do you have any objection to that?

MR. WEISS: I do. I think it should be higher, and I'll tell you why. So we did file, I believe, papers, and we'll stick by our papers. And we may file a supplemental application later, but let me tell you why. We did a lot of work with regard to the BAP.

We brought to the table Grant Iverson, that Mr. Coben will talk about, who was very instrumental in getting the testing protocols done for the BAP, making sure that T

scores -- evaluations were appropriate, and so that a fair number of people who deserved to get compensated for neurocognitive benefits were.

In addition to that, we had a 2,000 player database that we created, with assists from a lot of the firms. And that database was given to the NFL when we actively involved in negotiations.

And it gave a lot of information about the spread of ages of players, the symptoms they had, when they first developed some neurocognitive injuries.

That was a very important tool, and it was used. It took months to do that. We also did work on preemption. At my recommendation, we retained David Frederick, and you remember he argued in front of Your Honor.

I was there for all of his prep. We helped look at the briefs and give suggestions. And we also went to the mock panel discussions.

We also were involved in public relations that Mr. Seeger talked about. And one of the things that we thought were important was to make sure for communications that it wasn't about lawyers, but it was about players.

And so we helped recruit five or six different families who became the face of the communication network throughout the United States, and am happy to say that when we started this program most people in the United States thought

that the NFL players didn't deserve to be compensated or sue the NFL, by August of 2012, that turned around and an ESPN survey found that 70 percent of the people who took the survey felt that the players were justified in suing the NFL.

And as Chris talked about, this helped shape not only football, but women's soccer, lacrosse. And the understanding of closed head injuries has grown exponentially because of this litigation, and we are actively a part of that effort.

So with that, I'm going to turn over my rest of my time to Mr. Coben. He'll talk about the science.

THE COURT: Okay.

MR. WEISS: Thank you, Your Honor.

THE COURT: Thank you.

MR. COBEN: Good morning, Your Honor.

THE COURT: Good morning, Mr. Coben.

MR. COBEN: Just very briefly. When I first had the idea for this lawsuit, I met with a number of experts who were key to issues. And Your Honor will recall when we first met with you, with the Easterling case, there were six plaintiffs including Ray Easterling and Jim McMahon, and several others of notoriety.

And it was at that -- of course right before that is when we created the whole idea of doing this by way of a national lawsuit in concussion. And to do that, we had to

understand the issues both from liability and damage standpoint.

And that was my role, since I've been involved in head injury cases, individual cases for decades. And so we organized a team of experts, and that was critical, both to looking at the liability issues and the damage issues. And that was my role primarily.

To hire and to work with people Thomas Gennarelli, who is a world renowned neurosurgeon, who's written book, after book, after book. David Hovda, who you cited in your opinion, from UCLA, and Chris Giza.

And we worked to develop, not just the liability issues, but then when the case transitioned, to looking at settlement issues.

We then used and worked with a gentleman named Grant Iverson, who's only referenced as a footnote in some of the briefs. Grant Iverson originally is from Vancouver. He's now at Harvard. He is a world renowned neuropsychologist. He developed all of the test modalities, along with Dr. Keilp that Chris's firm hired.

Dr. Iverson always wanted to remain in the background. But he actually -- I traveled to Vancouver, of course I spent a lot of time with him, and then interacting with Dr. Keilp, we then also then developed for the settlement purposes for your guidance, the work of Dr. Hovda, Dr. Giza,

Fischer, and Dr. Hamilton.

Those are the primary declarations that were attached to explain both the nature of the phenomenal problems confronting these players, as well as ways to measure their losses and then to determine how to compensate.

So that was the primary issues -- once we got past the master complaint, all of the legal issues to be worked with, I think the thing I'm most proud of is having developed the science that we could use and was incorporated into the plan, and is so effectively working.

I'm so proud that, even for instance with Mr. Easterling, although he took his life two months before Junior Isaiah, I'm very proud of that as well.

THE COURT: Okay. Thank you very much.

MR. COBEN: Thank you, Your Honor.

THE COURT: Okay.

MR. SEEGER: Your Honor, I have nothing but good things to say about both Mr. Coben and Weiss. They worked hard on the case, I appreciated their support and their help.

But, you know, again, going back to my analysis, they had, in terms of the time that was reported, they had $1.8 million in time. And I applied to that a multiple of two and a half times that amount, which I thought was very fair under the circumstances.

I don't really want to get into a situation here

today where I'm picking on the nitty-gritty of whether this person made a, you know, did this or did that. I just, unless Your Honor has questions for me about it, I will just simply say that there were teams of people involved with experts.

But when it came time to turn this thing into a settlement, there were also a very -- a small group of highly qualified people that were able to take those opinions and shape them into what ultimately has become this settlement.

And although there was involvement by Mr. Coben and Mr. Weiss, and others, it wasn't as substantial as the work done by other people, frankly.

Even the work on the term sheet and the settlement agreement, if you read it today, it was an around-the-clock effort to write it, to rewrite it. And although Mr. Weiss did review drafts, it wasn't like they were there with us all day and all night on this.

So having said that -- as you also know that the main expert for the case was Dr. Keilp from Columbia, who, again, took many of these opinions by all these other great experts and great work done by lawyers, there's no doubt, I don't -- I don't think a 2.5 is me disparaging anything that they have done in this case.

THE COURT: No question about that.

MR. SEEGER: So I'll just rest on that, Your Honor.

THE COURT: Okay. Thank you. All right. Next

person on the list is Mr. Locks. I want to tell you -- I do want to announce, if you don't have any objection, I've asked Mr. Locks to look into the third-party funders and to play a special role in this litigation to try and resolve that. And, Mr. Locks, I'll appreciate your effort. Okay? Okay. Why don't you come forward?

MR. LOCKS: Your Honor, not knowing exactly the format that you are going to follow today, we have our of counsel, Professor Tobias Wolff here, who was going to address the Court on our behalf concerning all of the issues --

THE COURT: Oh, I thought you were going to argue -- is he part of your group?

MR. LOCKS: Well he's been involved in every single issue involving fees and anything with fees.

THE COURT: Okay.

MR. LOCKS: And all the briefs.

THE COURT: I'll hear him. Okay.

MR. LOCKS: And he -- he's here to present. Obviously, I can amplify on specific things, anything the Court thinks is appropriate.

THE COURT: But is he going to talk about your role?

MR. LOCKS: Yes.

THE COURT: Okay.

MR. LOCKS: Yes.

THE COURT: Okay. Just as long as he's familiar

with your role, I don't have any --

MR. LOCKS: He's familiar with our role and he --

THE COURT: And he participated with you?

MR. LOCKS: Yes. And he's also familiar to recommend a process and procedure that we think is going to be helpful to the Court.

THE COURT: Okay. Thank you. All right.

MR. SEEGER: Your Honor, can I just ask -- I'm not objecting. Just for the record, Mr. Wolff -- Professor Wolff, I apologize, is not part of Mr. Locks' firm?

PROFESSOR WOLFF: That's correct.

MR. SEEGER: Okay.

THE COURT: You're not part of the law --

PROFESSOR WOLFF: I've been serving as counsel to the firm as a formal matter for about a year and a half now, but I'm not a member of the firm.

THE COURT: Because I had restricted it, but I did not inform Mr. Locks. I did inform the two that were obviously a problem. So I have no -- I'm going to let him speak.

PROFESSOR WOLFF: Thank you, Judge.

THE COURT: Okay. But you'd better introduce yourself, because I have no idea who you are.

PROFESSOR WOLFF: Yes, Your Honor. Your Honor, my name if Tobias Wolff. I'm a member of the faculty at the

University of Pennsylvania Law School.

THE COURT: Oh, I do know you.

PROFESSOR WOLFF: You do. Indeed so, Your Honor. It's a pleasure to have the opportunity to appear before you today. And I'm going to do two things with my time. The first is to make a couple of brief remarks about the allocation that's specific to the Locks Law Firm. And then I'd like to make some recommendations about a process and about methodology.

And I'm going to pick up, actually, on several things that Mr. Seeger said during his presentation, which I think bear on that question of process and methodology. Now first and foremost as to the Locks Law Firm, and the issue of the multiplier that should be applied to Mr. Locks and his colleagues.

The Locks Law Firm has been subjected to a much lower multiplier than other class counsel. And the position of the firm, which I think is a reasonable one, is that their multiplier should be commensurate with those of other class counsel, certainly no less than the firms -- the multipliers applied to Podhurst Orseck, or to Levin Sedran & Berman, which is a two and a quarter multiplier.

Locks Law Firm was one of the prime movers of this litigation from the very beginning. It was -- the firm showed leadership from early stages, both in filing some of the

earliest cases, both individual cases and proposed class actions, developing both the legal and the medical expertise that would be necessary to conceptualize and frame these cases.

Mr. Locks himself argued before the JPML for the creation of this multi-district litigation process. And after the formation of the MDL, the Locks Law Firm was one of the core group of lawyers and firms involved in the creation of the PSE, the creation of the PEC. The firm co-drafted the personal injury master complaint, and the medical monitoring master complaint.

And at every stage of this litigation, the firm has represented more individual players than any other firm involved in the proceeding.

As Mr. Seeger acknowledges in his original petition for the award of class counsel fees, the firm was involved in settlement negotiations, the firm was involved in the opposition to the motion to dismiss on preemption grounds.

The factors that my colleague at Vanderbilt, Professor Fitzpatrick identifies as relevant to the designation of the multiplier. The role that they played as a formal matter by appointment of Your Honor, the early contributions, and also capital investment and opportunity cost investment in this case.

This case became a viable enterprise because firms

like the Locks Law Firm dedicated their time, their resources, and their reputations to the proposition that these injured players were entitled to a remedy.

That the obstacles that were both legal and scientific, and also, with all due respect to the NFL, the reputation well-earned that the NFL had for scorched earth opposition to any attempt to seek compensation for players, those were daunting obstacles.

And I think all of the firms that were involved in a core role early in litigation should have that role appropriately recognized. And the Locks Law Firm is not asking for a larger multiplier than any of their fellow class counsel, but they are certainly asking for equitable treatment in that regard.

I'll mention very briefly on the issue of the calculation of the lodestar, it was included in the lodestar, there's some disagreements here. There's several hundred thousand dollars attorney's fees, and at least several tens of thousands of dollars of paralegal time that were disallowed by Mr. Seeger and his firm.

And let me just, as one example, offer the following. Mr. Seeger in his petition seeking the award of class counsel fees, pointed, quite appropriately, to the player injury database, which was a very important part of both creating the -- the body of knowledge about the nature of

the injuries that would form as -- serve as the basis for forming a legal theory about the claims.

And also put the NFL on notice of exactly the magnitude of the problem that they were going to be confronted with, both in litigation, and in the popular press. And the Locks Law Firm dedicated an enormous amount of time, primarily staff and paralegal time, with the creation of that database.

That time was disallowed by Mr. Seeger. Without much explanation, other than some suggestion that paralegal time was not compensable, which doesn't appear to be a consistent rule that he's followed.

And I mention that example because it speaks to the issue of process, and I'll spend the balance of my time talking about that, if I could. Mr. Seeger said three things during his initial presentation that I want to pick up on.

The first is that he said that he and his firm have sought to be transparent at every stage of this litigation. And I think that is a laudable principle. It is not the principle that has characterized the process of negotiating allocations for class counsel fee and common benefit fees.

This has been a process which is characterized by a lot of one-sidedness of access to information, and of the principles by which tradeoffs are being made. Mr. Seeger also said that the Diet Drugs litigation in many ways laid the groundwork for this case, as a matter of the theory of the

case. He's absolutely right.

And what Judge Bartle did in the Diet Drugs litigation with respect to the allocation of common benefit fees should also be a model in this case. What Judge Bartle did in that case was to instruct class counsel to come together and enter into a negotiation through a committee process.

A process by which disagreements about both what's included in lodestars, and how multipliers should be awarded or designated for common benefit lawyers, could achieve as much consensus as possible.

So that the Court would not be burdened with the micro management of very serious and very real disagreements about money that these lawyers have earned, and tradeoffs that are going to have to be made.

Consensus is entirely possible. And that process hasn't happened yet. What this Court should have in front of it is the product of a committee process by which most of the lawyers in this room have come to consensus on most of the disputes and most of the questions about what's included in lodestars and how multipliers are awarded.

And that's not what this Court has in front of it yet. And --

THE CLERK: Two minutes remain, Mr. Wolff.

PROFESSOR WOLFF: Thank you so much. Third, what

Judge Bartle did, which we think would be a model for this case, is after imposing some guidance about standardization of approach to lodestar, and billing rates, which this Court has already spoken to, that the rates need to be standardized somewhat, we can't have some lawyers charging two or three times as much.

THE COURT: Please complete.

PROFESSOR WOLFF: That after there's some standardization there, an interim award would be appropriate up front, perhaps 20 percent of claimed lodestar without multipliers. So that lawyers can start getting paid for their work. And then, second, the process of instructing counsel, form a committee, enter into negotiations, and produce a consensus proposal to the Court is the preferred process.

THE COURT: Thank you.

PROFESSOR WOLFF: Thank you, Your Honor.

THE COURT: Okay.

MR. SEEGER: Spoken like a man who has had nothing to do with the case, Your Honor. And that's the problem with, you know, bringing in I think a law professor to come and argue.

THE COURT: I mean, I -- that was my fault, and I apologize.

MR. SEEGER: No, it's fine. It's fine. Because it actually --

THE COURT: I did call two other firms when it was obvious to me that they -- that someone else was arguing. But under the circumstances I -- I'm pleased that I allowed this argument. Okay.

MR. SEEGER: But my point is that, you know, when you appoint lawyers to do a job, I don't think you've appointed us to go out and hire other lawyers to come and argue our motions, and to do other things. And I'm not just talking about the fee thing, I'm talking about the credit claimed for hiring David Fredericks.

I wouldn't -- I personally would -- it was a group decision. I personally wouldn't have done that, because I think the lawyers have to stand before the Court when they're appointed and be lawyers. And we are all capable of doing that. But I want -- let me address just briefly some of these comments. The time that was disallowed for the most part for Mr. Locks was pre-MDL time.

If you look at the CMO-5, it says it's disallowed. It is not included. Everybody has lived by that rule. When you're talking about a database, our view was that many of that was client-specific. Now Mr. Locks has 1,100 individual clients for which to date 105 claims have been processed, and he is entitled to over $10 million in attorney's fees, for a case that was worked on by many lawyers, those go to him, nobody share in that.

Those are his attorney fees. And I don't fault him for that. I don't have an issue with it. But at the end of the day, we don't allow case-specific work in this setting, because it's not for the common benefit.

It was for Mr. Locks and his client, and he's being paid. As far as the reason for the lower multiplier, he did get a lower multiplier.

There was a period of time when Mr. Locks during the negotiations, these are in our papers, Mr. Locks gave an -- when both sides had promised strict confidentiality, Mr. Locks gave an interview at Business Week that caused the NFL to come back to us and terminate discussions.

The only way that could move forward was if we eliminated Mr. Locks from the group, because they believed he would be a source of leaking information. I'm not agreeing with them at all.

But I had to deal with that situation. I had to deal with many situations like that. I've had to deal with Mr. Locks launching complaints against the settlement on provisions that he has signed off on as class counsel.

And -- and, you know, Mr. Wolff -- Professor Wolff didn't have anything to do with this case, so it's very easy to come in here -- I would have preferred to hear -- have heard from Mr. Locks.

But it's very easy for somebody to come in and argue

for somebody else, and just give these big picture theories on how it should be done.

As far as the committee, I would have had no objection to it. Your Honor chose to ask me to make recommendations. They're merely recommendations.

THE COURT: Let me ask you something.

MR. SEEGER: Yes.

THE COURT: Are you familiar with cases -- they keep on raising this issue of getting a special negotiator for this. Are you familiar with other cases that you would like to address, and I would like to maybe have a subsequent two or three page discussion of this, on whether or not -- whether or not -- this is for my use of you, who I think knows more about this case than I.

I mean, you have been the face of the case, and, frankly, you're the only one that faced the Court. The only one. Maybe Mr. -- Professor Issacharoff, when he told me that he's sure he can get class certification, I looked at him with real surprise.

And he said, just leave it to me. And I said, well, let's see what goes on. But the reality is that you were the face of it, and you were the only person that I -- that interacted with the Court, other than the -- than the argument that we had.

There's no question about that -- no question about

it. But are there other situations that I may not be familiar with, besides the -- Judge Bartle, whom I respect tremendously, who have used the system of having lead counsel submit to the Court, just as you have?

MR. SEEGER: They're -- I mean, they're in our brief, Your Honor, and I can put those into a two-page letter, it's very simple. But there are a number of cases in the context of a class action where they not only have allowed lead counsel solely to make those recommendations, but I can tell you I've personally been involved with cases, the most recent one was the Volkswagen case, overseen by Judge Breyer in the Northern District of California where he appointed Elizabeth Kibrazer to just go ahead and make the allocations.

It wasn't a recommendation to the Court.

THE COURT: And he approved it?

MR. SEEGER: He approved it. And he appointed her to go ahead and do it and make those allocations.

THE COURT: Okay. Thank you.

MR. SEEGER: And there are a number of cases where that -- and, in fact, in many places in class actions that's more the practice.

THE COURT: That's what -- that was my understanding of it, but I wasn't sure.

MR. SEEGER: I just had a couple of other very -- very --

THE CLERK: Less than one minute.

MR. SEEGER: I'm sorry, what do I have a minute left, you said?

THE CLERK: Less than one minute left.

MR. SEEGER: Less than one minute. Let me go quickly. After the execution of the term sheet, the Locks firm -- again, great -- Gene Locks is a great lawyer. He's well-known, the work he's done in other cases.

But after the signing of the term sheet his firm did not have that much involvement, frankly, with the crafting and drafting of the settlement agreement, and the briefing thereafter. That's all.

THE COURT: Okay. Thank you. All right. The next person from Podhurst Orseck and you are?

MR. MARKS: Steven Marks, Your Honor.

THE COURT: Oh, okay, Mr. Marks.

MR. MARKS: I want to first start by echoing what Mr. Seeger said. I'm extraordinarily proud of the role that I was honored to be given. Mr. Seeger invited me early on, and I thank him for that. We've worked very well together throughout, and from the beginning.

But I want to go back in time long before this MDL was created, and how we got involved. Because Your Honor has asked us to tell us -- tell the Court about our involvement and our role. It's an uncomfortable position to be talking

about yourself that way, but since you've invited it, I will go back.

In -- about seven years ago, I believe it was May of 2011, a professor at Boston University, a doctor, and some other folks that were doing research -- you know of Ann McKee, who's one of the famous researchers in this area, contacted our office.

At that point in time there was no concussion litigation. or even a thought of concussion litigation. And as a result of that. Mr. Turner. Kevin Turner was actually being treated by a Dr. Cantu.

He was actually in the process of filming a movie, a documentary which ultimately came out through David Frankel at HOB Sports, and was released. And we participated in helping him get an audience at the Aspen Film Institute, before all of this happened.

When Mr. Turner, who was our client throughout these proceedings, and only problems arose after his death by other family members, Mr. Turner and I became exceedingly close.

We -- we were very, very close, and I considered him a personal friend. Kevin came to our office in 2011, met with me and my partners, two of which are here now, and we researched, without anyone else's participation, all of the issues that ultimately were going to be seen in this case, including preemption, causation, collective bargaining

agreement, and so on.

And at that point in time through word of mouth we started getting lots of clients. No suit had been filed, we were working on a complaint. We didn't perceive this as a class action, to be honest with you. Because it was individualized damage cases, causation was not going to be a common issue.

And so we filed a complaint --

THE COURT: Well that was one of the brilliant parts of this --

MR. MARKS: In the settlement, yes.

THE COURT: -- in the settlement.

MR. MARKS: It could only be done through a statement. And that's where I give everyone who was on the team, I think of myself, Mr. Seeger was kind enough to mention me first in his list of contributors, and I always thought of myself, and I think Chris did too, as having the second most important role in this case.

But getting back to the process, we've prepared this master -- our complaint, a whole bunch of firms started filing complaints. I think we were the second one to file. The MDL was gathered together, and it happened to be in Miami. So we held an organizational meeting back then, and we helped to negotiate a structure that we proposed to Your Honor, which Your Honor generally accepted, with the change of having lead

counsel.

We had decided before that time that we were going to be a committee of six. Your Honor changed it. Shortly thereafter, Mr. Seeger called me up, and I was very honored and very respectful of Chris, he's a brilliant lawyer, and very capable. He asked me to get involved. And I did. And from that moment and through today -- well I'm going to cover two periods of time. Pre-settlement work, post-settlement work.

Mr. Seeger I think had respect for our capabilities. So he asked me to identify and vet clients to be class reps. The two class reps in this case are our clients, Kevin Turner and Shawn Wooden. They were out clients. We vetted hundreds of people.

Chris asked me, and I wanted to be a part of the communications committee, because it was my personal opinion that the only way we were going to get to a result was -- and Kevin wanted this, public awareness. That was key, in my belief.

And I was the chair of the communications, along with -- and Mr. Turkon (phonetic). And we were very successful. The public awareness, as Mr. Weiss alluded to, was everywhere.

I was taking my son to football games and being asked to sign waiver, concussions, everybody was -- it was a

great objective, and we were incredibly successive as creating a dialogue every Sunday, every football game, every halftime. And a lot of the players that were presented were our players that we had vetted.

So what did we next do during the negotiations? I was there from day one and to the end. I was never -- I never missed a phone call, I never missed a meeting, and I was there through the negotiations even with Layn Phillips. And I think we played a very major role.

And, in fact, the very first MOU at the early stages of the litigation I drafted. The framework for the settlement that ultimately was approved by Your Honor, and I have correspondence, I can show you in camera all the communications, I drafted the MOU.

That had two programs that were ultimately adopted. A monetary award program, and a baseline assessment. We didn't call it that at that time, but that was the idea of helping these players medically.

Then I was asked to work with the actuarial's. We had to figure out what was going -- this was going to cost. We had to price it. This was before uncapped became involved, Your Honor. And I worked with the actuarial's almost exclusively.

They came to my office and spent weeks, if not months, going through very complicated actuarial analysis,

take rates, and how many people are going to get different disease, and so on. We then were asked to find experts.

You already heard their names. Who are the two experts of the four that I think were mentioned? Dr. Hamilton and Fischer. Dr. Fischer was a neurologist. Dr. Hamilton was a neuro psych.

Where are they? They're both from Miami. How did they get selected? Because I interviewed lots of doctors and I found them, and it was agreed, and Mr. Buchanan, Dave, worked with them and he did great jobs of getting the affidavits done.

But they were in your final order of approval. Who were the faces of the case? I know a lot of people are going to take credit for this. Kevin Turner and Shawn Wooden were the faces, our clients. I accompanied them every single event that they went to, and we were very successful, as I said earlier.

We had other faces. Chris asked me to get medical information, so I had to comb through hundreds of player's files to get medical information to understand disease rates who -- what were the percentages of these players who were likely to be making claims. Now I don't object, I think Mr. Seeger has tried to do the right thing. I think he is an honorable person.

And like I said, I have nothing but nice things to

say. My comment, though, I believe that our multiplier is low. And I know it's 2.25, and I saw your reaction before with the 2.5 with Mr. Weiss. And I will tell you why.

We were involved from day one, even before lawsuits were filed. We had the biggest risk, because at the early stages of this case, we had hundreds and hundreds of players.

We have since lost lots of players, because of poachers and advertisers, and people promising them favorable doctor's reports, and loans, and all that kind of nonsense. But we lost half of our cases. And that's life. I mean, we're not going to do those things.

But for us to get a 70 percent less than -- 70 percent increase, Mr. Seeger is at 3.89, he has 70 percent more lodestar. Now, Chris, like I said, is great. I have no problem. But I don't think that's equal, and I don't think it's fair, and I don't think it's right in conjunction with the risk that was taken.

The vast majority of his time, and almost all of Mr. Levin's time was post-settlement. There isn't a lot of risk at that point. Of course there is a risk of Your Honor approving it, and then the third and --

THE COURT: I -- this is not included in that. In other words, this is not post-settlement money this is --

MR. MARKS: My work. My work was -- yes. Pre-settlement.

THE COURT: I understand that, and so was his.

MR. MARKS: Well, you know, but a lot of it has been post-settlement too.

THE COURT: Yes, but that's not what's being discussed today. Post-statement work is something --

MR. MARKS: Okay. But I think it's included in the allocation that was done.

THE COURT: I don't believe so. Is it?

MR. SEEGER: I think what Mr. Marks is referring to, Your Honor, is from the time the term sheet was signed --

MR. MARKS: Right.

THE COURT: Oh, that's a very different --

MR. SEEGER: -- we --

THE COURT: -- that's a different --

MR. MARKS: Yeah.

THE COURT: -- I thought you meant implementation.

MR. MARKS: No. No, no, no, Your Honor. I'm glad Mr. Seeger cleared it up.

THE COURT: Okay.

MR. MARKS: He read my mind. And he's right.

THE CLERK: Less than two minutes remaining.

MR. MARKS: I'm sorry?

THE CLERK: Less than two minutes remaining.

MR. MARKS: All right. I will speak very fast. Your Honor, I believe that our lodestar should be commensurate

with Mr. Seeger's, not only because of the quality of work we did, but because of the important role we played, and the fact that we did so early on when there was the highest amount of risk taken on hundreds and hundreds of players that we since -- we'll never get compensated for.

Which is the reason this occurred. If it weren't for the number of players we had -- we had the stable of players that were always going on news or -- and that were supporting the work that was necessary in order to evaluate the case from a damage standpoint, and from an actuarial standpoint. If we didn't have that stable of players, which provided us the information, this settlement couldn't have been done.

THE COURT: Right.

MR. MARKS: And so that's why I think our lodestar should be higher. And we did not have an audit issue in our case at all. I don't even think any time was taken off. I think we had the least amount of time of any attorney or law firm in this entire case audited and reduced.

THE COURT: All right. Thank you.

MR. MARKS: Thank you.

THE COURT: Okay.

(Transcriber change)

MR. SEEGER: So, Your Honor, I mean, like I said with Sol and with Steve Marks, he did outstanding work. That

is -- I thought that was represented by a 2.5 -- what was it -- a 2.25 multiplier. He had $3 million in lodestar and it was earned. I mean, as Mr. Marks said to you just now, I don't think we pushed back much at all on his time. It was -- it was well earned.

But you have to make a judgment call here. I was asked to do that and my -- and the judgment that I made was that that was a fair multiplier based on a $3 million lodestar as since I'm sort of the benchmark here as opposed to, you know, I had over $18 million in lodestar, a number -- I mean a substantial part of my firm was committed to this case, where for a period of time I wasn't doing anything else and others weren't so there's -- there's an opportunity cost component.

But having -- having said that, I would only push back on a couple things that Mr. Marks said. I have no problem with him showing to the Court the initial MOU that was drafted based on some committee discussions we had. I don't think it represents the ultimate deal.

Now, there are some concepts that are picked up, but they had to go a little bit farther than a couple pages and I don't think Mr. Marks meant to say that worked exclusively with the actuaries. I think he's talking about the Garrettson (phonetic) folks.

There was a time when they were trying to build a -- sort of a calculator to calculate damages in the case, which I

put an end to because I felt at the end of the day that that calculator and where it was going, the idea was that you would punch in certain characteristics of a player and you'd get a number.

I felt it wasn't benefitting our overall negotiations so I decided that we wouldn't go forward with that. Having said that, there is nothing else, I have no criticisms of the work Mr. Marks did.

THE COURT: Okay, thank you very much.

Okay, the next -- the next are seeking class benefit fees. This is a different group, Pope McGlamry.

MR. MCGLAMRY: Good morning, Your Honor.

THE COURT: Good morning.

MR. MCGLAMRY: Mike McGlamry with Pope McGlamry. I appreciate your time this morning. We presently represent about 400 players. At one point we had over 500. Most of those were in place before the settlement was announced.

THE COURT: One second, please. Okay, yes, go on.

MR. MCGLAMRY: Okay. Sorry, Your Honor. And we lost obviously a lot of these. I'm not a big fish and I'm not here to complain about anybody. I think Chris did a great job. I hate that when we talk about Chris we don't include Sol because as I -- the way it was built was he's co-lead counsel, that's what I think of him as.

And it kind of makes me feel bad that Sol or even

Gene or Steve have to get up here and justify what they did because this would not have all happened had we not all been together and done what each of us did.

This was a very unique case and a very difficult case and anybody that asks -- and I know you know that better than anybody, and a wonderful result. It's been difficult to administer, but that's the nature of the game. This was a hard-fought battle.

Players were identifiable and accessible so people could get at them and change what they did. That was -- that was unusual. You never see that in a class action, much less an MDL. It involved the NFL so we had huge media attention to it.

You had 5,000 individually filed cases against the NFL and you end up settling this case as a class action so you bring both of those dynamics to the table, both with lawyers and with clients. There were very difficult legal issues.

Chris has mentioned most of those, and most of those have not been appreciated once the settlement was announced as to how thing -- how difficult things may have been and so people have taken that for granted. There's been a tremendous distrust of players of the NFL.

I believe that's personal and real and that permeates some of this. I hate that I'm here today. I think it makes us all look bad. I think we look like what the media

portrays us as, as greedy plaintiff lawyers. I remember back when this got started and you appointed us to leadership, we all had our roles.

Larry and Sol had their roles, we met at their office. Chris was the leader. We did that, we had the Communications Committee that really changed the way the world looked at concussions. All of those people did things and all of them contributed to this.

And I'm not going to say one over the other because I don't think that's fair. We had, you know, individual players or clients to come out and speak on behalf of this settlement on various issues. That was all by design so the lawyers didn't speak.

But that didn't just come from Chris or Sol or Steve, that included a lot of us. And I believe that media pressure was -- was incredible. What we seem to have done here is pit the people with no cases or very few cases against those that have a lot of cases, right?

And I know one of the criteria here is how we contributed toward making the settlement happen. Well I -- you know, I had relatively a lot of cases, I don't have as many as Gene or some others or Steve. Had we not participated to support this settlement, it would never have happened.

You can talk about great legal argument which we had, you can talk about briefing, you can talk whatever you

want but we all stepped up to the table, we had the clients and we got them into this settlement, and so you can't say we're not important.

Or, you can say well, you know, you've got 500 clients so you're going to get your day where you're going to get paid off with the individual claims. I know Chris mentioned that about Gene a minute ago. Well, number one, those two shouldn't be tied together, but I'll tell you right now from me, I'm losing money.

I have like I said, maybe 400 clients now. Over 300 of them I'm going through the BAP process. We all know how that works -- you might get five percent of those people what will ever qualify for an amount. I'm working for free and all that. If you tallied all this up, I'm not making money because I have a lot of clients.

What I did bring to the table though is I brought those clients into this settlement, I participated in what I was supposed to do, I was the head -- co-lead of the Discovery Committee. Unfortunately we didn't get there, but we had worked to get ready to do that. I had people on the Briefing Committee.

I was part of the Communications Committee, which I think made the difference here and forced this settlement. I was also part of the Ethics Committee, which was the group that was initially put together to look at poaching that led

to the work that Chris did and Your Honor did with regard to these funding companies and all of that.

And so, you know, you want to say I'm not a big fish, I'm not a big fish. I did not do as much as Chris did or his people. He has great people. But so does Sol and so does Steve and so does Anthony, and those people that stepped up to the plate in the leadership of this case ought to all be treated fairly.

And for somebody to come up and say well I'm now supporting this group because they're on my side versus where people were when we all got started, that's just unfair to me, Your Honor. I think we ought to be all treated fair.

THE COURT: Thank you. Is there any -- do you want to answer? Do you want to respond?

MR. SEEGER: It will be very brief because I know it's a theme that's been touched upon by Mr. McGlamry and others, the idea that there are lawyers that have a lot of cases and then some firms that don't.

And it's true and it's not that unusual and in MDL, particularly one that has been partially settled by a class action where you have lawyers that do pure common benefit work and you have lawyers that do common benefit work and have individual clients like Mr. McGlamry. I made a proposal for him to receive common benefit fees --

THE COURT: And he certainly can get paid for his --

where appropriate, for his -- for his work on individual clients.

MR. SEEGER: Well --

THE COURT: I am not curtailing that.

MR. SEEGER: No, and you're right, Your Honor, and in fact, and I just took a quick look, Mr. McGlamry has 583 clients registered. I don't know how many he has remaining, I'm not disputing him on that. I'm just saying what the numbers are in the system.

11 of those claims have been approved, which would give Mr. McGlamry approximately $2.7 million in attorney's fees on 11 out of 500-and -- well, 500. So, you know, Mr. McGlamry's right, you've got to look at it as a team. So did I do anything to contribute to helping him receive those fees? I think I did.

I'm not asking him for anything back. It's very different. So I think there's a fundamental misunderstanding too of the separation between doing work for your specific clients and common benefit work that -- that helped everybody.

And the issue of media pressure, I think you can see by the objections that there are a number of firms that did important work in that respect, but there are a number of firms claiming the same -- the same work.

And the media -- the media plan all along was never to turn that into a litigation strategy. It had two

objectives; to make sure that if this case was discussed in the media it wasn't just the NFL's view, and that they understood they were real people suffering from these problems, that was it.

And we hired an independent PR firm to handle that, CLS. I think they should get some credit here. We've been paying them on a monthly basis for the last several years for -- for creating that strategy.

THE COURT: You have?

MR. SEEGER: Well, I am now but at the time it was the -- all of us were. I mean, there was a -- we had put money in a litigation fund and we were compensating them. My point was that once we hired a PR firm, yes, there were lawyers overseeing it, agreeing with the strategy, but the PR firm did the PR work.

And I'm -- and don't -- I don't want to be misunderstood to be saying that it's not -- I mean, Steve Marks was individually representing Kevin Turner and Shawn Wooden, he did make them available. We did talk with them and decided they were the perfect class reps.

But the reality is that this was a class action and we believed any player -- and this is not to disparage the work done by the class reps, but obviously in a class they all have to be representative of the claims or you don't have the -- the -- you know, the cohesion that you need. So anyway, I

don't -- I don't want to belabor that point. Mr. McGlamry did great work. I think the proposal is fair, but it's just my recommendation. It would be Your Honor's decision.

THE COURT: Okay, thank you.

All right, Bruce Hagen.

MR. HAGEN: Good morning, Your Honor, and thank you for the opportunity to allow me to speak today. I've been co-counsel with Mike McGlamry on all of the cases that he's representing clients on and he and I have represented all those clients together so when he talks about having had 500 clients in the case and that number trimmed down to about 400, it's exactly the same for me.

I am also just new to this world, a very small fish in this big pond and it's been quite an honor to work on this case and work around a lot of the brilliant minds that we've seen here, and this has been quite an education for me.

And I'm proud to be considered among the group of plaintiffs' counsel, as that term was defined by Mr. Seeger in his petition to also include law firms that have done important common benefit work for this litigation, approved by co-lead class counsel and who are submitting declarations in support of the petition.

THE COURT: And you are not getting anything out -- have you been awarded anything?

MR. HAGEN: I got reimbursed my expenses, Your

Honor.

THE COURT: Yes, that's what I --

MR. HAGEN: Yes, I was reimbursed expenses --

THE COURT: Okay.

MR. HAGEN: -- and Mr. Seeger did include me among the list of folks that were to be paid for the time put into the case at a multiplier of 1 --

THE COURT: Oh, okay.

MR. HAGEN: -- so I am included on that list. But, Your Honor, looking at the relative values and the issues that were identified as far as how value is to be determined, I believe that that multiplier of 1 is inadequate.

And it's unfortunate, Judge, that we're in a position where anybody who's arguing for an increase in what they're to be paid is by necessity arguing that the leader of our team here should get less, and yet that's the reality of the situation that we're in because of the disparity between what our leader is getting --

THE COURT: So you're really --

MR. HAGEN: -- and what everybody else is getting.

THE COURT: -- you're really -- what you're objecting to is what Chris is getting more than what -- more than what you've gotten --

MR. HAGEN: Your Honor --

THE COURT: -- is that correct?

MR. HAGEN: -- I don't know where else the adjustment could come from, if not from -- from the top, and that's the reality of this. Yes, Mr. Seeger played the most important role of anybody on this team here, it's just that the $70 million out of 112 becomes problematic when other folks also contributed to this effort.

And looking at the criteria that Mr. Seeger has identified and that the Court is looking at here --

THE COURT: Of course I might decide that I'm going to put some away for the future --

MR. HAGEN: That's --

THE COURT: -- out of the 112.

MR. HAGEN: Yeah, the Court can decide whatever the Court decides, as Mr. Seeger --

THE COURT: Well --

MR. HAGEN: -- has repeatedly pointed out.

THE COURT: -- I wouldn't be quite that generous.

MR. HAGEN: But one of the things that is a point everybody keeps coming back to, Judge, is the point at which a firm's claimed common benefit contributions were made and were they involved in the early stages of the litigation and the project, and also contributions to the settlement.

So as you've heard, yes, we -- I was involved, I was at that meeting at Mr. Marks' office, prior to the MDL I was at the meeting in Philadelphia at Mr. Weiss's office. At that

meeting I was asked to put on a presentation talking about a media campaign and how this was being perceived in the media.

And based on that, when Mr. Tarricone was appointed as the lead head of the Communications and Public Relations Committee along with Mr. Marks, I was the first one put on that committee because I was geared towards that aspect of things.

I was very actively involved and supported the team the entire way in everything that we were asked to do. We identified the firm to be hired that we picked which is CLS, we vetted them among with several others and we crafted a very specific strategy to try to keep everybody on message.

That included particularly keeping the lawyers on message, but also getting the players on message as well. We created news where news didn't exist, Judge, to try to put pressure on the NFL.

And the question really to be asked, and I think this was the question that most of us who were not in the room when the settlement negotiations were taking place asked ourselves was, why did the NFL settle in August, 2013? Why did they agree to this so early on in the litigation?

THE COURT: They were afraid of me, obviously.

MR. HAGEN: That's -- that's one explanation, but what they were also afraid of, Judge, was the rising tide of negative publicity that was coming against them and how that

affects their bottom line. And they announced this, not coincidentally, the week before the new season was set to begin. I want to read something to the Court.

This is from the proposal that we received from CLS when we were interviewing them. “Every so often the legal process brings together a combination of factors” --

MR. SEEGER: Your Honor, can I just point something out? I’m sorry, Mr. Hagen --

THE COURT: Is it ten minutes?

MR. HAGEN: Yes.

MR. SEEGER: I don’t know if that’s work product that we’re reading from. Can you hand that to the Court? No, don’t hand it to her.

MR. HAGEN: Oh, okay --

MR. SEEGER: Maybe it would just be easier not to read it. I don’t know what it is. I haven’t had a preview of it so --

MR. HAGEN: Oh, it’s --

MR. SEEGER: Okay.

MR. HAGEN: I don’t mind handing it to the Court but if the Court doesn’t mind, “Every so often the legal process brings together a combination of factors that elevates a case, class action or mass tort to a level of attention at which the media can be a great asset if properly managed, or a huge liability if not. The personal injury cases filed by former

National Football League Players against the League in connection with a variety of head and neurological injuries are just such an instance."

"They bring together the celebrity of former NFL stars, the huge draw of pro football, a set of moving stories about profound health problems and a dramatic clash between players and the League."

"The challenge now is for the Plaintiffs' Steering Committee to make the media work to its advantage and avoid errors that could be used against your interests both in the court of public opinion and in Federal Court in the Eastern District of Pennsylvania."

"The stakes in this mass tort litigation could hardly be higher. For the NFL, the litigation poses one of the greatest reputational risks in recent history."

"Meanwhile, in your own legal camp are several law firms along with a mass of plaintiffs who likely have quite varied perspectives on legal and communications strategies."

"In this environment, a failure to actively manage the strategy message and messengers can result in message chaos with conflicting or worse, quite damaging messages. The key is to drive our key messages to explain on our terms what this case is about, proactively frame and simplify the debate to foster a positive public environment for the litigation to succeed."

Judge, all of those things were done, yes, under the guidance of our PR firm. But through the actions of folks like me who were actively following through and laying down the base for then when they needed us to identify sympathetic plaintiffs to write stories about or do op-ed pieces, we were there to do all of that.

When I say we created where none existed, a ministerial event in this case became a national story when the filing of the Master Complaint in -- June 7th of 2012, we used that as an opportunity to send out a massive press release with carefully cultivated quotes from players, from counsel, and it was picked up by 1,800 media outlets.

Judge, we, through our work early on in this case when the risk was at the highest, are the group of folks -- and it was myself and Mr. McGlamry, Mr. Marks, David Rosen who I don't see here today, and Anthony Tarricone, who under the guidance of Sol Weiss and Chris Seeger, put this plan in action and made it happen.

And I would put it to the Court that that's where the pressure was put on the NFL that led this case to be settled. You also had the very difficult situation of trying to communicate to the community of players. This is a fraternity that speaks and talks to each other frequently.

So once the settlement was announced, there was a tremendous amount of push-back from players who have a history

of distrust of the League. They look at the disability program that existed and they feel that they get a bad shake there, they feel that they are constantly on the defensive when it comes to medical issues with the League.

I and the other folks on the committee helped to craft the communication strategy to the players to try to help get them on board so that we could proudly stand up and as Mr. Seeger has repeated many times, have less than one percent of players who actually objected.

That was part of the support that came after the settlement was announced but prior to the final approval. I wasn't writing briefs, Judge, I wasn't involved in any of that. But when it came time to try to rally the troops and lay down a foundation for the work that the rest of the guys did, I was there and I answered the call at every single turn.

And I know that that contribution is worth to the overall success of this effort, Judge. It's worth exactly 1-112th, my contribution to this, and that's what I would ask the Court to --

THE CLERK: Less than two minutes.

THE COURT: Okay.

MR. HAGEN: -- consider for mine.

THE COURT: Thank you.

MR. HAGEN: Thank you.

THE COURT: All right, Mr. Mitnick.

MR. SEEGER: Oh, I can --

THE COURT: Oh yes, no, I want you to be heard. I'm so very sorry. I'm sorry.

MR. SEEGER: I mean, I don't -- I don't have a problem waiting. I'm not going to -- two minutes and, you know, so Mr. Hagen's submitted $325,000 in common benefit time and I did give it a 1 multiplier. The idea that if people argue for more it comes from Mr. Seeger, I have no problem with that again, just to be really clear, it's your decision, Your Honor.

Obviously the money has to be rejiggered if you think that my recommendations are inaccurate and there's no problem with that. Reading from the pitch from a PR company I don't think is all that helpful, that they would point out how important they are in the context of wanting to be hired.

But I don't want to diminish either the fact that these lawyers did really good jobs overseeing them and dealing with very important issues. But it's not a PR case. This was a legal case at the end of the day and we had big issues. We had -- preemption was a big issue.

If we survived that, we would have had other things and I think we all know there are many cases where the PR is great, but the case goes down in flames and this -- this could have happened. This could have happened on appeal. So Mr. Hagen is a great guy, he did great work. I have nothing else

to --

THE COURT: Okay. All right. Mr. Mitnick, are you --

MR. MITNICK: Good morning, Your Honor, and thank you for allowing me the opportunity to speak. Judge, we've heard a lot this morning about big fish and little fish. I'm the smallest fish of anyone here and --

THE COURT: You don't look so small to me.

MR. MITNICK: No, but, Judge, I was the foot soldier. I did what no one else did and it's the players who are most important here. It is Mr. Seeger who is most important here because he negotiated a deal whose benefits were tremendous to these players, but the players didn't understand the benefits.

The players didn't understand the obstacles they faced. The PR company didn't do that, the Communication Committee didn't do that, I did. I traveled from Fargo, North Dakota to Birmingham, Alabama to Tennessee, to Denver, to New York, to Chicago --

THE COURT: There must be a -- I must misunderstand something. You -- when you ask for -- when you book your time for common benefit work, you should get compensated for it --

MR. MITNICK: Yes.

THE COURT: -- is that correct?

MR. MITNICK: Yes, Your Honor.

THE COURT: I'm not sure that I understand in all these arguments today why these necessarily should be enhanced. You certainly are getting -- going to get paid. I understand that, Mr. Mitnick, that Mr. Seeger suggested that you should be paid $673,000-plus --

MR. MITNICK: That's correct, Your Honor.

THE COURT: -- and because you went these places and did what you did.

MR. MITNICK: Judge, for two-and-a-half years almost on a consistent weekly basis I traveled at my own risk, at my own expense --

THE COURT: You didn't put those in as expenses?

MR. MITNICK: Sure, and I got reimbursed for those, Your Honor --

THE COURT: Yes, well certainly --

MR. MITNICK: -- yes.

THE COURT: -- I should think so.

MR. MITNICK: But those are expenses. I'm talking about my time.

THE COURT: And that's what you were paid for as I understand it. Let's get ground rules from this. That's what you were getting paid for, Mr. Mitnick --

MR. MITNICK: Absolutely.

THE COURT: -- isn't that not correct?

MR. MITNICK: Absolutely, Judge, absolutely. And my

argument is that there is so much talk and everyone believes they're of huge value, okay? I'm not saying that I'm of great value, but what I'm saying is I was the conduit. I was the work horse. I was the foot soldier that went out and spoke to over 10,000 players and their wives through Alumni Chapter organized meetings.

This wasn't a rogue tour on my part. This was organized with presentation materials, with explaining preemption and causation, with explaining the benefits that Mr. Seeger negotiated in this tremendous settlement agreement, and I've been unwavering in my support for that settlement agreement from early -- late 2011.

Judge, when I traveled I met with Mr. Seeger one day for lunch or dinner right after the settlement terms sheet was announced and Mr. Seeger said to me, Craig -- or Chris said to me, Craig, do whatever you need to do to get the endorsement of these players to educate them, to make them aware of the issues, and that's what I did.

THE COURT: That's important common benefit work, there's no question about that.

MR. MITNICK: But I didn't receive even my hours. I received a .75. Judge, that is what is mind boggling to me. I was in constant communication with Seeger, Weiss throughout this whole process for two-and-a-half years of traveling. My time is at .75, yet in the final settlement brief submitted to

Your Honor before the final fairness hearing, one of the exhibits carried 25 pages of quotes that I gathered from class members.

It allowed Mr. Seeger to stand up there and to say to Your Honor at the very end of his argument, Judge, the most compelling reason that you should grant final approval is that 99 percent of the player community has endorsed this settlement. I'm not saying I am the one that caused that 99 percent endorsement rate.

But, I was the only one that was out there as a foot soldier for Mr. Seeger, for everyone else involved, and for the players to help them understand, to educate them. And for me to get a .75 when my hours were cut initially, I didn't put that many hours in initially.

I had many more, but Mr. Seeger -- Chris said to me, Craig, you have my authority to do whatever it takes, don't be a pig about it. And, Judge, I tried not to be. I did what I had to do to make sure that every class member understood this settlement and the benefits.

And because of that, that was instrumental in that 99 percent endorsement rate that also Mr. Karp was able to stand up and his first remark to the Court after Mr. Seeger's last remark was Mr. Seeger's comment about the 99 percent endorsement rate is correct.

THE COURT: Okay, thank you very much.

MR. MITNICK: Thank you, Judge.

THE COURT: Okay, Mr. --

MR. SEEGER: Your Honor, Mr. Mitnick is correct. When the first settlement -- I believe it started with the very first iteration of settlement, I knew that Mr. Mitnick had not only great access to a lot of players because he's very well-connected in the community, but I knew he referred a lot of cases to Mr. Locks.

I knew he had many clients of his own. He was kind of a logical place for me to turn to to say I want to get the message out. We had objectors that had websites up at the time with incorrect information --

THE COURT: I'm aware of all those things.

MR. SEEGER: So Mr. Mitnick did great work, all right, let me start with that. The reason he's at a .75 for his time were two-fold. One is he did not receive a court appointment. It was somebody that I tapped to help, but I thought that was important.

But I also felt that when I got his time records, I thought they were -- I thought there was some heavy billing that went on so I made adjustments in my judgment that I thought were fair. But I don't want that to detract from the fact that when I made a phone call to people, he was one of several that I want to get the word out -- we need to get the word out because we're up against the misinformation campaign,

he stepped up.

THE COURT: Okay, thank you very much.

MR. MITNICK: Thank you, Your Honor.

THE COURT: Okay, Anthony Tarricone. Hello, Mr. Tarricone.

MR. TARRICONE: Good morning, Your Honor.

THE COURT: Good morning.

MR. TARRICONE: Anthony Tarricone from the Kreindler Law Firm. Professor Rubenstein in his report to this Court stated, and I quote, “Class counsel settled the entire case after briefing one dispositive motion, without undertaking any formal discovery, without significant motion practice, without summary judgment briefings, and without preparing for, much less engaging in, a class or even a bellwether trial.”

There were two drivers -- main drivers that made that happen. The first was the critical mass of cases that were filed representing thousands of retired players, and the second one, and there’s been some discussion about it today, was the tide of public opinion.

And the tide of public opinion turned against the NFL in a very big way by design. It turned against the NFL and turned on its head with a C change (phonetic), the common view that people had of this litigation at its outset that was very negative to these players. And the tide of public opinion, the change, the C change, didn’t just happen. It was

because of the plan, the communications plan that you've heard about. I am the one who conceived it.

I went to Mr. Weiss in the late part of 2011 before any of the lawyers who worked on the settlement papers were involved in the case. At the time, I chaired the Communications Committee for the BP Deepwater Horizon Oil Spill case in the Eastern District of Louisiana, and we had a communications campaign there that I chaired the effort of.

And I told Mr. Weiss that I thought this case presented a unique opportunity to use the public opinion to move how people thought about this case in start and to turn the very negative view that people had on its head.

And we had an organizational meeting on February 21st, 2012 at which time Mr. Weiss asked me if I would chair the effort. Mr. McGlamry and Mr. Hagen also asked to be on it at that time, and Mr. Marks was asked to co-chair it a few weeks later.

And then on April 26th after we were appointed formally by this Court, we continued with a committee and there were some other members as well, but we had that meeting on February 21st. Two days later, February 23rd, I first contacted Ray De Lorenzi, who at the time was the Communications Director at the American Association for Justice, where I had recently been President.

And we had worked together on the Affordable Health

Care Act to prevent changes to the law that would have prevented people from having access to justice in malpractice cases, and Mr. De Lorenzi and I talked on the 23rd, it was a Thursday. On the following Monday, he introduced me to CLS.

And a few days later, he gave his notice at AAJ and he went to work for CLS, and that was in February that this happened. April 26th, some time later, you made the appointments. On April 26th, I drafted and submitted a request for proposal to several PR firms, including CLS and several others.

We then engaged in two weeks of interviews which I arranged. They were attended by Mr. Seeger, Mr. Weiss, Mr. Marks and myself, and I don't recall whether others participated in those. We decided on CLS.

We retained CLS on May 16th, 2012 and we had a plan that had started -- on February 21st, before we retained CLS, I laid this plan out and you've heard it today, no lawyers talk to the press, we use the stories of the families to tell what happened to educate the public about TBI and the devastating effects it had on these families, and to dispel the myths that were being propagated by the NFL and to turn the tide of public opinion.

That began on February 21st we laid that out. And then after May 16th when we retained CLS on the 22nd, we were in Washington, our core group, meeting with CLS and we came up

with a plan to roll out a media campaign the day that the Master Administrative Complaint was filed.

And I'm sure you recall, Your Honor, it was all over the papers, it was all over the media, and there was a lot of preparation that went into that, media briefings, and I coordinated that with CLS.

But I was involved in it many hours a day, every day, seven days a week, and on June 7th, Kevin Turner was on Good Morning America. Mary Ann Easterling was on CNN. Diane Sawyer covered this as the lead story on ABC Evening News. It was a major coup.

We had a teleconference on that day featuring Kevin Turner and Mary Ann Easterling. It was attended by CBS, ABC, NBC, ESPN, Fox, CNN, Bloomberg, Reuters, New York Times, Atlanta Journal Constitution, Philadelphia Inquirer, HBO Sports, Sports Illustrated, LA Times, Minneapolis Star Tribune, Richmond Times, Milwaukee Journal Sentinel, and others.

That didn't just happen. We made that happen and it's easy today to downplay the effect that this campaign had, but it was an extraordinary result. It was a unique case to be sure, but I recognized the opportunity and brought it to Mr. Weiss and then he had the -- the faith in me to ask me to do that, as did Mr. Seeger when he was then appointed, and we continued.

We had regular committee meetings. Then we had a core group which consisted of Mr. Seeger, Mr. Marks, Mr. Weiss and myself. Every week we had a meeting by phone that included us and in some times, the CLS people, Ray De Lorenzi and others.

This was a carefully coordinated campaign and there were detractors. The lawyers didn't like the idea that they had to be quiet. The only way we could make the filing of the complaint on June 7th a newsworthy event was to keep the lawyers out of the press for months beforehand.

That was not easy to do because there are a lot of egos in this room and people wanted to -- you know, they file a complaint, they want to give a press release and so forth, and -- and a lot of them didn't believe it would work. But it did work. We were then in the news.

One of our goals was to educate the public, turn the tide of opinion, but to do that we wanted to be in the news every single day. One of our goals was to take the campaign out of the sports pages and move it to the front page, to the news, and we did that.

We were in both camps, sports and news, and we were there every day up until the start of the season. We were there every day during the season. It dominated the 2012, 2013 season. And it was against that backdrop that in January of 2013 the negotiations started. And it's easy to say well,

it had nothing to do with the NFL coming to the table, but I think we all know that it did and I think if you ask in this room, I don't think there's a lawyer in this room who won't agree that there wasn't another case ever where communications had such an effect and --

THE CLERK: Less than two minutes remaining.

MR. TARRICONE: I'm sorry?

THE CLERK: Less than two minutes remaining.

MR. TARRICONE: So I can't -- I don't have time to go through everything I did. I was involved every day and right up until the settlement was announced and the committee and myself remained involved to sell this deal and so we were involved in that as well.

I was not involved in the negotiation and I was not involved in the -- all the work to push it through. I wish I had been. Didn't have that opportunity. But the creative work that we did was very important. My firm was given a 1.25 multiplier.

I believe it's unfair given the circumstances of this case and how it brought the -- the work that we did brought the NFL to the negotiating table and I believe that my firm should have a multiplier that begins with a 2.

THE COURT: Okay.

MR. TARRICONE: The only other thing I would mention, Your Honor, is we were directed by somebody at Mr.

Seeger's office to delete any time for people who didn't have a minimum of 50 hours. I'm a team player, I did it, I didn't question it, I did it.

And then I saw that -- afterwards that at least seven firms have multiple timekeepers with less than 50 hours, so we had to take out 73 hours or so, and I would ask that they be put back in.

THE COURT: Okay, thank you.

MR. TARRICONE: Thank you.

THE COURT: Mr. Seeger.

MR. SEEGER: Your Honor, this was a breakthrough legal case that is being studied in law schools throughout the country, has now put the ability to settle personal injury cases using Rule 23 and, you know, this constant -- you know, this -- I'm trying to say this as tactfully as I can and it's something I would say to everyone in this room privately.

But to stand here and act as if it was just some PR ploy or some PR case is just inaccurate. Does that diminish from the fact that I think Mr. Tarricone led that committee and did a great job? I enhanced his lodestar by .25 for that reason.

He -- the case has gone from 2012 to January, 2017 which is our relevant time period. In that time he billed $1.258 million, and I enhanced it by 25 percent to recognize the work that he did. I understand he's not happy with what I

did, but that was my thinking behind it. Just a couple other points that are really I think important.

You know, when I have not -- I have not put in any of the time submissions, the work done for legal fees. I don't think it's appropriate to do it and that's -- that's the right thing to do. I'm not complaining about that.

But I don't -- I also didn't put in the time that when Professor Rubenstein got the valuation of the settlement wrong, I -- we went out, got the actuaries to revalue the settlement which showed that the common benefit fees were actually less than he had -- as a percentage of the total and allowed individual retainer agreements to go up.

That -- even though I don't have that same interest, it was my job as a lead to do that and we did it and we're not billing the case for it. So just a couple things to point out because I think there's a perception in the room that I somehow am against the guys with individual -- I am not at all, no problem for me so --

THE COURT: You made that pretty clear.

MR. SEEGER: Yeah. I think that's all I have.

THE COURT: Okay, thank you.

All right, Mr. Rude -- Rudd -- Rude?

MR. RUDD: Rudd, Your Honor.

THE COURT: Is it Rudd? Rude is good enough.

MR. RUDD: Well, I hope I'm not, you know --

THE COURT: Okay. Okay, Mr. Rudd.

MR. RUDD: Good morning, Your Honor, my name is Gordon Rudd. I am a partner at Zimmerman Reed Law Firm and I'm appearing on behalf of Bucky Zimmerman, who is out of the country and couldn't attend --

THE COURT: Are you --

MR. RUDD: -- today.

THE COURT: Are you a part of that Zimmerman firm?

MR. RUDD: I am a managing partner at Zimmerman Reed, yes --

THE COURT: Oh, okay.

MR. RUDD: -- and I'm appearing on behalf of Bucky Zimmerman, who couldn't be here today, and we're pleased to be able to present our arguments to the Court --

THE COURT: Okay.

MR. RUDD: -- as to why we believe primarily that all firms that were on the PSC including Zimmerman Reed should be entitled to a multiplier based upon the factors that have been described in Mr. Seeger's declaration and Professor Fitzpatrick's declarations.

And I -- part of my presentation was around the fairness to all the team players who were on this case that Mr. McGlamry earlier spoke to. I'm not going to repeat what he stated, but I wholeheartedly agree that this case involved not just one or a few, but many lawyers who participated at

the very earliest stages. We -- our primary objection to the proposed allocation is the fact that we're not being recognized with a multiplier.

We have been given a 1 multiplier which of course is no multiplier at all. We're receiving our straight time. And we believe that our early involvement in the case, the leadership roles that we played on behalf of the Plaintiffs' Steering Committee and our work specifically on the Ethics Committee which was a committee that was created and appointed later in the case to support and defend the settlement when issues of poaching and promises of settlement loans and diagnoses that have been referred to throughout the case became prevalent, we -- we spearheaded that effort.

I'm going to address that slightly. But our -- just as by way of background, our background, our role in representing players started as early as 2009.

We were lead counsel in a class action involving NFL players -- retired players called Dryer v. NFL that was pending before Judge Magnuson in the District of Minnesota and we reached a class settlement in that case on behalf of players involving their publicity rights.

And during the -- the tenure of that case, we came into contact with more than 1,600 players who contacted us to discuss the use of their likeness and images and whether they should be compensated for it. And what we began to see during

that time was cognitive issues with regard to players. Players who were contacting us had cognitive issues.

And in 2010, we began to meet with players and we began to meet with other attorneys and we met with Dr. Omalu to discuss concussions in football, and that happened well before this case started.

And by early 2011, our firm represented more than 350 retired players with regard to concussion issues after the Dryer case finished. When the MDL was formed, we fully supported the multi-district litigation and we supported the case being transferred to the Eastern District of Pennsylvania, and we met with Sol Weiss and Michael Housefeld (phonetic) at Mr. Housefeld's office to discuss the formation of the MDL.

Once the case was formed and we were appointed to the PSC, one of the earliest strategies in the case was to file cases. The leadership -- Mr. Seeger, Mr. Weiss and others including everyone on the PSC believed that creating a critical mass -- a large number of cases so that the NFL understood that players were coming forward and were willing to present their claims at trial in a court of law was a critical aspect of placing pressure on the NFL to perhaps create the opportunity to explore resolution.

And we filed cases at the direction of lead counsel. We filed more than 350 claims in -- in multiple plaintiff

complaints. And when we did that, Your Honor, we did it understanding that we were going to represent each and every one of those 350 individuals through trial, any appeals. We knew that we were going to be advancing costs and we knew that we --

THE COURT: Do you think you would have won?

MR. RUDD: Your Honor, it's unknown because we never got to that point.

THE COURT: Well, do you think that the odds of winning --

MR. RUDD: It was --

THE COURT: -- were high?

MR. RUDD: -- a very difficult case, Your Honor, a very difficult case --

THE COURT: Yes, I would so say.

MR. RUDD: -- which -- which is why I believe, Your Honor, that the early risk that we took because of the uncertainty and the high -- the high possibility of various defenses being won by the NFL should be compensated through a multiplier.

That early risk, that early effort and the lawyers who stepped forward to represent these players and make sure the NFL understood these players were -- were not going to just sit quietly is something that should very much be appreciated by this Court and recognized by this Court through

a multiplier. And in fact, the cases that were filed in this Court, 4 to 5,000 resulted in common benefit to more than 20,000 players who registered for this settlement and who are participating.

Those clients, those players who stepped forward didn't just get a settlement for 4 or 5,000 people, they got a settlement for 20,000 people.

So to use a baseball analogy in a football case, while lead counsel may have negotiated a settlement that -- that was a grand slam, we -- and by "we" I mean all the lawyers who filed cases -- loaded the bases, and we believe without loading those bases this settlement would not have been possible.

Certainly there are other reasons for the settlement -- the good work of lead counsel, the communications effort, but the fact that these cases were filed played a very important role.

And I know that Mr. Seeger diminished the value of filing those cases by saying well, those -- those individual -- those attorneys will be compensated through their individual retainer agreements, but the fact of the matter, like Mr. McGlamry earlier stated, the vast majority of our clients will go through the BAP, but they're not entitled to compensation and yet they, by coming forward, helped achieve this settlement for a far larger group.

Additionally, Your Honor, the fees that we will earn, I anticipate Mr. Seeger may stand up and say how many cases we have that we'll receive awards and the fees that we'll receive.

We've had -- you know, several claims, I don't know the exact number, it's more than a dozen claims that have been approved, but we have put in substantial efforts in representing the individual clients as well. There's a lot of work that has been done.

So we believe that -- that although Professor Fitzpatrick stated that the lodestars were properly adjusted, the fact that we're receiving a 1 when we were appointed to the PSC, when we took early risk, simply doesn't recognize those efforts and those risks under the case law.

I just want to talk about other aspects of our leadership in the case, and certainly, you know, we haven't had the opportunity to appear before the Court, but I can assure the Court we have done a lot of work on behalf of the Plaintiffs' Steering Committee, on behalf of lead counsel in ways to support the settlement and to support the litigation.

We worked on preemption issues, we worked on the Master Complaint. We weren't invited to the Settlement Committee. We certainly would have been eager to participate, and we believe we would have been fully capable of participating. Mr. Zimmerman has led many multi-district

litigations where billions of dollars have been paid to individual victims.

I think he would have been a very meaningful resource, but it was a small group and we -- we understand that's the way it goes. Right now, Your Honor, we're serving as lead counsel in the NHL Hockey Concussion Litigation pending in Minnesota and Mr. Zimmerman is lead counsel there.

So, we certainly have a lot of -- a lot of capabilities and a lot of experience with regard to this and we believe that leadership should be recognized. Just turning briefly --

THE CLERK: Less than two minutes remaining.

MR. RUDD: Thank you. Just turning to the Ethics Committee work, Your Honor, Mr. Seeger discusses the work of the Ethics Committee in his declaration at paragraph 20, subparagraph h, and the Ethics Committee was formed later in the litigation.

Mr. Zimmerman and Mike McGlamry both -- both spearheaded that committee and it was when we began to see the issue of poaching evolving where lawyers were soliciting clients that they knew to be represented and -- and seeking to represent them, promising them diagnoses, promising them settlement loans which has been referenced today, and of course the Court is well aware with the issues regarding third party funding.

We, I would submit, Your Honor, were the first to present that issue to Mr. Seeger and to counsel. We were looking at the issue as early as, you know, several years -- as early as 2013 when we started seeing a number of our clients moving to other law firms in groups.

And we started looking at the issue, we brought the issue to lead counsel, the Ethics Committee was appointed, and I think that the Ethics Committee has played a critical role in supporting the settlement and defending the settlement because without recognizing those issues, identifying those issues and acting on those issues, the settlement could become fraught with issues of -- of fraud and -- and improper claims.

And so we believe that the Ethics Committee work was critical, it was work done to support the settlement which is another factor that the Court we hope will consider in approving a multiplier award to the Zimmerman Reed Law Firm. Thank you.

THE COURT: Mr. Seeger, I have a question to ask you.

MR. SEEGER: Yeah.

THE COURT: Do you think -- do you believe that if only five players were suing the NFL on an issue like this, the result would have been very different than if -- than if -- what is it, 800 or 8,000 or 9,000 -- I'm talking about the people --

MR. SEEGER: Yeah.

THE COURT: -- who sued individually, I'm not --

MR. SEEGER: There's no doubt about that, Your Honor. In fact, there are a string of cases involving several players that had brought cases prior to the MDL and had been confronted with the preemption issue and didn't do very well. So and then I think I've been through this many times about the --

THE COURT: But I don't know -- I don't know those settlement issues. I don't know how hard they worked on settlement there.

MR. SEEGER: I don't know either.

THE COURT: I mean, that I -- that I really don't know, but I do think -- I do think the fact that this was a public case, it would have been a public case if one -- if one player had fought the NFL --

MR. SEEGER: No doubt.

THE COURT: -- or if a number of players. I mean, it was the whole issue of discovery and everything else that went into this. I mean, that was --

MR. SEEGER: No doubt.

THE COURT: -- that was -- I mean, I sat in on those -- on what was presented to me and there is no question that discovery played a very, very, very large role.

MR. SEEGER: Yes.

THE COURT: Number of players less so; discovery, very, very important role, and I can be -- testify to that.

MR. SEEGER: Yeah. Yeah, and to this day the press is still, you know, trying to get their -- their hands on those -- on whatever documents they can.

I just wanted to make to make a couple of -- let me make an observation generally about the settlement, not necessarily specific to Zimmerman Reed --

THE COURT: Okay.

MR. SEEGER: -- because I've heard a number of people stand up here and say, you know, Judge, we've got all these clients that won't be diagnosed with a compensable injury and we're still servicing them and putting them through the BAP.

By the way, that is noble, that is important, the fact that they have these great lawyers shepherding them through the settlement. But let's also be fair and say what would have happened to those players without the settlement if they didn't have a compensable injury?

Where would -- where would they be? I mean, they would be -- right now they're getting BAP tested and we're hopefully catching problems early, they're getting into the healthcare system. Would these -- you know, I mean I guess the point is that it's not a -- it is a positive thing and the lawyers who accepted those representations, just as I do in

many cases where we also accept individual representations, you're there to the bitter end with these clients.

You can't just -- you know, obviously you've got to stay with them all the way through it. So and I do want to talk a little bit about the Ethics Committee because I think this is the first time I'm responding to it.

Yeah, it was created specifically because there were firms that were very -- and I was too -- was very concerned about this, what you've heard of as the "poaching issue." As soon as the case was settled there were a number of all the sudden claims handlers and lawyers who started blitzing clients represented by these guys in the courtroom who had been with the case since 2010, some of them.

And they were taking clients from them. They were offering them cheaper deals and it was a really unfortunate thing and I think some of that anger is directed my way because I think the belief is I could have done more about it.

The reality was we all had the obligation to the class and as much as I have been out there doing town halls telling players that that is -- that would be inappropriate, there's a lawyer who took all this risk, he was with you from the beginning and he should be with you in the end, and I also have said to these lawyers and I want to say it in this courtroom, that to the extent somebody has poached their client after the settlement and they've done a lot of work,

they can make an application still to Judge Strawbridge and talk about where those fees go.

THE COURT: Absolutely, that's a very -- absolutely. That is understood.

MR. SEEGER: Yeah. I just -- I just think it's important to point that out.

THE COURT: That's very important because he's going to evaluate the amount of work that each lawyer did on each individual -- for each individual client --

MR. SEEGER: Yeah.

THE COURT: -- and somebody came in and poached may not -- very well may not have done as well as somebody who has held a hand of this client -- this class member for a long period of time.

MR. SEEGER: Right, thank you.

THE COURT: So I think that's certainly something that should be argued to Judge Strawbridge.

MR. SEEGER: Thank you.

THE COURT: Okay, Mr. McCorvey.

MR. MCCORVEY: I was going to say good morning, Your Honor, but it seems like we're at noon now, so I'm going to say good afternoon.

THE COURT: Yes, well we recess when the Judge gets hungry so I'm not hungry yet.

MR. MCCORVEY: All right.

THE COURT: So --

MR. MCCORVEY: All right, well again, Your Honor, my name is Derriel McCorvey. I thank you for this opportunity to be heard and I also thank you for your foresight in appointing me to this committee.

As I stood here at the first hearing I recognized that I was the only former player in the room and the only African American and I really appreciate Your Honor trying to achieve some level of representation of the punitive class.

THE COURT: I think you were the only African American who applied, if I'm not --

MR. MCCORVEY: Well, yeah, it might have been that case, Your Honor, I didn't get to see all the filings. But I want to talk more so and I'm not here to pump my chest and I don't have an ego, Your Honor.

I don't play ball anymore, I just try to live a nice peaceful life. But as Mr. Seeger said earlier, he submitted what he thought was best, and I'm here to suggest to the Court that I fundamentally disagree with his approach to allocating the fees in this case and I think it's telling that 16 other law firms has joined in our universal opposition to it.

We would favor a either committee where various ideas on appropriate lodestars -- for instance, if you were appointed to the PSC, your minimum lodestar should be a 2.0, Your Honor. A 1.0 lodestar is no lodestar at all. It doesn't

take into consideration that we were here early on in the litigation, we incurred assessment costs that we wasn't going to -- we wasn't sure that we were going to get back.

We invested expenses in traveling for meetings, we participated in conference calls --

THE COURT: Did you get -- you got reimbursed for those expenses?

MR. MCCORVEY: Yes, Your Honor, I got reimbursed but when you look at -- I think when a Court values what a lawyer did to achieve an outcome, you look at the amount of financial resources that that lawyer risks, the -- along with assessment and expenses, and the likelihood of failure or success in a litigation.

I want to echo many of the lawyers that have spoken today that at the time we spent that money, we weren't sure with how you were going to rule on a preemption issue.

We knew very well about the import of the CBA so that was the risk that many of my colleagues are echoing that wasn't really factored in for a PSC member to not receive a minimum lodestar of 2.0.

I think the allocation that Mr. Seeger did to the extent that he was essentially Judge and jury is also why I think this Court needs to either appoint a Special Master or require a committee to be formed of the PSC and PEC to determine the matter. As one counsel said, we wouldn't have

this public fight if that would have been done because a consensus would have been reached. It wouldn't have been one person deciding who had a significant interest --

THE COURT: He's not deciding.

MR. MCCORVEY: Well, you're right, Your Honor, he's not --

THE COURT: I'm the Special Master.

MR. MCCORVEY: Yes, Your Honor.

THE COURT: Take a look at her.

MR. MCCORVEY: Yeah, I stand corrected.

THE COURT: Here she is.

MR. MCCORVEY: I stand corrected, Your Honor, you are the ultimate decision maker on it. But the process could have went smoother. We wouldn't have this public fight that really doesn't reflect well on -- on trial lawyers in general.

THE COURT: I have to take some responsibility on that because frankly, he was the face that I saw for years, he and Mr. -- Professor Issacharoff are the people that I've seen for years and years and years and they have been the face of this and I have felt that they would be in the best position.

MR. MCCORVEY: Yeah.

THE COURT: I probably -- I will reevaluate but it think that they -- I think I still believe that, that he -- but I certainly will reconsider it, whether or not he is in the best position to allocate.

MR. MCCORVEY: And, Your Honor, respectfully that's what a lot of the objectors have somewhat of an issue with. I wanted to be here, Your Honor, I wanted to be included in the process, I wanted to take my appointment to serve this class -- the punitive class.

But frankly, Your Honor, since the terms sheet was reached in 2013, we were pretty much -- the PSC and the PSC (sic), we were excluded from that process --

THE COURT: Well that I can't -- that's something that's very hard --

MR. MCCORVEY: Yeah.

THE COURT: -- for me to adjudicate on.

MR. MCCORVEY: No, you can't, and I'm not asking you to adjudicate it, Your Honor. But I'm asking you to consider that 1 when you're looking at the appropriateness of whatever awards Your Honor determines to be reasonable and appropriate in this case.

And I would also ask that -- for you to look at -- I think you asked the question earlier did -- to Mr. Seeger, do you think thousands of plaintiffs filing suit had more of an effect than just five. And I think the answer is certainly, Your Honor, it was the critical mass.

That was the strategy that the PSC under the leadership of Mr. Weiss and Mr. Seeger decided that this is what we're going to do, everybody, we're going to start filing

cases, we're going to get everybody on the same page --

THE COURT: I appreciate that.

MR. MCCORVEY: -- and I think that has to be valued.

THE COURT: Well, that's why I asked that question. I appreciate that.

MR. MCCORVEY: Okay. You know what? And again, Your Honor, I'm not here to attack anyone. I think Mr. Seeger's a fine lawyer. My -- my general sentiment is that -- that I was prevented from earning more than 331 hours in the litigation.

Not because I wasn't available, not because my firm didn't have the resources to devote more time, it's just that systematically, we were prevented from doing work after the settlement term sheet was executed. My role, Your Honor, again, I was on the Communication Committee, I worked under the leadership of co-leads, I worked with my clients, I did various interviews on behalf of the PSC.

But again, I think that the whole value of the collective group was the critical mass, along with the negative adverse publicity that the NFL had to endure because of the Communication Committee was a factor in bringing about the settlement.

And the -- the polishing it up and executing it later I don't think should be valued more than the -- the genesis that got the settlement, drove it to its fruition.

THE COURT: Thank you.

MR. MCCORVEY: Thank you for your time, Your Honor.

THE COURT: All right, do you wish to be heard, Mr. Seeger?

MR. SEEGER: No, Your Honor. I don't have any specific comments.

THE COURT: Okay. I'm going to take a five-minute recess, okay? And I'll be back on the bench.

(Recess taken)

THE COURT: Okay.

THE CLERK: Your Honor, back on the record, Your Honor.

THE COURT: All right, who was speaking? Mr. Molo?

MR. MOLO: Good afternoon, Judge Brody. Thank you very much for hearing us here this morning on behalf of the Feneka objectors (phonetic). I'd like to say that we weren't invited to the party, but I think eventually we like to think we became the life of the party and so it's a pleasure to be here this morning, and in all sincerity, with the -- with the great lawyers that did achieve a wonderful, wonderful settlement.

There's been criticism of us in some of the papers that were filed that we were some kind of anarchists or terrorists that were out to blow up the settlement, and that could not be farther from the truth. The very --

THE COURT: I looked toward you, there's no -- I asked you to organize the defendant -- the objectors, there's no question about that.

MR. MOLO: And we clearly up front said that we wanted a settlement. We did not in any way object to the notion of a settlement. We wanted one that was fair. And we saw a settlement that was of major import, highly visible case. It had ramifications beyond the confines of its own facts, but it was legally deficient, Judge.

And in the face of strenuous, strenuous opposition from some of the leading lawyers in America on the plaintiffs' part, as well as the NFL that had three excellent law firms representing it, we challenged that and as a result of that, we proposed specific solutions to remedy the deficiencies and fortunately for the class, this Court -- the injured class, this Court agreed. And as a result of that, we brought about great benefits to the class.

You know, objectors --

THE COURT: Why don't you articulate them.

MR. MOLO: Sure. I have, as a matter of fact, Judge, a set of slides here that I can give the Court, as well as put them up on the screen. We have a set for Mr. Seeger too.

MR. SEEGER: Thank you.

MR. MOLO: And as we get into the specifics of -- of

the actual financial benefits, Judge, I do want to call attention to the role that we played merely by challenging the settlement. As Judge Posner said in the Pella Windows case, you know, objectors play a substantial role by providing the clash of adversaries to generate information that a Judge needs to decide a case.

That's gone in the settlement context. So if we were to go through the specific benefits that were achieved as a result of our objection, they would be as follows. The first one -- and I -- and the screen is not coming up --

THE COURT: Well I have it --

MR. MOLO: Okay.

THE COURT: -- and I think I'm the Special Master here.

MR. MOLO: So the first -- and as we get into the -- into the details of the numbers, if Your Honor wishes in terms of our expert's calculations and such, my colleague, Mr. Nitz, will be happy to step up and address the Court as well too.

And my colleague Mr. Hangley is here, and the objection by the Feneka Objectors was brought not just by Molo Lamken, but by the Hangley Aronchick firm as well. So and as to the specific benefits, by including NFL Europe, which was substantially excluded -- players who had played just in NFL Europe -- 2,300 players that would not have gotten a meaningful benefit were given a meaningful benefit by -- and

under the BAP, be included in the BAP, getting exams and increasing the amount of eligible seasons that they would be allowed under the settlement, the value there is increased by $36.8 million.

On the modification of the BAP, which the Court agreed that the cap on the BAP which had been $75 million would be lifted, by providing additional exams and providing full supplemental benefits that would not have been there had the $75 million cap been in place, $29.6 million --

THE COURT: You -- did you ask for that, or is that what happened?

MR. MOLO: We did.

THE COURT: I don't have any recollection that that was done because you asked for it.

MR. MOLO: It -- well, we asked for it and --

THE COURT: I mean, that was done --

MR. MOLO: -- and it was done.

THE COURT: -- because the Judge asked for it.

MR. MOLO: We asked for it and it was done.

THE COURT: Well, it may have been incidental but that was not, as far as I know -- and I'll have to check on that.

MR. MOLO: It was, Your Honor, and in fact we had slides on that and I can -- I can provide you with specific citations from our brief and petition.

THE COURT: I'm not saying you didn't raise it, but I didn't think you were the impetus of it.

MR. MOLO: Okay, we -- we did. We did.

THE COURT: You raised it.

MR. MOLO: We raised it.

THE COURT: If you told me you raised it I'll accept that --

MR. MOLO: Okay.

THE COURT: -- but that does not mean that that was the reason for it.

MR. MOLO: Okay.

THE COURT: I'm --

MR. MOLO: But the case law -- the case law says that if an objector raises an issue and the Court modifies or the settlement is modified following that, the objector's entitled to credit for that modification.

THE COURT: Or lucky, one of the two. Okay, but go on.

MR. MOLO: Well, Your Honor, you know, in all seriousness, this Court gave preliminary approval -- you did great service to the class in the very first instance rejecting the settlement that was initially proposed to you. That's how closely you were -- you were monitoring this without -- sua sponte, before we could even object.

And afterwards class counsel and the NFL came to the

Court and said we've got a revised settlement that provides, you know, additional benefits and the Court again scrutinized that settlement and gave it preliminary approval.

We came in and very vigorously, spending as we pointed out collectively over $4 million in time, our two firms, contested that with extraordinary expert testimony. We had nine of the leading expert -- 11 of the leading experts in the world that provided affidavits.

We had over 1,000 pages of exhibits. We had extraordinary briefing that we provided to the Court, and after that was provided and after we had a very vigorous fairness hearing which I stood before this Court at this very podium, my friend Mr. Seeger got up, Mr. Karp got up and there were a handful of other people got up, but it was a very vigorous full-day hearing.

After that the Court issued its order saying that the settlement could be improved if the following changes were made and the four that I've identified here -- and we've gone through two of them -- are the change as we said by allowing for NFL Europe, the modification of the BAP to lift the cap, the waiver of the appeal fee which is fairly valued at $11.6 million for financial hardship waiver, and the last being the extension of the CTE benefit.

Now, we didn't get what we wanted. We wanted that to be unlimited. But it was extended, at least to the period

of final approval, and that picked up another 111 additional class members.

Unfortunately we know that there are 111 that had passed away, and the fair value of that based on the NFL and class counsel's expert's valuation of what the general value would be -- the average value of a settlement would be of $400-and-some-thousand dollars, is $44.6 million.

So together, Judge, the value of those improvements is approximately $122 million, about 15 percent, 16 percent more than the value of the settlement had been.

I don't for one moment take away from the extraordinary work that Mr. Seeger did, from the extraordinary work that Mr. Weiss and all the rest of the lawyers that sit in this room did.

But, I can tell you to a certainty that had we not been here, this injured class, these players suffering from terrible, terrible circumstances and terrible diseases would not have gotten the treatment that we've gotten.

By including 2,300 players that played only in NFL Europe, we increased the meaningful benefit to more than ten percent of the class. I mean, I will say, Judge, you know, in doing this work over time and a lot of it on the defense side rather than the plaintiffs' side, it's very rare to see a situation where an objector comes in and would be entitled to the kind of fee that we're requesting, but it's even more rare

when you would say that an objector has come in and done the kind of good that we were able to do.

And, you know, we've been criticized as having delayed the proceedings. That could not have been farther from the truth. We came in and we asked first to intervene where we raised some of these issues. Class counsel ignored us. We objected to preliminary approval, the issue wasn't there.

The 23(f) petition that we took to the Third Circuit did not delay anything at all. In fact, the fairness hearing proceeded just as it was scheduled to proceed and, you know, to the extent that they claimed that that was frivolous somehow, they've actually changed the rules to address the issue that we raised in the 23(f) petition.

As far as our appeal goes, we did file an appeal to the Third Circuit, but that appeal was not in any way deemed frivolous. There is a means for the Third Circuit to -- to deal with a frivolous appeal. It didn't do so. The NFL and the class counsel vociferously and aggressively opposed that appeal.

They set aside two hours for oral argument and once that appeal was decided, we looked at it and even though some of these statements that have been made in some of the briefs are just wrong, I mean, we did not file a petition for rehearing on en banc, and we did not file a sur petition. We

went about trying to achieve a settlement and get it done in a way that we thought was going to be most expeditious.

When there were limitations on what was done at the -- at the conclusion and when we didn't get all the relief that we wanted from the fairness hearing, we actually engaged in independent negotiation with the NFL, to Mr. Seeger's full knowledge.

I called up Mr. Seeger and said, Chris, you know, I don't really want to appeal, I want to see if the NFL might go along with what we want to expand the CTE benefit because they've got some money they could devote to this, and he said go have at it.

If they could -- if you can get them to, you know, give -- give you more, have them give you more. And I tried, but I didn't succeed. But we have had at all times the interest of the class first.

The amount that we requested is in our papers and the amount that we've asked for is $20 million which I don't for a moment say is not a significant amount of money, but when you look at the context of what it represents in terms of the value -- increased value to the class, it's well within the precedent that this Circuit and the Courts throughout the country have allowed. We achieved effectively --

THE CLERK: Less than one minute, sir.

MR. MOLO: I'm sorry?

THE CLERK: Less than one minute.

MR. MOLO: We achieved effectively over a $100 million settlement through our objection. Now, we had a $4.3 million lodestar between our firms.

We were extraordinary efficient and, you know, in the Shop N' Stop case which is an Eastern District of Pennsylvania case, they quote the Class Action Reporter as saying that in a $100 million case, a multiplier of 4.5 is average, so our multiplier at about 4.6 was -- was right in that neighborhood.

I know that when you consider the risk that we took which far exceeded the risk that the plaintiffs -- plaintiffs' counsel had taken that it had taken on the case because by the time we got involved, they had a settlement, they pretty much knew that they were going to get paid something. We knew nothing.

We didn't -- we were facing these armies of both the class counsel and the armies of the NFL and we came in and risked over, you know, $4 million of time and $50,000 in expenses --

THE CLERK: Time, sir.

MR. MOLO: -- to achieve that $100 million, Judge.

THE COURT: Thank you very much.

MR. MOLO: Thank you.

THE COURT: Okay.

MR. SEEGER: I was reminded at counsel table by a statement by Justice Scalia. It says if you ride with the cops you don't cheer for the robbers. Mr. Molo and his crew did nothing but try to blow this deal up from day one, Your Honor.

The fact that he comes in here right now to take credit for changes that Your Honor was discussing with the parties that even predated the final approval hearing just shows you how out of touch they really are with what happened in this case.

Let's talk about the waste, the 23(f) -- what a complete waste of time that was. He says it was no delay at all. Well, it's true because he was thrown out 24 hours after oral argument, they dismissed his 23(f) appeal, and although there was a concurrence, they all agreed with the results.

It was -- it was not timely, it was not properly brought. That's a waste of time. He wants to be paid for that. He talks about the -- so there are -- there -- you will not find one case, by the way, let's be really clear, he can't because he would have cited to it where an objector was paid anything like he's asking for. They get paid nothing typically.

I put a $150,000 recommendation for one reason at all, because I was on the phone call when Your Honor asked him to coordinate with the other objectors. I felt that was

somewhat of a court-appointed position and that the Court deserved deference for that -- not Mr. Molo, but the Court deserved deference for that. So for that reason, I made that recommendation.

You won't even find a catalyst case -- in the typical catalyst situation where the objector comes in and says we want changes, you accommodate those changes, they then get on board and support the settlement. They didn't do that, they continued to try to blow it up.

And they put this case at risk every chance they could on their one point that they knew they were wrong on and they -- and we had to go through a two-and-a-half year delay to prove them and that was that we weren't compensating CTE.

He acts like he doesn't understand the deal but he understands we compensated the disease sets associated with CTE, and he also well knows that you can't compensate CTE -- you cannot diagnose CTE in living people. It was a waste of time, he should get zero, Your Honor.

THE COURT: Okay. I have one more. Mr. Lubel.

MR. LUBEL: Good afternoon, Judge.

THE COURT: Good afternoon.

MR. LUBEL: I have been referred to by Mr. Seeger as both the nit-picker and the hair splitter. I assure you I am probably both. I want to address first the --

MR. SEEGER: I'll tell you what I really think in a

minute, okay?

MR. LUBEL: I want to address first, Judge, the three things that he has specified in his declaration that are particular to our law firm and its claim for common benefit fees. One, he says that the claim is voided, when in fact this Court never set a deadline for that claim.

The closest we came to it is when you invited others if they had counter-declarations to his allocation and that's what we did. We timely filed our counter -- our counter-declaration, his allocation requesting $450,000 for our time. That's one. He claimed that we were belated.

Two, he claimed that all of the discussions that I raised in my counter-affidavit were not at his request or not at anybody's request on the leadership, the plaintiffs' leadership team.

And I find that interesting, first of all because a lot of the common benefit that I personally provided to this group was communications I had with Mr. Seeger that he then delegated -- I guess delegated is the right word to Sol Weiss on what has become and you've heard from today, the generally accepted or generally consistent with language.

In the first settlement agreement that you rejected, Judge, it just said "consistent with." When you looked at Level 1.5 and Level 2, the diagnosis had to be consistent with and it led to Exhibit 2, neuropsychological battery, and I

went to Chris first who delegated the conversation to Sol and I said, Sol, look, you're telling us that pre-effective date settlements are going to be covered by this.

And, there was no textbook definition or diagnosis of Level 1.5 or Level 2 before this settlement was ever announced and so you're not going to have a pre-effective date diagnoses that amount to that, and we had spirited conversations about it and it proceeded changes.

And when you look at the next or revised draft of the settlement, Judge, what you'll see is they substituted "consistent with" for "generally consistent with" in those sections.

But then more importantly when you look at 6.4B, an entirely new section appeared and that is the section that said for the avoidance of any doubt, generally consistent with in this agreement does not mean that there must be identical diagnostic criteria, testing protocols or documentation.

And so we think those conversations that I had with Mr. Weiss that I have now learned -- or they were in charge of the Medical Committees, led to changes, at least the spirited discussions we had that have improved the settlement.

Also, Judge, I was involved in -- I spoke to you, I hadn't seen you in about three-and-a-half years, it's good to see you, I was a spokesperson, I was an objector and I spoke at the -- at the fairness hearing at the request of Mr. Molo.

We prepared for and we objected, we made good arguments, and the Court did make substantive suggested changes to the settlement that were actually implemented, in part because of the arguments that were raised by all the objectors.

Following the conclusion of that hearing, I was approached by a lawyer out of Beaumont named Matt Matheny, Your Honor, and he had asked that I round up, discuss with all of the objectors what their prioritized issues were so that I could have a meeting with Gene Locks.

And I assure you, I didn't show up and -- at Fisher Island, Miami unannounced to -- to Gene's place with Matt Matheny to talk about the objectors' positions, Judge. I had -- I called them all, I emailed them, I went and met with Mr. Locks about what the position was, this is post-certification hearing.

And then after that, Gene asked me if Matt and I would both meet with Chris Seeger at a restaurant in New York and we all dined together and we then -- we then again talked about what the objectors' positions were and whether any agreements could be reached.

We had a pleasant meeting. At that time Mr. Seeger was truly a charming guy. Following that dinner, Your Honor, I have multiple text messages with -- with Chris at his request where he's asking me to calm down Tom Demetrio

(phonetic), who ultimately did not object. I mean, he objected -- he ultimately did not appeal.

But I kept in constant or consistent I should say, communications with Locks and Seeger and others trying to reach a deal post-fairness hearing prior to the appeal being filed. And so I wanted to address specifically the statement in Chris's declaration that all those discussions that I reference in mine were not at his request or Mr. Locks' request.

Because there's just no way that it was a coincidence that we all sat down at the same dinner table in New York City. It's not a coincidence that I met Mr. Locks at his place in Fisher Island. I tried, Judge. I was not successful, but I did what they asked me to do.

And I want to talk to you more broadly about the allocation. Where I grew up I was taught that if you wanted your contractor to build your house correctly and on time, you didn't give him the money up front.

I was told that you paid him over time, that you monitored his work and if you were really smart, you held some money back so that you could get that punch list done.

Professor Rubenstein when he issued his first report to you, Judge, said what they were trying to do here, what the class counsel petitioned for fees was doing was essentially asking you to pay them in one year for 65 years' worth of fee

work, and that's -- that's what concerns me, Judge. There's legal obstacles to both paying what they're asking for and providing a bonus now.

We've written extensively on that. It's in our motion for reconsideration to this Court, it's referenced in my declaration here related to this specific hearing, Judge.

It would be a travesty for the Court to deplete what's remaining of the $112-and-a-half million based on work that's been done to date when we know what the record shows us is that the projections have not been met. There's not been $411 million in payments.

Those $411 million in notices are subject to appeals. To date, there's been $183 million in payments according to the -- the claims administrator's website. They're way behind the NFL's projections on Alzheimer's, Level 1.5 and Level 2.

Judge, they represented to you -- the NFL represented to you in 12 months you would see payments on approximately 580 of those three categories and according to the claims administrator's website, to date only 85 people have been paid in Alzheimer's, Level 1.5 and Level 2.

This has led to much disharmony and dissension amongst these lawyers in here. They've -- they've been on their best behavior today, Judge, but we know from the pleadings that Anapol Weiss --

THE CLERK: Less than two minutes, sir.

MR. LUBEL: Thank you. That Anapol Weiss has -- has questioned, has called into question at a public pleading Seeger Weiss's -- both their -- their hours --

THE COURT: Are you talking about lawyer's fees now?

MR. LUBEL: Totally, I am talking about the fees.

THE COURT: And what are you trying to say?

MR. LUBEL: I'm trying -- what I'm trying to say --

THE COURT: In one minute, because I don't understand what you're trying to understand about the lawyer's fees.

MR. LUBEL: What I'm trying to say is that three out of the four class counsel you've appointed, Judge, they are contesting the fees that Seeger Weiss is claiming. Sol Weiss's firm has filed a public pleadings questioning both the hours and the billing rate.

You yourself in an order, Judge, you've -- you have held that the billing rates were unreasonable. That's in your April 5th order. For us to do this right, we do need to have a committee, Judge, but we need to see the data that -- the hourly data that was submitted to you in camera.

We need to see the CMO-5 data that allegedly started in 2012 which is supposed to be their quarterly billings. That was their timekeeping and any audit reports from that.

Once we get the foundation -- Judge, a house is

built on a foundation -- once we get that, then the Court can decide, although we don't think a multiplier is going to be warranted any time soon, if warranted at all under the case law, Judge.

Clearly, a bonus is not applicable at this time. We don't want to stop people from getting paid fairly, but you can -- you can set up a committee, Judge, you can circulate the data and people an start getting paid now. We don't want to -- we're not trying to stop that from happening. Thank you for your time.

THE COURT: Thank you.

MR. SEEGER: This guy's a doozy because he stands here and he talks about "we" and all the -- I mean, he's a -- he's one of the objectors who also tried to blow up the settlement. And to this day even at the final approval hearing he misread that he got up there and he misread a provision in the settlement and he still misreads it.

All he had to do was go online today and he would have seen that there are 342 claims that have been paid for $296 million. He can't even get information that's in the public domain correct. Let's just talk about what he wants to take credit for.

First of all, he didn't file a request for fees when he was supposed to. Mr. Molo did that at least. He put his request for fees in his objection. I mean, arguably he's

late. I don't think he should get anything whether he's on time or not anyway because of the role that he played here.

He's talking about improving a settlement that all he worked to do was to blow up, up until it was finally -- cert was denied by the Supreme Court.

And this -- that has real effect. I mean, the real effect is that we had a class rep who was involved in this case and wanted nothing more to see completion of it -- Kevin Turner. He didn't survive the appeal period, he passed away. The good news is this settlement is there for his family.

But he never got to see the end of this. That's on a personal note. That will always bother me about these objectors trying to blow this settlement up.

But the second part that bothers me is there were also financial opportunities for the class that they -- they caused us. One is we get a yearly inflation adjustment. One was just recently approved.

Because it was up on appeal for two years, we didn't get inflation adjustments for the time it was on appeal. There are real consequences to playing the game that Mr. Lubel wants to. I won't call Mr. Molo a professional objector, he's just wrong. Mr. Lubel is a professional objector.

He -- he objected to fees in BP, he's going to be here throughout no matter what you award him. He's going to -- he's already attempted to appeal your April 5th order.

He filed a notice of intent to appeal, which I would say, Your Honor, you should accommodate him because I don't know if that's a final order, but if it's not, I would ask you to certify it as final and let's take him up on appeal on that one too.

Let's not waste any more time with Mr. Lubel. Let's just get rid of him once and for all and let him go pick on another case.

I -- the last point I'll make is this "generally consistent" provision is so ridiculous of his that I think if you call the Special Masters you'll get the real story on what firms raised the "generally consistent" standard. Mr. Lubel was nowhere near that issue. Thank you, Your Honor.

THE COURT: Okay, thank you. Let's -- let me speak with -- just with -- I'm just going to call and speak with Mr. Seeger at sidebar, please.

MR. COOPER: I'm here. I'm here.

THE COURT: Who's that?

MR. COOPER: Hello?

THE CLERK: That could be either Mr. Dugan (phonetic) --

THE COURT: Who's that?

MR. COOPER: This is Fenn Cooper (phonetic).

THE CLERK: I don't know why he's on there, Judge.

THE COURT: Okay. We're on the record --

THE CLERK: Sidebar on the record, Judge?

MR. COOPER: Jack, I heard -- I heard you talking, Jack.

THE CLERK: You have the wrong number, Mr. Cooper.

THE COURT: All right, I will rule and I will take those steps that have to be taken.

Yes, you are?

MR. BENZA: I'm Robert Benza (phonetic).

THE COURT: You're not on the list.

MR. BENZA: I filed a notice of intent to argue. I'm not sure if you'll permit me to speak for just minutes, Your Honor?

THE COURT: I got all --

MR. BENZA: I'm class counsel for Kevin Turner, the class rep -- excuse me, I'm not class counsel, I'm counsel for the class representative, Kevin Turner.

THE COURT: Well, one second. Let me speak with my law clerk. Turn off the record, Jim, please.

(Off the record)

THE COURT: I will rule. If I need anything else I'll let you know, okay?

ALL COUNSEL: Thank you, Your Honor.

THE COURT: Court is adjourned.

(Matter concluded, 12:50 p.m.)

* * *

C E R T I F I C A T I O N

We, Josette Jones and Diane Gallagher, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

_____

JOSETTE JONES

_____ _____

DIANE GALLAGHER DATE

DIANA DOMAN TRANSCRIBING, LLC

UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	Case No. 2:12-md-02323-AB MDL No. 2323 **Hon. Anita B. Brody**
Kevin Turner and Shawn Wooden, *on behalf of themselves and others similarly situated*, Plaintiffs, v. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	Civ. Action No.: 14-cv-00029-AB
THIS DOCUMENT RELATES TO: ALL ACTIONS	

CO-LEAD CLASS COUNSEL CHRISTOPHER A. SEEGER'S
STATUS REPORT WITH UPDATED ACTUARIAL ANALYSIS

Co-Lead Class Counsel, recognizing that Year One of the implementation phase of the 65-year Settlement Program had concluded, in accordance with his fiduciary duties to the Settlement Class Members, to keep them informed, and to update the Court in furtherance of its ongoing jurisdiction to oversee the Settlement's implementation phase, determined that it would be appropriate to provide an updated actuarial analysis that reviews the progress of the Settlement Program thus far, and recalculates the projections through Year Sixty-Five of the Settlement Program, based upon the currently available data. As such, Co-Lead Class Counsel respectfully submits the attached Updated Analysis of the NFL Concussion Settlement, prepared by Thomas Vasquez, Ph.D. of Ankura Consulting Group. This update is based upon the Claims Administrator's data through June 30, 2018.

From time to time, Co-Lead Class Counsel expects to provide further updates as additional data become available.

Dated: July 18, 2018

Respectfully submitted,

/s/Christopher A. Seeger

Christopher A. Seeger
SEEGER WEISS LLP
55 Challenger Road, 6th Floor
Ridgefield Park, NJ 07660
Tel: (212) 584-0700
Fax: (212) 584-0799
cseeger@seegerweiss.com

Co-Lead Class Counsel

AN UPDATED ANALYSIS OF THE NFL CONCUSSION SETTLEMENT

Prepared by:
Thomas Vasquez Ph.D.
Ankura Consulting Group
July 13, 2018

I was originally asked by Co-Lead Class Counsel in *In re National Football League Players' Concussion Injury Litigation*, MDL No. 2323 (E.D. Pa.) to undertake an analysis to assist in settlement negotiations in mid-2013. My conclusions from that work are reflected in the NFL Concussion Liability Forecast, dated February 10, 2014. In late 2014, Co-Lead Class Counsel asked me to prepare a Declaration and to elaborate on certain elements of the work I had conducted for my initial report. A discussion of those analyses is contained in my Declaration, dated November 12, 2014. In March of 2017, I was asked to provide updated analyses to reflect changes to the initial settlement agreement and additional data concerning Class Member participation rates. A discussion of those analyses is contained in my Declaration, dated April 7, 2017. In December of 2017, I conducted an analysis of conclusions reached by Dr. Rubenstein.[1] My conclusions are contained in my report of January 3, 2018. [2]

I have now been asked by Co-Lead Class Counsel to compare actual approval and payment experience with the original amounts estimated in 2014. My analysis is based on the actual claims experience available through the end of June 2018 – the first fourteen months of experience (the first claim approved for payment was in May 2017).

There are three conclusions that are clear:

- The amount actually approved for payment in the first year (through April 2018) is approximately $378 million[3] - $154 million or 68% higher than originally estimated in 2014. The approved amount continues to exceed the original estimate. Indeed, the approved amount for May and June was $47 million – nearly twice the amount estimated in 2014.
- The participation rate in the Settlement as a whole, including the MAF program, is much higher than anticipated. The participation rate is now known - approximately 80% of former players have registered. The achieved participation rate is 21 percent points higher than the 59% estimated in 2014.
- The higher participation rate (and the expansion of eligibility) ensures that the higher approved amounts to date are not simply an acceleration of payments. I now estimate that approximately $1.4 billion will be paid to class members under the MAF program - $468 million or 50% higher than originally estimated.

It was expected that the amount approved and paid would be heavily front-loaded. There were a large number of claims from Class Members with lawsuits filed before 2013, who had obtained diagnoses prior to the Settlement, and those who obtained diagnoses after the Settlement but before the Effective Date of the Settlement. These claims were expected to be filed at the opening of the Settlement and would dominate approved and paid claims.

Table 1 shows the updated estimate of the total settlement amounts to be paid under the MAF program. The table splits the total settlement amount into three components – the first year, the following two years, and all subsequent years. In total, due to higher participation rates and

[1] "Expert Report of William B. Rubenstein"; December 3, 2017.
[2] All four of these documents have been provided earlier and are not reproduced here.
[3] Based on experience to date, this amount assumes that 90% of amounts under audit will not be paid. This reduces the total amount by approximately $38 million.

expanded eligibility I now estimate that approximately $1.4 billion will be paid to class members under the MAF program - $468 million or 50% higher than originally estimated.

The actual approved amounts in the first year exceeded the original estimate by approximately $154 million or 68%. Over the next two years, I now estimate that approved amounts will exceed estimated amounts by approximately $52 million or 64%. The remaining claims paid (for year Four through the last claim filed) are now estimated to be $891 million or 42% higher than originally estimated.

Table 1

Comparison of Original Forecast with Current Actuals and Updated Future Payments: MAF Only
(Dollars in Millions)

Time Period	Original Estimate	Actual/ Current Estimate	Actual less Estimated Amount	Actual less Estimated Percent
First Twelve Months	$224.5	$378.1	$153.6	68.4%
Next Two Years	$80.6	$132.3	$51.7	64.1%
Remaining Years	$628.3	$890.62	$262.3	41.8%
Total	$933.4	$1,401.0	$467.6	50.1%

Note: Original estimate made in February 2014
Actuals May 2017 through April 2018

The original forecasting model was based on: (1) detailed information on every former player; (2) the propensity of former players to contract a compensable disease; (3) the timing of the diagnosis of disease and (4) the propensity of former players to register and file a claim. It was recognized at the time of the original estimate that the weakest assumption was the propensity to file a claim. The propensity depends on the willingness of the players to admit they contracted such disease and the ability of plaintiff lawyers to educate and inform the former players to encourage their involvement, regardless of whether they had yet contracted a disease or not.

Clearly, the effort was successful – far exceeding the participation rate in most class settlements. Table 2 shows the estimated and actual participation rates. The original estimates assumed a 95% participation rate for individuals already filing a claim (and/or represented by counsel) and a 50% participation rate for all other former players. These assumptions yielded an approximately 59% participation rate overall. However, the actual participation rate is approximately 80%. This 33% increase in the participation rate (from 59% to 80%) has a direct increase in the projected total value of the MAF.

Table 2

Player Registrations as Class Members: Estimated Vs. Actual

Player Categories	Estimated Registrations	Actual Registrations	Actual Less Estimated Registrations: Count	Actual Less Estimated Registrations: Percent
Estimated Registered Players[a]	12,200	17,200	5,000	41.0%
Total Class Members[b]	20,500	21,500	1,000	4.9%
Participation Rate	59%	80%	na	na

a.) Ex. A; Declaration of Orran L. Brown, Sr. ISO Third Joint Status Report on the Implentation of the Settlement Program; Paragraph 5, (excludes Derivative Claimants.)

b.) Players of NFL affiliate leagues were included as eligible class members in my April, 2017 report

Thomas Vasquez, Ph.D.
July 13, 2018

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing document was served electronically via the Court's electronic filing system upon all counsel of record in this matter.

Dated: July 18, 2018

/s/Christopher A. Seeger
Christopher A. Seeger

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION LITIGATION	§	**No. 12-md-2323 (AB)**
	§	**MDL No. 2323**
THIS DOCUMENT RELATES TO: ALL ACTIONS	§	

Alexander Objectors' Opposition to Co-Lead Class Counsel's First Verified Petition for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs

I. Introduction

The Alexander Objectors respectfully oppose Co-Lead Class Counsel's First Post-Effective Date Fee Petition seeking $9,484,424.01 ($8,559,179.97 in fees and $926,244.04 in costs). According to this Court's appointed expert, Professor William B. Rubenstein, the $112.5 million Fee Fund set aside by the NFL "should be sufficient to fund past, present, and future [attorney] work" on this settlement "so long as certain safeguards are put into place." ECF 9571, p. 5. Exactly sixty days ago, the Court distributed $85,619,466.79 out of the $112.5 million. The Court explicitly held "the remaining funds in reserve to pay Class Counsel for their services in supporting the class **through the implementation of the 65-year term of this Agreement.**" ECF 10019, p. 1. Placing the remainder in an interest-bearing account, opined Professor

Rubenstein, will allow the Fee Fund to regenerate at $1,000,000 per year to the end of the 65-year life of the settlement. ECF 9571, p. 5.

Co-Lead Class Counsel's Post-Effective Date Fee Petition—clearly titled its "First"—reflects an intent to thwart the Court's plan to grow the Fee Fund. As Professor Rubenstein predicted, safeguards are essential to avoid prematurely draining the Fee Fund. The Court has already put those safeguards in place: Case Management Order No. 5 Re: Submission of Plaintiffs' Time and Expense Reports and Appointment of An Auditor ("CMO 5"). ECF 3710. The Court need only enforce them here:

1. CMO 5, entered by the Court at Co-Lead Class Counsel's request, states its purpose to foster accountability and transparency; the present fee petition disregards those principles.

2. CMO 5 requires documentation of fees and expenses; the present fee petition supplies none.

3. CMO 5 forbids double billing; the present fee petition demonstrably bills for services already paid.

4. CMO 5 mandates common benefit fees for work that benefits the common good; the present fee petition seeks funds for work that does not benefit the Class Members as a whole.

Only by safeguarding the remainder of the Fee Fund will the fund grow sufficiently to handle future fees. If the Fee Fund cannot regenerate according to Professor Rubenstein's recommendation, future fees will be paid from a percentage of Class Member recoveries. Professor Rubenstein's opinion is

that a 5% holdback for these fees is not necessary. In fact, all Class Counsel agree the 5% holdback should not be necessary for future fees, except Co-Lead Class Counsel. Notably, Co-Lead Class Counsel seeks 88% of the $9.5 million sought here. Although the Court has awarded and allocated a generous bonus for work achieving and implementing, the Court should not continue to award fees without public substantiation.

The Alexander Objectors ask the Court to deny the fee petition in its present form because Co-Lead Class Counsel fails to support its petition and seeks fees that are both double-billed and over-billed. In the alternative, the Alexander Objectors ask the Court to

> (a) direct the Court's auditor, Alan B. Winikur CPA/ABV/CFF, to review the CMO 5 data to determine whether the fees sought are reasonable, nonduplicative, and otherwise meet the Court's CMO 5 criteria; and
>
> (b) direct a fee committee to review the CMO 5 data and report (1) whether post-effective date fees should be capped in light of the nature of the work being performed and (2) what portion of the fees sought are attributable to the third-party funding issues and, therefore, properly taxed to those litigants alone, as suggested by Professor Rubenstein (*See* Professor Rubenstein Reply, ECF 9571 p. 5 n. 13); or
>
> (c) permit independent, limited fee-petition discovery.

II. Argument

A. Safeguarding the Fee Fund - Case Management Order No. 5

Professor Rubenstein recommends the Court put safeguards or controls in place to preserve the Fee Fund for the 65-year life of the Settlement. In other words, Class Counsel needs a budget. But, Class Counsel has steadfastly refused to forecast how much money is necessary to implement this Settlement Agreement. Class Counsel has no plan. Class Counsel has no incentive to exercise economic restraint. As an example, Co-Lead Class Counsel seeks in this Petition $1,366,518.78 for 2433.5 hours of paralegal work over approximately fourteen months. The day to day implementation services can be accomplished by qualified attorneys and paralegals with oversight by class counsel at substantially reduced rates. The Philadelphia Bar Association Community Legal Services suggested range of hourly attorney rates between $180 (under 2 years) -$650 (over 25 years) and paralegal rates of $115-$140 based on Philadelphia market survey. The paralegal billing rate used by fee petitioners exceeds the suggested range by more than $100 per hour.

As long as Class Counsel is spending "other people's" money, money held for them in escrow, Class Counsel is not likely to formulate a budget. As long as Class Counsel's billing statements are not subject to Class Member scrutiny, Class Counsel is not likely to exercise business judgment about who performs what services and for how long. There is approximately $20 million remaining in that fund. The Court cannot safeguard the remainder of the Fee Fund by allowing Class Counsel to present serial fee petitions without some assurance that there is an implementation business plan going forward. Stated

differently, each Class Member is facing a potential 5% tax or holdback to replenish the Fee Fund if it is exhausted. If the implementation services that Class Counsel is providing do not further each Class Member's interest by at least 5%, then the trade does not benefit anyone but Class Counsel. Unchecked attorney services that drain the Fee Fund and deprive it of the potential to regenerate is the antithesis of the fiscal safeguards the Court contemplated in CMO 5, but has not yet utilized.

In September, 2012, the Court placed all Class Counsel on notice of the compensable categories of fees and expenses. (ECF 3710, CMO 5). It was the purpose of the early request to establish such a protocol, according to Co-Lead Class Counsel; that is, to "ensure only reasonable and necessary fees and costs inuring to the benefit of all plaintiffs are incurred." (ECF 3698, p. 3). The Court specifically articulated the purpose of such a protocol: "[T]o guide the payment of fees and expenses to attorneys performing common-benefit work" and "help ensure this matter is efficiently prosecuted for the benefit of former-player plaintiffs without unnecessary duplication or undue costs or fees." (ECF 3710). Documentation was the touchstone for protecting Class Members from duplication and overbilling. Specifically, by CMO 5, the Court ordered Class Counsel to use the following form to document its time:

Attachment A

CASE NAME: NFL PLAYERS' CONCUSSION INJURY LITIGATION, MDL NO. 2323

FIRM NAME:

REPORTING PERIOD: Inception thru

SUMMARY TIME REPORT														**CURRENT TIME REPORTED**		**CUMULATIVE TIME REPORTED**	
Timekeeper Name	*Professional Status**	*Current Hourly Rate*	*Pleadings, Motions, Briefs & Legal Research*	*Preparing & Responding to Discovery Requests*	*Factual Research and Analysis*	*Document Analysis*	*Depositions (Including Preparation)*	*Officially-Called Meetings of Counsel*	*Common Benefit Case Management*	*Court Appearances*	*Trial Preparation & Trial*	*Appeals*	*Settlement*	**Hours**	**Hours x Hourly Rate**	**Hours**	**Hours x Hourly Rate**
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
TOTALS			0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	-	0.00	-

*Professional Status: P-Partner A-Associate OC-Of Counsel PL-Paralegal LC-Law Clerk

The Court also specifically itemized those time categories that were non-compensable (EFC 3710, pp. 3-4). As relevant here, the Court ordered that the following were not compensable:

- Time entries that are incomplete or provide insufficient detail;
- Time billed by multiple people in the same firm, unless justified by the work that has been assigned to the firm in relation to the particular task;
- Time that is duplicative or excessive in relation to the work assigned;
- Read and review time for persons not overseeing or directly participating in a project;
- Time related to litigation the claims of individual clients;
- Clerical time, including time spent preparing hearing or meeting notebooks, copying, filing, making travel arrangements or calendaring dates;

On expenses, CMO 5 gave Class Counsel a list of compensable categories such as long-distance telephone or postage. But, the Court also ordered that certain expenses were **non-compensable (**p. 6-7). For example, as relevant

to this fee petition, the Court said that the following expenses would not be reimbursed: duplicative expenses, undocumented expenses and expenses related to non-compensable time.

This Court should not approve any requests for attorneys' fees until provided with a satisfactory business plan detailing the common benefit work remaining and how the current funds from the $112.5 million in the qualified attorneys fee fund can be utilized to pay for such effort without tapping into class members awards. The Petition should be denied.

B. The First Post-Effective Date Fee Petition should be denied because Co-Lead Class Counsel fails to support the petition with any documentation of the work alleged performed or the expenses alleged incurred.

Federal Rule Civil Procedure 23(h) authorizes an award of "reasonable attorney fees." Fed. R. Civ. P. 23(h). The Third Circuit achieves a reasonable attorney fee by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *See Washington v. Phila. City Ct. of Common Pleas*, 89 F.3d 1031, 1035 (3d Cir. 1996). "In calculating the second part of the lodestar determination, the *time* reasonably expended," a district court should "review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described and then exclude those that are excessive, redundant, or otherwise unnecessary." *Pa. Envtl. Def. Found. v. Canon-McMillan Sch. Dist.*, 152 F.3d 228, 232 (3d Cir. 1998); *see also Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (holding that to arrive at a reasonable number of hours worked, the court must excise those hours deemed excessive, redundant, or otherwise unnecessary). Co-Lead Class Counsel's new fee petition renders it impossible to conduct that review.

To support the $9.5 million Fee Petition, Co-Lead Class Counsel

supplied a one-sentence verification and a one-page chart listing Firms seeking payment, with the "Professional Rank" of the individual, the hours alleged worked and the total amount sought including expenses. The chart does not disclose the billing rates. The chart does not disclose dates or a range of dates for the hours alleged worked. The chart does not disclose the identity of the individual alleged to have performed the service(s).

None of the law firms or attorneys have submitted a single time record to support the 13,553.5 claimed hours of work. None of the law firms or attorneys have submitted a receipt, a cancelled check; or even a list of expenditures to support the $926,244.04 in expenses alleged incurred.

The lack of documentation, alone, is sufficient for this Court to deny the subject fee petition. It is undisputed that this fee petition is to be analyzed as a pure lodestar. The Court has, by CMO 5, made the difficult decisions about not only what is compensable, but the process by which Class Counsel must transparently document adherence to compensable categories. Co-Lead Class Counsel supplies none of that documentation.[1] But, even without CMO 5, the Third Circuit requires that Class Counsel prove their entitlement to fees; a demand for payment is insufficient.[2] CMO 5 tracks the Third Circuit

[1] Co-Lead Class Counsel cannot simply "stand ready" to tender supporting documents *in camera* to meet movants' burden of proof. *See* ECF 10128 p. 18 n. 4; *see also,* for example, ECF 7606, p. 15. If Co-Lead Class Counsel needs to meet the movants' proof with confidential documents, there is a presumption of access that must be overcome and "the burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption.'" *LEAP Sys., Inc. v. MoneyTrax, Inc.*, 638 F.3d 216, 220-21 (3d Cir. 2011) (quoting *In re Cendant Corp.*, 260 F.3d 183, 190 (3d Cir. 2001). Co-Lead Class Counsel has never articulated a reason that time sheets are confidential in a proceeding where the party seeks attorneys' fees.

[2] The Manual for Complex Litigation echoes the Third Circuit authority stating that "the party seeking fees has the burden of submitting sufficient information to justify the

pronouncement a court should not compensate fees that are excessive, redundant or otherwise unnecessary. See *Rose v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). And, CMO 5 accumulates the data upon which a Third Circuit lodestar analysis is founded (1) the number of hours reasonably expended on the litigation to multiply by (2) a reasonable hourly rate. *See Washington v. Phila. City Ct. of Common Pleas*, 89 F.3d at 1035. "[A] district court may not set attorneys' fees based upon a generalized sense of what is customary or proper, but rather must rely upon the record." *Coleman v. Kaye*, 87 F.3d 1491, 1510 (3d Cir. 1996).

C. This First Post-Effective Date Fee Petition should be denied because Co-Lead Class Counsel seeks payment for work performed from January, 2017 to September, 2017 that has already been considered and paid by this Court – it is double billing.

By this $9.5 million First Post-Effective Date Fee Petition, Co-Lead Class Counsel discloses that the "work undertaken" and at issue in the petition occurred "from January 7, 2017, the Effective Date of the Settlement, to May 24, 2018." (ECF 10128, p. 1) However, this Court considered Class Counsel's work undertaken from January 7, 2017 to September, 2017 in granting the prior fee petition. (ECF 10019, p. 15 stating "[additionally, Class Counsel has submitted 6,830 hours for implementation through September 2017). Any hours for "work undertaken" between January 7, 2017 and September, 2017 are hours double billed.

The Court need not rely solely upon the statement in the Court's order to know that these hours are double billed. In an October, 2017 supplemental filing, Co-Lead Class Counsel submitted a declaration stating: "After Final

---

requested fees and taxable costs" and applicants must provide full documentation of hours and rates." The Manual for Complex Litigation (Fourth) § 21.724 (2004).

Approval, my firm took a similar lead on the implementation of the Settlement which became effective on January 7, 2017. My firm submitted 21,044 hours for a lodestar of $18,124,869.10 and reported $1,498,690.99 in common benefit expenses." (ECF 8447, p. 12).

That same declaration described the "work undertaken" in eight categories:

> a. Work to Ensure Class Member-Friendly Registration and Claims Processes; b. Selection of Appeals Advisory Panel Members and Appeals Advisory Panel Consultants; c. Selection and Orientation of Hundreds of Individuals to Serve as Qualified BAP Providers and Qualified MAF Physicians and Maintenance of These Physician Networks; d. Oversight of the Claim Process and Monetary Award Determinations; e. Appeals of Claims Determinations; f. BAP Examinations; g. Fielding Calls from Class Members and Lawyers Representing Class Members; h. Efforts to Combat the Dissemination of Misinformation to Class Members and Other Forms of Exploitation of Class Members.

(ECF 8447, pp. 15-190)

The present fee petition seeks compensation for "work undertaken," for the following categories only, as excerpted with track changes for comparison:

> a. Work to Ensure Class Member-Friendly Registration and Claims Processes; b. Selection of Appeals Advisory Panel Members and Appeals Advisory Panel Consultants; c. Selection and Orientation of Hundreds of Individuals to Serve as Qualified BAP Providers and Qualified MAF Physicians and Maintenance of These Physician Networks; d. Oversight of the Claim Process and Monetary Award Determinations; e. Appeals of Claims Determinations [3] ; f. BAP Examinations and Supplemental

[3] According to the NFL Concussion Website, there are 98 appeals filed by one party or the other; however, Class Counsel has not filed anything in 80% of them. Note, too, that Co-Lead Class Counsel attributes his appellate efforts to "a properly inclusive interpretation of 'generally consistent' standard; this is one of the issues that movant's counsel urged pre-

Benefits; g. Fielding Calls from Class Members and Lawyers Representing Class Members; h. Efforts to Protect Class Members from Third-Party Profiteers[4].

(ECFF 10128, pp. 3-12)

The Court can see that these submissions—one seeking payment for hours through September, 2017 and the second, post $50 million distribution, seeking payment for fees January, 2017 to March, 2018, inclusive—are virtually identical. Even the original petition for fees contains similar descriptions of work undertaken as justification for pre-February, 2017 services. Co-Lead Class Counsel's Declaration is replete with implementation services that are now also the subject of the new petition. *See* ECF 7151-2, p. 25.

The Court should deny this First Post-Effective Date Fee Petition without prejudice to resubmission of nonduplicative, reasonable hours.

D. This First Post-Effective Date Fee Petition should be denied because Co-Lead Class Counsel seeks payment upon unreasonable rates, as already determined by this Court.

In its First Post-Effective Date Fee Petition, Co-Lead Class Counsel states that movant "utilizes the blended rate used in the May 24, 2018 Allocation Order." Petition, p. 18 n. 5. It is true that as part of the Court's

---

Settlement clarification on to avoid post-Settlement interpretation. Co-Lead Class Counsel disregarded the pre-Settlement suggestion and Class Members are now asked to pay for it.

[4] This category is modified somewhat to highlight Co-Lead Class Counsel's effort to spearhead challenges to third-party profiteers who "might confuse or unduly influence [susceptible] Class Members through third-party advances to Class Members against their anticipated Monetary Awards. Remarkably, the third-party advance on Class Members' recoveries appears to have been conceived by Co Lead Class Counsel, himself. *See* Exhibit 2, Email from Co-Lead Class Counsel Christopher Seeger introducing Plaintiff's counsel Mitnick to Ari Kornhaber of Esquire Bank for Plaintiffs' financing needs."

lodestar cross check in the Allocation Order the Court (a) found Class Counsel's billing rates to be unreasonable and (b) found that "blending the rates of all partners, associates, and paralegals produces an average rate of $623.05 per hour.[5] (ECF 10019 pp. 15-16). It is not true that Co-Lead Class Counsel has utilized that blended rate found to be fair in connection with the current fee petition.

Firm Total Hours	Total Lodestar	Rate applied
Anapol Weiss – 137.7 – Partners: 137.7 hours	$104,424.80	$758.35
Brad Sohn[6] Law Firm – 38.4 – Partners: 38.4 hours	$29,120.64	$758.35
Levin Sedran and Berman -73.3 – Partners: 71 hours – "Counsel": 2.3 hours	$55,587.05	$758.35
Locks Law Firm - 670 – Partners: 670 hours	$508,094.50	$758.35
NastLaw – 80.1 – Partners: 37.8 hours – Associate: 42.3 hours	$49,251.77	$614.88
Podhurst Orseck – 287.6 – Partners: 187.8 hours – Associate: 9.1 hours	$173,313.42	$602.62

[5] Moreover, even if Co-Lead Class Counsel is purporting to re-calculate a blended rate based upon, Co-Lead Class Counsel completely departs from the Court's methodology. Specifically, Co-Lead Class Counsel has calculated a "blended rate" by firm, not across the board as the Court did. The Court will recall that the reason for the blended rate was as part of the cross check computation was that "the billing rates submitted by these law firms varied greatly." (ECF 10019, p. 15). As such, the Court averaged between all firms, not firm by firm.

[6] The Court should note two important points about Mr. Sohn's $29,120.64 efforts. First, it is undisputed that the hours Mr. Sohn worked, he worked for an individual client; Co-Lead Class Counsel has made the unilateral decision to retroactively compensate Mr. Sohn from the common benefit fund. Second, Mr. Sohn, whose hours are being billed at $758.35 appears to be the same Mr. Sohn who served as a law clerk for Podhurst Orseck and, in connection with the first fee petition, was billed at the rate of $295, commensurate with the paralegal rate. (ECF 7151-8, Exhibit I)

– Paralegal: 90.7 hours		
Prof. Issacharoff – 36.3 – Partners: 36.3 hours	$27,528.10	758.35
Seeger Weiss – 13,552.5 – Partners: 6,438.1 hours – "Counsel": 2,246.2 hours – Associates: 1,112.3 hours – Paralegals: 2,433.5 hours	$7,611,859.69	$561.66

The Court did not suggest that any blended rate would be used in a pure lodestar. And, it should not. The Court can see from the table above that many, many of the hours being expended during "implementation" efforts are services provided by paralegals. Using a blended rate raises the compensation for such paralegal services from, for example, $260.00 per hour to a rate higher than an associates' rate. *See* Petition, p. 18 n. 5. As such, Seeger Weiss is being compensated for paralegal work in the amount of $1,366,518.78. Co-Lead Class Counsel cites no case in which any Court has used a "blended rate" for an actual lodestar award.

The Court should deny this First Post-Effective Date Fee Petition without prejudice to resubmission with actual, but reasonable rates for work along the guidelines of CMO 5.

E. In the alternative, the Court should refer the First Post-Effective Date Fee Petition to either Mr. Alan Winikur or a Fee Committee for review of CMO data and use of strategies to preserve the Fee Fund for the benefit of all Class Members.

If the Court does not deny the petition, without prejudice, outright for its failure to provide support and its double and overbilling, the Court should nonetheless provide transparency in the review of Co-Lead Class Counsel's new fee petition by applying CMO 5 to it via data and auditor. **Where the Court has a process in place, such as CMO 5, and then fails to follow that**

process, there is no transparency. *See* Exhibit 1, June 15, 2018 Declaration of Christopher A. Seeger, *In re: Zimmer Durom Hip Cup Products Liability Litigation*, MDL 2158, 2:90-cv-04414, ECF 986-2, p. 3 (averring that other lawyers failure to comply with Case Management Order No. 3, "pre-specified guidelines" was not normal or usual for a fee process and deprived the procedure of transparency). Instead, "it is normal for fee committees to be organized who analyze common benefit claims and ultimately reach consensus amongst all the lawyers who contributed to the process." *See* Exhibit 1, June 15, 2018 Declaration of Christopher A. Seeger, *In re: Zimmer Durom Hip Cup Products Liability Litigation*, MDL 2158, 2:90-cv-04414, ECF 986-2, p. 3.

It is, in fact, normal to afford transparency in the fee process. That is the reason the Court entered CMO 5. That is the reason the Court appointed an auditor. His services should be employed at this time.

Further, as a part of the Court's effort to conserve the Fee Fund for the next sixty-three years, the Court should consider taxing third-party funders whose arrangements are found to be improper with the fees incurred in challenging them. This is the suggestion of the Court's expert, Professor Rubenstein. (ECF 9571 p. 6 n. 19).

If the Court determines not to deny this First Post-Effective Date Fee Petition, the Court should refer the Fee Petition to either Mr. Alan Winikur or a Fee Committee for review of CMO data and use of strategies to preserve the Fee Fund for the benefit of all Class Members. Either independent review, with an eye toward conserving the fee fund and performing a critical analysis of reasonable fees and rates could afford the necessary transparency.

F. In the event the Court declines to deny or refer the First Post-Effective Date Fee Petition, the Court should permit limited fee-petition discovery.

The above requests for review by Court-appointed experts or a Fee Committee would likely result in compensation from the Settlement. As an alternative, the Court should permit limited fee-petition discovery to be conducted by objectors[7] – at the Alexander Objectors cost (no fee) only and save expenses that would otherwise fall to the Settlement or Class Members. The discovery might be in the form of written questions or an oral deposition.

Section 21.724 of The Manual for Complex Litigation specifically contemplates such discovery where, as here, a petition for fees in not supported: If there is a request for discovery to support an objection to a motion for attorney fees, the court should consider "the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard." The Manual for Complex Litigation (Fourth) § 21.724 (2004).

The Alexander Objectors previously sought this discovery because Co-Lead Class Counsel provided no data or backup for fees sought. Co-Lead Class Counsel suggested that such data was not necessary for a "back of the envelope" lodestar cross check. Now, on this pure lodestar analysis, the data is necessary. Because Co-Lead Class Counsel has provided nothing for this Court to review in satisfaction of movants' burden of proof, the Court should permit the Alexander Objectors to conduct limited fee discovery.

[7] The Alexander Objectors incorporate, by reference their prior Motion for Leave to Conduct Fee-Petition Discovery (ECF 7534).

Prayer

For the reasons stated above, Co-Lead Class Counsel's First Post-Effective Date Fee Petition should be denied.

Dated: July 24, 2018

Respectfully submitted,

/s/ Lance H. Lubel

Charles L. Becker, Esq.
KLINE & SPECTER, PC
1525 Locust Street, 19th Floor
Philadelphia, Pennsylvania 19102
Telephone: (215) 772-1000
Facsimile: (215) 772-1359
Email: Chip.Becker@KlineSpecter.com

Mickey L. Washington, Esq.
WASHINGTON & ASSOCIATES PLLC
2019 Wichita Street
Houston, Texas 77004
Telephone: (713) 225-1838
Facsimile: (713) 225-1866
Email: mw@mickeywashington.com

Lance H. Lubel, Esq.
Texas Bar No. 12651125
Adam Q. Voyles
Texas Bar No. 24003121
LUBEL VOYLES LLP
675 Bering Dr., Suite 850
Houston, Texas 77057
Telephone: (713) 284-5200
Facsimile: (713) 284-5250
Email: lance@lubelvoyles.com
Email: adam@lubelvoyles.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2018, I filed the foregoing through the Court's CM/ECF system, which will provide electronic notice to all counsel of record and constitutes service on all counsel of record.

/s/ Lance H. Lubel
Lance H. Lubel

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: ZIMMER DUROM HIP CUP PRODUCTS LIABILITY LITIGATION	*	**MDL 2158**
	*	**2:09-cv-04414 (DFW)(SCM)**
	*	**JUDGE SUSAN D. WIGENTON**
**********	*	

THIS DOCUMENT RELATES TO: ALL CASES

DECLARATION OF CHRISTOPHER A. SEEGER

I, Christopher A. Seeger, hereby declare as follows:

1. I submit this Declaration in support of Plaintiffs' Brief in Support of Their Motion For Reconsideration and To Stay the Court's June 7 Order Concerning Common Benefit Fees (hereinafter the "Order").

2. I am the founding partner of the law firm, Seeger Weiss LLP, located at 55 Challenger Road, Ridgefield Park, New Jersey 07660.

3. I was appointed Plaintiffs' Co-Liaison Counsel by the Court on September 23, 2010, pursuant to Case Management Order No. 1 [Doc. No. 17]. Since that time, I have been an active participant in the litigation.

4. Beginning in 2010 and continuing into 2011, while the litigation was still in its early stages, I, along with other plaintiff's attorneys, engaged in settlement discussions with Defendant's counsel and was successful in resolving nearly one hundred claims. It was my belief that the case was on its way to early and productive global resolution. Indeed, these discussions laid the groundwork for what would later become the global Settlement Program for all claimants.

5. Approximately one year later, the law firm of Waters & Kraus, LLP, joined the MDL litigation. Instead of working cooperatively with existing MDL leadership to finalize a global and early resolution, Waters & Kraus implemented a different agenda which, I believe, was solely focused on developing its own inventory of cases for trial under the mistaken belief that the settlement framework we were

Exhibit 1

developing was not generous enough. Because of this, Defendants – unfortunately - suspended settlement discussions with all plaintiffs.

6. From March 2013 through 2015, Waters & Kraus conducted discovery and tried four of its cases, although only one of them was tried in this MDL. Three of the four trials resulted in a defense verdict. The lone plaintiff verdict was subsequently thrown out by trial court and is presently on appeal. During this time period, no plaintiff was able to engage in settlement discussions with defendants. Put simply, Waters & Kraus' decision to pursue a litigation strategy in the face of a defendant that was already positioned to settle claims, proved disastrous and contrary to the interests of the MDL – substantively and from a time perspective.

7. In the Fall of 2015, Defendant's counsel and myself, along with Plaintiffs' Co-Liaison Counsel, James E. Cecchi, and Co-Settlement Counsel, Richard D. Meadows, commenced negotiations for what would become the global Settlement Program offered by Defendant to all claimants.

8. These negotiations lasted for several months before an agreement on the size, scope, and criteria for the Settlement Program were reached. Settlement counsel engaged in numerous meetings and countless phone calls, and throughout this process, we advised the Court of our progress. The Settlement Program was presented to the Court for approval and then announced and offered to all claimants in February 2016. Over the next two and a half years, I, and other attorneys from my firm, assisted scores of plaintiffs and plaintiff's attorneys in enrolling in the Settlement Program. Further, we responded to countless questions regarding the settlement procedures and in some instances, helped resolve disputes between enrolled plaintiffs and Defendant's counsel. The Settlement Program was very successful, resulting in resolution of more than 450 claims, which constitute the vast majority of Zimmer Durom Cup claims before this Court.

9. By contrast, the firms who were allocated common benefit fees pursuant to Your Honor's June 7, 2018, Order [Doc. 983], initially objected to and sought to delay the Settlement Program, once again under the mistaken belief that they could somehow achieve a more generous result. Ultimately, Waters & Kraus did enroll their clients in the settlement program. Put simply, the decision to obstruct the MDL and the initial settlement program resulted in an unfortunate and unnecessary delay of clients receiving recompense here.

10. Rather than contributing to the common benefit of all plaintiffs, Waters & Kraus arguably diminished the value of their claims, particularly given the lapse of time between the original settlement discussions and the Settlement Program ultimately approved by this Court, which this firm and others negotiated despite Waters & Krauss' obstructionist tactics.

11. Nevertheless, on April 18, 2018, Waters & Kraus, LLP, along with two other movants, requested that this Court approve common benefit fees for their respective firms [Doc. 972-1].

12. On April 20, 2018, I filed an opposition to their motion [Doc. 973], arguing that the procedure utilized by the movants failed to include all MDL counsel who may have contributed to the common benefit of all plaintiffs. Further, the procedure lacked transparency and failed to follow any pre-specified guidelines. Indeed, the expenses submitted by movants were not reviewed by anyone other than the submitting firms. I believe the process utilized by Waters & Kraus and the other movants failed to comply with Case Management Order No. 3 and certainly did not comply with the normal and usual processes that are undertaken in cases such as this. By way of example only, it is normal for fee committees to be organized who analyze common benefit claims and ultimately reach consensus amongst all the lawyers who contributed to the process.

13. Under Your Honor's June 7, 2018, Order, Waters & Kraus and the other movants were allocated a total of $3,230,137.82 in fees and expenses (excluding prior expense allocations). This amount constitutes more approximately 66 percent of the common benefit fund – a result that is demonstrably unfair to those lawyers who actually provided the benefit to this litigation over many, many years.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 15, 2018.

Christopher A. Seeger

MITNICK LAW OFFICE
A LITIGATION AND CLAIM RESOLUTION FIRM

1-877-MITNICK
www.MitnickLawOffice.com

New Jersey Office
35 Kings Highway East
Haddonfield, NJ 08033
P. 856.427.9000
F. 856.429.2438

Reply to New Jersey Office

Philadelphia Office
123 South Broad Street Suite 2500
Philadelphia, PA 19109
P. 215.769.9000
F. 856.429.2438

April 16, 2018

The Honorable Anita Brody
US DISTRICT COURT - EASTERN DISTRICT OF PA
James A. Byrne US Courthouse
601 Market St., Room 7613
Philadelphia, PA 19106-1717

RE: NFL Concussion Settlement
No. 2:12-md-02323-AB / MDL No. 2323

Dear Judge Brody:

On Friday, April 13, 2018 I received electronic service of "Mr. Seeger's "Opposition to the Motion of Locks Law Firm for appointment of Administrative Counsel". After reviewing the filing, I felt obligated let alone compelled to respond to the allegations that Mr. Seeger crafted against my Firm, Mitnick Law Office, as well as against me personally.

In his filing, Mr. Seeger specifically attacked my integrity through an allegation whereby he asserts that I solicited players on behalf of Thrivest funding group, one of the funding companies involved in an ongoing matter with the Court. In his response to the Lock's motion, Mr. Seeger attached an email from my office contending to be a solicitation by me on behalf of the funding group. The substance of the email sent by me to my clients addressed the status of the litigation at the time and then provided information for those players or families who were considering funding. Prior to the funding information being provided, the email clearly stated "I do not recommend traditional funding companies who charge exorbitant rates". Again, the email was sent to my clients for informational purposes only and was in no way intended as a solicitation on behalf of any perspective funding Company.

What is equally as bothersome is the fact that while Mr. Seeger attempts to construct the inaccurate inference that I had a personal or professional relationship with Thrivest, he intentionally fails to mention in his filing that he personally solicited me in August of 2016 to assist Esquire Bank, another funding entity for which he held a seat on the board of directors. I was asked by Mr. Seeger to "meet with and assist Esquire in developing a funding program for Retired Players". Mr. Seeger never disclosed to me that he was either an active member of Esquire's Board of Directors or that he had recently resigned from that position, while possibly still holding an interest in the Company. Either way, the fact was extremely disturbing to me when I eventually found out about the conflict due to the fact that I had met with two of

Esquire's executives in my office for a substantial period of time and had assisted them with developing a funding formula for their proposed Concussion funding program. I also assisted Esquire at Mr. Seeger's suggestion while never being advised that any eventual funding Agreement would contain an "Assignment" clause. I have attached the relevant correspondence with Mr. Seeger and Esquire, as well as the Esquire funding agreement which includes the assignment language. In any event, why Mr. Seeger felt that it was necessary to include irrelevant, partial and inaccurate information in his response to the Lock's motion can only be construed as malignant on his part.

I must also note that contrary to Mr. Seeger's misguided assertions of solicitation by me on behalf of Thrivest, only 2 of the 1100 retired players who I represent obtained funding from Thrivest. That fact speaks volumes to the inaccuracy of Mr. Seeger's suggestions of solicitation. In any event, again, I have no idea what any of this has to do with the opposition to Locks Law Firm's request to become Administrative Counsel, or my Firm's joinder to that motion.

There is no legitimate reason why Mr. Seeger needs to practice in an unfair and bias manner, or attempt to discredit other attorneys involved in this litigation. The merits of the Settlement, the protection of the Players, fundamental fairness to all of the attorneys involved in the matter should always be primary. If Mr. Seeger could simply reflect on the dictates of common courtesy, the practice of law in this matter would be far less contentious and the administration of justice for the Retired Players better served.

Hopefully, Mr. Seeger will consider these words before he chastises another attorney, especially one who has always put their clients first and one who has constantly promoted the Settlement for which Mr. Seeger negotiated.

I thank your Honor for her time and consideration.

Respectfully,

CRM/sjg

CRAIG R. MITNICK

Monday, April 16, 2018 at 10:07:41 AM Eastern Daylight Time

Subject: RE: Intro
Date: Monday, August 1, 2016 at 10:22:40 AM Eastern Daylight Time
From: Ari Kornhaber
To: 'Craig Mitnick'

Craig:
I apologize for the multiple messages/emails, but I'm reaching out to you again at the suggestion of Chris Seeger. Have you been getting my messages or are you away, etc? Anyway, please let me know if we can schedule a few minutes to talk. I would greatly appreciate it.

-----Original Message-----
From: Craig Mitnick [mailto:craig@craigmitnick.com]
Sent: Friday, February 13, 2015 12:49 PM
To: Ari Kornhaber
Cc: Chris Seeger; craig mitnick
Subject: Re: Intro

Ari is a pleasure to meet you. At least informal leave this way. And I have a feeling we'll get to meet each other personally real soon. Chris thank you very much for the introduction. Sorry I am running around today because I have an event at my home tonight for 35 kids that are on my son's crew team so I am available sporadically. Whenever you have a chance please call me on my cell phone at 609-868-2800 and if you receive my voicemail, know that I will call you right back. I have my phone with me and will throughout the rest of the day. I look forward to hearing from you. And again, Chris thank you much for the introduction

Sent from my iPhone

On Feb 13, 2015, at 9:52 AM, Ari Kornhaber <Ari.Kornhaber@esqbank.com> wrote:
Thank you Chris. Craig, I look forward to speaking with you. I'm am available today other than from 12:30-1:30.

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.
Original Message
From: Chris Seeger
Sent: Friday, February 13, 2015 6:49 AM
To: craig mitnick
Cc: Ari Kornhaber
Subject: Intro
Craig, I want to introduce you to a very close friend, Ari Kornhaber, who I think can help you out with all kinds of banking needs and who works for a bank with a special relationship to the plaintiffs' bar. I'd like to get you both on the phone for 2 mins. Any time work today?
Sent from my iPhone
Please consider the environment before printing this email.

Monday, April 16, 2018 at 10:10:33 AM Eastern Daylight Time

Subject: Fw: Allan Clark
Date: Friday, September 16, 2016 at 6:42:15 PM Eastern Daylight Time
From: Ayal Glezer
To: Craig Mitnick
CC: Ari Kornhaber, Ave Doyle

Craig,
I ran the calc by Seeger and Buchanan today. David had a couple of suggestions that I will run by you.

Also, see below regarding Clark. Did you discuss the new foe players with altzheimer and dementia to get a power of attorney? I believe they are required under the settlement agreement to sign the release with a power of attorney, so will be needed anyhow.

From: Ave Doyle <Ave.Doyle@esqbank.com>
Sent: Friday, September 16, 2016 2:44 PM
To: Ari Kornhaber; Ayal Glezer
Subject: Allan Clark

Hi

I spoke with Mr Clark and explained we are finishing up the paperwork . He understands

I did ask for him to confirm his ailment and he did state Parkinson's and Alzheimers. I asked if he had set up any power of attorneys or representatives and he has not .

Lets discuss our next steps.

Ave

Ave Doyle | *SVP & Retail Director*
233 Broadway, Ste 820 | New York, NY 10279
Direct: 212.286.3030 | Cell: 718.986.8561 | Fax: 212.286.9052

esquirebank.com

Monday, April 16, 2018 at 10:22:43 AM Eastern Daylight Time

Subject: NFL Calc Sheet v 11.xlsx
Date: Monday, September 19, 2016 at 2:23:34 PM Eastern Daylight Time
From: Ayal Glezer
To: Craig Mitnick
CC: David Buchanan
Attachments: NFL Calc Sheet v 11.xlsx

Hi Craig,
I made the changes we discussed earlier and incorporated David Buchanan's suggestions as well to the attached calc sheet.

David – I could not find the pay grid by year other than the one with range of years that we looked at on Friday.

Thank you both for assisting the bank in putting together this loan program.

AG

Please note the new address below

Ayal Glezer | *Chief Lending Officer*
233 Broadway, Ste 820 | New York, NY 10279
Direct: 212.286.3030 | Cell: 212.671.0712 | Fax: 212.286.9052

esquirebank.com

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION LITIGATION	§	
	§	**No. 12-md-2323 (AB)**
	§	
	§	**MDL No. 2323**
THIS DOCUMENT RELATES TO: ALL ACTIONS	§	

[PROPOSED] ORDER

ON THIS DAY came on for consideration the First Verified Petition of Co-Lead Class Counsel Christopher A. Seeger for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs ("Petition"). Upon consideration of the Petition and the response(s), the Court DENIES the Petition at this time.

Dated: July __, 2018

_____
Hon. Anita B. Brody
United States District Court Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No.:2:12-md-02323-AB MDL No. 2323 Civ. Action No. 14-00029-AB
Kevin Turner and Shawn Wooden, on behalf of themselves and others similarly situated, Plaintiffs, v. National Football League and NFL Properties LLC, successor-in-interest to NFL Properties, Inc., Defendants.	
THIS DOCUMENT RELATES TO: ALL ACTIONS	

NOTICE OF APPEAL

NOTICE is hereby given that Class Counsel, the Locks Law Firm (LLF) hereby appeals to the United States Court of Appeals for the Third Circuit from the May 24, 2018 Explanation and Order (ECF No. 10019).

Respectfully submitted,

LOCKS LAW FIRM

Dated: August 2, 2018

By: /s/ Gene Locks

Gene Locks, Esquire (PA ID No. 12969)
David D. Langfitt, Esquire (PA ID No. 66588)
THE CURTIS CENTER
601 Walnut Street, Suite 720 East
Philadelphia, PA 19106
Phone: (215) 893-0100
Fax: 215-893-3444
glocks@lockslaw.com
dlangfitt@lockslaw.com

Tobias Barrington Wolff (PA ID No. 207270)
Professor of Law,
University of Pennsylvania Law School*
3501 Sansom Street
Philadelphia, PA 19104
Phone: 215-898-7471
twolff@law.upenn.edu

*For identification purposes only

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing Notice of Appeal was filed via the Electronic Case Filing System in the United States District Court for the Eastern District of Pennsylvania, on all parties registered for CM/ECF in the litigation.

Respectfully Submitted,

LOCKS LAW FIRM

Dated: August 2, 2018

By: /s/ Gene Locks

Gene Locks, Esquire (PA ID No. 12969)
David D. Langfitt, Esquire (PA ID No. 66588)
THE CURTIS CENTER
601 Walnut Street, Suite 720 East
Philadelphia, PA 19106
Phone: (215) 893-0100
Fax: 215-893-3444
glocks@lockslaw.com
dlangfitt@lockslaw.com

Tobias Barrington Wolff
Professor of Law,
University of Pennsylvania Law School*
3501 Sansom Street
Philadelphia, PA 19104
Phone: 215-898-7471
twolff@law.upenn.edu

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	MDL No. 2323 Case No. 12-md-2323-AB
Kevin Turner and Shawn Wooden, *on behalf of themselves and others similarly situated,* Plaintiffs, v. National Football League and NFL Properties LLC, successor-in-interest to NFL Properties, Inc. Defendants.	Civil Action No. 14-cv-00029-AB
THIS DOCUMENT RELATES TO: ALL ACTIONS	

OBJECTION TO FIRST VERIFIED PETITION OF CO-LEAD COUNSEL CHRISTOPHER A. SEEGER FOR AN AWARD OF POST-EFFECTIVE DATE COMMON BENEFIT ATTORNEYS' FEES AND COSTS

On July 10, 2018, Christopher Seeger filed his First Verified Petition of Co-Lead Class Counsel Christopher A. Seeger for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs ("First Post-Effective Date Request"). Seeger's request excludes Zimmerman Reed's submitted common benefit time and expenses from

January 7, 2017 ("Effective Date") to September 13, 2017. Zimmerman Reed wrote to Seeger requesting an explanation for his decision not to include Zimmerman Reed's submitted time and expenses in his first post-Effective Date fee request. Seeger never responded to Zimmerman Reed's request. Zimmerman Reed now objects to Seeger's first request for post-Effective Date common benefit attorneys' fees and costs and asks the Court to include Zimmerman Reed's uncompensated post-Effective Date time.

BACKGROUND

On September 15, 2017, pursuant to Seeger Weiss's request, Zimmerman Reed submitted its common benefit time and expense report totaling $128,209.50 for work performed from June 16, 2016 to September 13, 2017. Zimmerman Reed's report included a significant amount of post-Effective Date time, totaling $65,990.16[1] in attorney's fees. Zimmerman Reed performed its post-Effective Date work on behalf of the common benefit of the Class as the Co-Chair of the Ethics Committee, and its time includes efforts to prevent the spread of misinformation and remedy confusion amongst Class Members about the Settlement and its benefits. Zimmerman Reed took the initial lead on this effort, collecting information about bad actors who misrepresented the Settlement and exploited Class Members, and sending cease-and-desist letters to entities, legal or otherwise, who sent misleading mailers or made other misleading communications to Class Members. Zimmerman Reed pursued these measures on behalf of all Class Members, and specifically sought approval from Chris Seeger and Sol Weiss

[1] This amount reflects the reasonable hourly rates determined by the Court in its fee Order. *See* Explanation and Order, at n.4, ECF 10019.

before taking action. As Zimmerman Reed pointed out in its objection to Seeger's Declaration in Support of Proposed Allocation of Common Benefit Fund Fees ("Proposed Pre-Effective Date Common Benefit Allocation"), Seeger sought compensation for himself for similar activities, specifically "combat[ing] the dissemination of misinformation to class members and other forms of exploitation of class members." *See* Counter-Declaration of Charles S. Zimmerman In Response to Proposed Allocation of Common Benefit Attorney's Fees ("Zimmerman Counter-Declaration") at ¶ 33, ECF 8722.

In the Zimmerman Counter Declaration, Zimmerman Reed requested the post-Effective Date time it provided to Seeger in September 2017 be included in Seeger's first post-Effective Date request for attorneys' fees. *Id.* at ¶ 36. However, on July 10, 2018, Seeger submitted his First Post-Effective Date Request and did not include any of Zimmerman Reed's post-Effective Date time. *See* First Post-Effective Date Request, ECF 10128. Seeger did not provide an explanation for excluding it.

On July 19, 2018, Zimmerman Reed wrote to Seeger Weiss and requested that he amend his First Post-Effective Date Request to include Zimmerman Reed's post-Effective Date time, or explain his decision to exclude it. Seeger, to date, has not responded to Zimmerman Reed's letter.

On August 3, 2018, Seeger Weiss responded to a separate objection submitted by the Alexander Objectors, and maintained his position that the first post-Effective Date common benefit attorneys' fees and expenses should be distributed as he originally requested. *See* Co-Lead Class Counsel's Reply to the Alexander Objectors' Objections

to First Verified Petition for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs, ECF 10191. In his Response, Seeger argued that the Alexander Objectors were the only entity to take issue with his first post-Effective date proposal, despite Zimmerman Reed's request to him that he include Zimmerman Reed's time.

Therefore, it being clear Seeger Weiss will not hear Zimmerman Reed's request or request the Court to include Zimmerman Reed's post-Effective Date lodestar, Zimmerman Reed objects to Seeger's First Post-Effective Date Request and asks the Court include Zimmerman Reed's time totaling $65,990.16.

ARGUMENT

Zimmerman Reed objects to Seeger Weiss's decision not to request compensation for Zimmerman Reed's post-Effective Date time. Zimmerman Reed requests the Court approve its requested fee, adjusted according to the Court's reasonable hourly billing rates, of $65,990.16. Zimmerman Reed's request should be granted for three reasons.

First, Seeger Weiss previously proposed that Zimmerman Reed be compensated through the common benefit fund for its Ethics Committee efforts. In his Proposed Pre-Effective Date Common Benefit Allocation, Seeger recommended Zimmerman Reed receive the full amount of its lodestar submitted prior to June 16, 2016, which included time billed for work done on behalf of the Ethics Committee. *See* Proposed Pre-Effective Date Common Benefit Allocation, at ¶¶ 15(x), 17, ECF 8447. Seeger also specifically listed the type of work Zimmerman Reed undertook on the Ethics Committee as compensable through the common benefit, stating that efforts to "combat the

dissemination of misinformation to class members and other forms of exploitation of class members" deserved compensation. *Id.* at ¶ 33. The Court later agreed, and compensated Zimmerman Reed for its Ethics Committee work performed before June 16, 2016. *See* Explanation and Order, ECF 10019.

Seeger has not explained why Zimmerman Reed's efforts on behalf of the Ethics Committee were previously compensable through the common benefit fund but were not compensable after the Effective Date. Because Zimmerman Reed was compensated for pre-Effective Date Ethics Committee work that is substantially similar to its post-Effective Date Ethics Committee work, the Court should grant Zimmerman Reed's request.

Second, Zimmerman Reed's post-Effective Date time and expenses were undertaken on behalf of the Class and for the common benefit, and therefore, are appropriate for compensation through the post-Effective Date common benefit fund. As Zimmerman Reed described in its Counter Declaration, its post-Effective Date time reflects efforts to combat the dissemination of misinformation to class members. Zimmerman Counter Declaration, at ¶¶ 33-36. Zimmerman Reed gathered information and communications from law firms on the Plaintiffs' Steering Committee and the Plaintiffs' Executive Committee, including information on 244 former NFL players who received potentially misleading letters, emails, phone calls, or other communications. In part, these communications included statements from certain firms purportedly promising players a diagnosis through the Settlement. In fact, many of the bad actors Zimmerman Reed identified were later involved in potentially fraudulent or suspicious claims or were

otherwise accused of exploiting class members, including some with cognitive deficiencies. Zimmerman Reed led the effort to draft cease-and-desist letters to entities and law firms that misled players about the Settlement or Class Members' representation status. The majority of the information Zimmerman Reed collected, reviewed, and analyzed did not involve or relate to *any* of its individually retained clients. As such, Zimmerman Reed's efforts were not made for its own benefit, but rather, to protect the class as a whole.

Zimmerman Reed's efforts were not only authorized by Seeger Weiss, but Zimmerman Reed kept Seeger and Sol Weiss apprised of its progress and efforts, including sending the information it compiled and drafts of cease-and-desist letters. Seeger approved this type of work by authorizing the creation of the Ethics Committee and recognized the necessity of an effort to promote accurate information about the Settlement to Class Members.

Zimmerman Reed vigorously pursued its duty as Co-Chair of the Ethics Committee even after the Effective Date. From January 7, 2017 to September 13, 2017, Zimmerman Reed spent significant time, almost 100 hours, correcting misleading information and gathering information on bad actors, as Seeger requested upon forming the Ethics Committee. Zimmerman Reed deserves compensation for those efforts.

Third, and finally, Seeger Weiss's First Post-Effective Date Request shows that Zimmerman Reed's time is compensable as common benefit. In his First Post-Effective Date Request, Seeger proposes compensating his firm for time spent performing work similar to that which Zimmerman Reed seeks compensation here. Seeger Weiss lists

activities it believes are compensable through common benefit fees, including "Efforts to Protect Class Member from Third-Party Profiteers." *See* First Post-Effective Date Request, at 10. Seeger describes his work:

> As Co-Lead Class Counsel, Seeger Weiss was particularly concerned that profiteers might confuse or unduly influence Class Members, who might be more susceptible to deceptive tactics by reason of neurocognitive impairments, other ailments, age, financial distress, or some combination of all of these factors.

Id. at 10-11. Seeger also requests compensation for "fielded calls from Class Member and their family members concerning the potentially misleading third-party solicitations and deceptive practices . . . ." *Id.* at 10.

Seeger's work related to third-party funders is substantially similar to the type of effort Zimmerman Reed undertook as Co-Chair of the Ethics Committee. In the case of third party funders, entities took advantage of Class Members by offering money upfront but later taking substantial amounts from the Class Members' Monetary Awards. Likewise, the bad actors Zimmerman Reed sought to expose promised players Qualifying Diagnoses, misinformed Class Members about the Settlement, or actively sought to encourage Class Members to fire their attorneys, without cause. Seeger Weiss may not be concerned about Class Members unnecessarily firing their attorneys, and, undoubtedly, Class Members have the right to terminate their attorneys at any time. However, when Class Members are terminating attorneys because of false or exaggerated promises of other entities, Class Members are put in jeopardy and, just as with third party funders, this particular Class is vulnerable to exaggerated promises.

Ultimately, Seeger seeks compensation for his work preventing misleading and exploitative actions of third party entities, and Zimmerman Reed was authorized by Seeger to do the same. Seeger has not explained why his actions deserve common benefit compensation, but Zimmerman Reed's do not. Because both efforts were made on behalf of the Class, both are compensable.

CONCLUSION

Zimmerman Reed requests the Court include its post-Effective Date common benefit time, totaling $65,990.16, in the first post-Effective Date distribution of attorneys' fees for Zimmerman Reed's efforts as the Co-Chair of the Ethics Committee.

Dated: September 18, 2018

Respectfully submitted,

ZIMMERMAN REED LLP

s/ Charles S. Zimmerman

Charles S. Zimmerman – MN #120054
J. Gordon Rudd, Jr. – MN #222082
Brian C. Gudmundson – MN #336695
Michael J. Laird - MN #0398436
1100 IDS Center, 80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 341-0400
Facsimile: (612) 341-0844
Email: Charles.Zimmerman@zimmreed.com
Gordon.Rudd@zimmreed.com
Brian.Gudmundson@zimmreed.com
Michael.Laird@zimmreed.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a copy of Zimmerman Reed LLP's Objection to First Verified Petition of Co-Lead Class Counsel Christopher A. Seeger for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs was filed electronically with the Clerk of Court using the CM/ECF System on September 18, 2018. The CM/ECF System will serve all counsel of record.

Dated: September 18, 2018

ZIMMERMAN REED LLP

s/ Charles S. Zimmerman

Charles S. Zimmerman – MN #120054
J. Gordon Rudd, Jr. – MN #222082
Brian C. Gudmundson – MN #336695
Michael J. Laird - MN #0398436
1100 IDS Center, 80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 341-0400
Facsimile: (612) 341-0844
Email: Charles.Zimmerman@zimmreed.com
Gordon.Rudd@zimmreed.com
Brian.Gudmundson@zimmreed.com
Michael.Laird@zimmreed.com

ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323 **Hon. Anita B. Brody**
Kevin Turner and Shawn Wooden, *on behalf of themselves and others similarly situated*, Plaintiffs, v. National Football League and NFL Properties LLC, successor-in-interest to NFL Properties, Inc., Defendants.	Civ. Action No. 14-00029-AB
THIS DOCUMENT RELATES TO: ALL ACTIONS	

DECLARATION OF CHRISTOPHER A. SEEGER IN RESPONSE TO THE OBJECTION OF ZIMMERMAN REED TO FIRST VERIFIED PETITION FOR AWARD OF POST-EFFECTIVE DATE COMMON BENEFIT ATTORNEYS' FEES AND COSTS

CHRISTOPHER A. SEEGER declares, pursuant to 28 U.S.C. § 1746, based upon his personal knowledge, information and belief, the following:

1. I submit this response to the Objection to First Verified Petition of Co-Lead Counsel Christopher A. Seeger for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs, filed by Zimmerman Reed LLP (ECF No. 10261) ("Zimmerman Objection").

2. As an initial matter, the Zimmerman Objection is nearly two months late. The First Verified Petition of Co-Lead Counsel Christopher A. Seeger for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs (ECF No. 10128) ("First Post-Effective Date Petition") was filed on July 10, 2018. Under this Court's Local Rules, any response to the First Post-Effective Date Petition was due on or before July 24, 2018.

3. Even if the Zimmerman Objection were timely, the work for which Zimmerman Reed seeks compensation is not common benefit work. In preparation for the Proposed Allocation of Common Benefit Attorneys' Fees, Payment of Common Benefit Expenses, and Payment of Case Contribution Awards to Class Representatives, in September 2017, I requested from firms on both the Plaintiffs' Executive Committee ("PEC") and Plaintiffs' Steering Committee ("PSC") that they submit to me any time that they believed reflected common benefit work performed subsequent to the filing of the Petition for an Award of Attorneys' Fees, Reimbursement of Costs and Expenses, Adoption of a Set-Aside of Five Percent of Each Monetary Award and Derivative Claimant Award, and Case Contribution Awards for Class Representatives (ECF No. 7151) ("Initial Fee Petition"), so that I could present to the Court the continuing common benefit work I was overseeing as part of the implementation of the Settlement.

4. Zimmerman Reed submitted time for work that it had performed subsequent to its submission of time in connection with the Initial Fee Petition that it believed was for the common benefit of the Class. After reviewing that time, however, I did not believe that Zimmerman Reed's additional work was common benefit work and I did not

include it with on-going common benefit time that I presented to the Court alongside the Proposed Allocation. *See* ECF No. 8447. ¶ 21.

5. To begin with, I had not requested that Zimmerman Reed undertake any further work for the common benefit after the Effective Date.

6. The work for which Zimmerman Reed now requests compensation as common benefit work is primarily related to the "poaching" of clients from one firm by another.[1] This kind of work has two interests potentially in play: those of the firm losing a client and those of the client who, for whatever reason, decides to seek new representation. Work to advance the interests of any firm losing clients is not being performed for the common benefit of the Class. Only work that serves the interest of the clients may be for the common benefit. If the client sought new representation because he was unhappy with the prior firm's lack of responsiveness or other perceived inadequacy, the work to dissuade the client from switching representation would not be common benefit work. If, however, the client's decision to retain a new firm was based upon misrepresentations (e.g., touting relationships with physicians to assure the client would be able to obtain a Qualifying Diagnosis, or representing that they could "teach" clients to appear as though they were impaired, even if they were not) by the new firm, that could be common benefit work if it focuses on the client and his or her circumstances.

[1] Zimmerman Reed also submitted time that it had spent coordinating with other firms to respond to the briefing surrounding the contingent fee agreement between Kevin Turner and his former law firm. Zimmerman Reed no longer appears to be seeking payment for this work as being for the common benefit of the Class.

7. Shortly after the Settlement Agreement was approved, there were widespread misrepresentations by some firms seeking to sign-up players, even those who already had counsel. By early 2017, Co-Lead Class Counsel began seeking this Court's intervention to address the wide array of unfair and deceptive practices aimed at Settlement Class Members, including Retired NFL Football Players with neurocognitive impairments. *E.g.*, ECF Nos. 7175, 7347, 7625, 7811. By July 2017, the Court was addressing such deceptive practices, including by holding a hearing and directing that a corrective notice be sent to all members of the Settlement Class. *E.g.*, ECF Nos. 7814, 8037.
8. Zimmerman Reed was involved in the early efforts to investigate the "poaching" of clients, and it submitted time up to July 15, 2016 related to these early efforts as part of the Initial Fee Petition. I ultimately submitted such work as common benefit work with the Initial Fee Petition. This work was useful in identifying the firms that were engaging in widespread efforts to secure clients after the final approval of the Settlement and the type of misrepresentations some of these firms were making in the course of their solicitations.
9. The work that Zimmerman Reed continued to undertake on the matter of "poaching," however, changed over time. After the Effective Date of the Settlement, it appeared to me that the work Zimmerman Reed was undertaking was no longer for the common benefit of the Class. Rather than seeking primarily to protect the interests of Settlement Class Members, the work Zimmerman Reed continued to dedicate to the problem of "poaching" became focused instead on the interests of the firms, like its own and other PEC and PSC members, who were losing clients to the "poachers." Indeed, none of

this work contributed to the efforts by Co-Lead Class Counsel to address deceptive solicitations to the Settlement Class. Instead, such work was primarily, if not exclusively, serving the interests of the firms who had lost clients.

10. Nothing in the Zimmerman Objection leads me to change my opinion about whether this work qualified as common benefit time and thus to reconsider my decision.

11. Accordingly, the Court should overrule the untimely Zimmerman Objection.

12. I declare under penalty of perjury that the foregoing is true and correct.

Date: Executed on September 27, 2018

/s/ Christopher A. Seeger
Christopher A. Seeger
SEEGER WEISS LLP
55 Challenger Road, 6th Floor
Ridgefield Park, NJ 07660
cseeger@seegerweiss.com
Telephone: (212) 584-0700

CO-LEAD CLASS COUNSEL

CERTIFICATE OF SERVICE

I, Christopher A. Seeger, hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the date below upon all counsel of record in this matter.

Dated: September 27, 2018

Respectfully submitted,

/s/ Christopher A. Seeger
Christopher A. Seeger

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323 **Hon. Anita B. Brody**
Kevin Turner and Shawn Wooden, *on behalf of themselves and others similarly situated,* Plaintiffs, v. National Football League and NFL Properties, LLC, Successor-in-interest to NFL Properties, Inc., Defendants.	
THIS DOCUMENT RELATES TO: ALL ACTIONS	

ORDER

Pursuant to the Court's continuing jurisdiction over this action as set out in the Court's Amended Final Order and Judgment (Doc. No. 6534, paragraph 17), it is hereby **ORDERED** that the attached Amended Rules Governing Attorneys' Liens are **ADOPTED.**

BY THE COURT:

David R. Strawbridge, USMJ

Date: October 2, 2018

Approved.

Anita B. Brody, J.

Date: October 3, 2018

NFL CONCUSSION SETTLEMENT

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
No. 2:12-md-02323 (E.D. Pa.)

AMENDED RULES GOVERNING ATTORNEYS' LIENS

TABLE OF CONTENTS

EXHIBITS

AMENDED RULES GOVERNING ATTORNEYS' LIENS

TITLE I: GENERAL

Rule 1. Purpose of These Rules. These Rules govern the process for asserting Attorneys' Liens and resolving Disputes as to whether the Attorney Lienholder's fees and/or costs, if any, may be awarded from the affected Settlement Class Member's Award. The resolution of the Dispute will necessarily take into account and resolve the extent of any other attorney's fees and/or costs to be awarded from the Settlement Class Member's Award.

Rule 2. Court Approval of These Rules. The Court has approved these Amended Rules pursuant to its continuing and exclusive jurisdiction under Article XXVII of the Settlement Agreement and Paragraph 17 of the Court's May 8, 2015 Amended Final Approval Order and Judgment (ECF No. 6534). The Court may amend these Rules at any time.

Rule 3. Definitions Used in These Rules. All capitalized terms used in these Rules will have the meanings given to them in the Settlement Agreement. In addition:

(a) "Attorney's Lien" means a Lien asserted for attorneys'/law firm's fees and/or costs for work in connection with representing a Settlement Class Member in the NFL concussion litigation and/or in the Settlement Program. The fees and/or costs sought by an Attorney Lienholder must not include tasks undertaken for the Settlement Class as a class, or for tasks that replicate such common benefit tasks, or for any other tasks performed for the common benefit of Settlement Class Members. The common benefit fees and/or costs are addressed through Article XXI of the Settlement Agreement and as addressed in the Court's April 22, 2015 Opinion under the heading "Attorney's Fees" (ECF No. 6509).

(b) "Attorney Lienholder" means the attorney/law firm that asserted an Attorney's Lien with the Settlement Program.

(c) "Award" means a Monetary Award, Supplemental Monetary Award, or a Derivative Claimant Award.

(d) "Claim Package" is defined in the Settlement Agreement in Section 8.2(a).

(e) "Court" is defined in the Settlement Agreement in Section 2.1(x).

(f) "Derivative Claim Package" is defined in the Settlement Agreement in Section 8.2(b).

(g) "Dispute" means any disagreement between the Parties over an Attorney's Lien as to the reasonableness and amount of the fees and/or costs sought by the Attorney Lienholder(s) and any other matter relating to attorney's fees and costs the Court determines are necessary to ensure that the rights of the Parties are protected.

(h) "Dispute Record" is the compilation of information provided by the Claims Administrator to the Magistrate Judge for his consideration when resolving a Dispute, as described in Rule 20.

(i) "District Judge" means the Honorable Anita B. Brody, U.S.D.J., or any successor judge.

(j) "Hearing Schedule" establishes the date, time, and place of the hearing, as described in Rule 22. The Claims Administrator will serve the Hearing Schedule on the Parties.

(k) "Magistrate Judge" means the Honorable David Strawbridge, U.S.M.J., appointed by the District Judge in the April 4, 2017 Order to handle all Attorney's Lien Disputes (ECF No. 7446) or any other United States Magistrate Judge for the Eastern District of Pennsylvania appointed by subsequent order of the District Judge for this purpose.

(l) "Notice of Duty to Resolve Lien Dispute" is a notice issued by the Claims Administrator to the Settlement Class Member who disputes or fails to consent to an Attorney's Lien and to the Attorney Lienholder, as described in Rule 11.

(m) "Notice of Lien" is a notice issued by the Claims Administrator to the Settlement Class Member and the Attorney Lienholder providing notice of an Attorney's Lien assertion with copies of the required proof, as described in Rule 10.

(n) "Notice of Lien Payment" is a Notice issued by the Claims Administrator to the Settlement Class Member after it has issued payment for an Attorney's Lien, as described in Rule 12.

(o) "Party or Parties to the Dispute" means the current attorney on behalf of a represented Settlement Class Member or an unrepresented Settlement Class Member on his or her own behalf, and any Attorney Lienholder(s), hereinafter referred to as "Party" or "Parties." The Claims Administrator is not a Party to the Dispute.

(p) "Presumptive Fee Cap" means the presumptive cap on attorney's fees imposed by the Court's April 5, 2018 Opinion and Order (ECF Nos. 9862 and 9863), which capped attorneys' fees at 22% plus reasonable costs, less the amount (not to exceed 5% of the total Award) that the Court determines must be paid into the Attorneys' Fees Qualified Settlement Fund pursuant to the Court's June 27, 2018 Order Regarding Withholdings for Common Benefit Fund (ECF No. 10104).

(q) "Report and Recommendation" is the Magistrate Judge's recommendation to the District Judge for resolution of the Dispute, as described in Rule 25.

(r) "Response Memorandum" is the information submitted to the Claims Administrator by each Party in response to the Statement(s) of Dispute from other Parties, as described in Rule 18.

(s) "Schedule of Document Submissions" is the schedule issued by the Claims Administrator to the Parties setting the deadlines for the submission of the Parties' Statements of Dispute and Response Memoranda, as described in Rule 19.

(t) "Settlement Class Member" ("SCM") means a Retired NFL Football Player, the Representative Claimant of a deceased or incompetent Retired NFL Football Player, or a Derivative Claimant.

(u) "Settlement Program" means the program for benefits for SCMs established under the Settlement Agreement.

(v) "Statement of Dispute" is the information about the Dispute submitted by the Parties to the Claims Administrator, as described in Rule 17.

(w) "Statement of Fees and Costs" is the form that an SCM's attorney must sign and return to the Claims Administrator pursuant to the Court's June 27, 2018 Order (ECF No. 10103) and Rule 17(b) verifying his or her law firm's fees and/or costs for work in connection with representing the SCM in the NFL concussion litigation and/or in the Settlement Program.

(x) "Withdrawal of Attorney's Lien Dispute" ("Withdrawal") is a form that must be submitted by all Parties to the Dispute to withdraw from the dispute process, as described in Rule 24.

(y) "Withdrawal Record" is the compilation of information provided by the Claims Administrator to the Magistrate Judge for his consideration when resolving a Dispute, as described in Rule 24(b).

Rule 4. Referral to Magistrate Judge. The District Judge has referred all Attorney's Lien Disputes to the Honorable David Strawbridge, U.S.M.J., pursuant to the Court's April 4, 2017 Order (ECF No. 7446) and as authorized under 28 U.S.C. § 636(b)(3). The Court will issue a final decision in accordance with these Rules.

Rule 5. How Things are Submitted and Served Under These Rules. Where these Rules require service to the Claims Administrator, such service shall be by one of the following methods:

(a) Email to ClaimsAdministrator@NFLConcussionSettlement.com, by a secured and encrypted method and include "ATTN: NFL Liens" in the subject line;

(b) Facsimile to (804) 521-7299, ATTN: NFL Liens;

(c) Mail to NFL Concussion Settlement, Claims Administrator, P.O. Box 25369, Richmond, VA 23260, ATTN: NFL Liens; or

(d) Delivery by overnight carrier to NFL Concussion Settlement, c/o BrownGreer PLC, 250 Rocketts Way, Richmond, VA 23231, ATTN: NFL Liens.

Rule 6. How to Count Time Periods and the Date Something is Submitted Under These Rules.

(a) How to Count Time Periods: Any time period set by these Rules will be computed as follows, which is based on Rule 6 of the Federal Rules of Civil Procedure:

(1) Do not count the day that starts the running of any period of time. The first day of the period is the day after this trigger day.

(2) Count every day, including Saturdays, Sundays, and legal holidays.

(3) Count the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(4) Legal holidays are New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President of the United States or the United States Congress.

(5) An additional three days will be added to any time period specified by these Rules for an action or submission where the acting or responding party was served by mail with the Notice or submission requiring action or response rather than by service on a Portal or delivery.

(b) How to Mark the Date Something is Submitted: Any document submitted by email or facsimile will be considered submitted on the date emailed or faxed at the local time of the submitting Party. Documents submitted by mail will be considered submitted on the postmark date. Documents submitted by overnight delivery will be considered submitted on the date delivered to the carrier.

TITLE II: ASSERTION AND SUBMISSION OF ATTORNEYS' LIENS

Rule 7. Required Notice of Attorney's Lien Filed in the Court. If an attorney wants to assert an Attorney's Lien, or otherwise present a claim against an SCM in any way related to a SCM's Award, he or she must file a notice, but notice only, of Attorney's Lien in the United States District Court for the Eastern District of Pennsylvania, Case No.: 2:12-md-02323-AB. An Attorney's Lien filed with any other court is not binding on the Claims Administrator or effective in the Settlement Program and will not be considered by the Court.

Personal information such as Social Security Number, Taxpayer Identification Number, or Foreign Identification Number MUST NOT be included in the notice of lien filed with the Court, pursuant to the Local Rules of Civil Procedure for the Eastern District of Pennsylvania, Rule 5.1.3.

Rule 8. Required Proof for an Attorney's Lien.

(a) Proof of Attorney's Lien. The Attorney Lienholder must submit the following information and documentation to the Claims Administrator:

(1) Information to identify the Retired NFL Football Player or Derivative Claimant against whom the Attorney's Lien is alleged (such as the SCM's full name, Social Security Number, Taxpayer Identification Number, Foreign Identification Number, Date of Birth, and/or Settlement Program ID);

(2) The amount of the asserted Attorney's Lien;

(3) The notice of Attorney's Lien filed in the United States District Court for the Eastern District of Pennsylvania, Case No.: 2:12-md-02323-AB as required by Rule 7;

(4) A copy of the attorney's retainer agreement signed by the SCM; and

(5) The dollar amount of the attorney's costs if the attorney is seeking reimbursement of costs in addition to fees.

(b) An Attorney Lienholder must submit all of the required proof as set forth in Rule 8(a), before the Claims Administrator begins processing the Award. Failure to comply with Rule 8(a)(1)-(4) before the Claims Administrator begins processing the Award will result in the waiver of the Attorney Lienholder's right to assert an Attorney's Lien against the Award. Failure to comply with Rule 8(a)(5) before the Claims Administrator begins processing the Award will result in the waiver of the Attorney Lienholder's right to seek reimbursement of any costs incurred during representation of the SCM.

(c) The Claims Administrator will review the information and send the Attorney Lienholder an email or letter to acknowledge receipt of the assertion, confirm the Attorney Lienholder's contact information, and inform the Attorney Lienholder if it needs to submit further information or documentation about the Lien.

Rule 9. Attorney's Lien by an Attorney Currently Representing the Settlement Class Member. An SCM's current attorney who believes that other competing Lien payments, including but not limited to those for medical expenses and services, child support, unpaid taxes, and judgment debts, may interfere with recovery of his or her attorney's fees and/or costs must assert a Lien in accordance with Rules 5, 7, and 8 to protect his or her interests.

Rule 10. Notice of Lien to Settlement Class Member and Attorney Lienholder. The Claims Administrator will issue a Notice of Lien to the SCM and the Attorney Lienholder after the Claims Administrator receives both the required proof for the Lien (as set forth in Rule 8) and a Claim Package or Derivative Claim Package. The SCM's Notice of Lien will include copies of the proof of the Attorney's Lien and provide the SCM with at least 20 days to consent to or dispute the Attorney's Lien.

Rule 11. Notice of Duty to Resolve Lien Dispute to Settlement Class Member and Attorney Lienholder. If the SCM disputes or fails to consent to the Attorney's Lien within 20 days after the Claims Administrator issues a Notice of Lien, the Claims Administrator will take no further action on the Lien until the SCM becomes eligible for an Award. If and when the SCM becomes eligible for an Award, the Claims Administrator will issue a Notice of Duty to Resolve Lien Dispute to the SCM and the Attorney Lienholder. The Notice advises that the Claims Administrator is not a Party to the Dispute and does not have a decision-making role in how the Dispute will be resolved. The Claims Administrator will withhold adequate funds to pay the Lien, as well as the fees and/or costs of any current attorney, in accordance with the Presumptive Fee Cap, to the extent funds are available, until the Dispute is resolved.

Rule 12. Resolution of Disputes Over Attorneys' Liens. The Claims Administrator will refer the Dispute to the Honorable David Strawbridge, U.S.M.J., or another United States Magistrate Judge for the Eastern District of Pennsylvania. If consent to Magistrate Judge jurisdiction is given pursuant to Rule 15, the Magistrate Judge will issue a final decision resolving the Dispute or ruling on Withdrawals of Attorney's Lien Dispute in accordance with these Rules and as authorized by 28 U.S.C. § 636(c). Otherwise, the Magistrate Judge will prepare a Report and Recommendation in

accordance with these Rules and pursuant to the Court's April 4, 2017 Order (ECF No. 7446) and as authorized by 28 U.S.C. § 636(b)(3).

The Claims Administrator will disburse the withheld funds in accordance with the Court's final decision, the provisions of the Settlement Agreement, and Court orders regarding implementation. The Claims Administrator will issue a Notice of Lien Payment to the SCM.

Rule 13. Resolution of Petition for Deviation in the Attorney's Lien Dispute Process. If a Party to an Attorney's Lien Dispute timely filed a Petition for Deviation in accordance with Rule 10 of the Rules Governing Petitions for Deviation from the Fee Cap (ECF No. 9956 or any Amended Rules Governing Petitions for Deviation from the Fee Cap as approved by the Court), the Petition will be resolved in the Attorney's Lien dispute resolution process. The timing of and requirements for document submissions are governed by the Schedule of Document Submissions issued by the Claims Administrator for the Attorney's Lien Dispute. The Claims Administrator will include the Petition for Deviation in the Record for the Attorney's Lien Dispute to be considered by the Magistrate Judge.

TITLE III: DISPUTE RESOLUTION PROCESS

Rule 14. Attempts to Reach an Agreement. The Parties must make reasonable efforts to resolve the Dispute by agreement before and during the dispute resolution process.

Rule 15. Agreement to Consent Jurisdiction. Pursuant to 28 U.S.C. § 636(c), the Parties may consent to have the Magistrate Judge enter a final order as to the resolution of a Dispute by signing and returning to the Claims Administrator the Notice, Consent, and Reference of an Attorney's Lien Dispute to a Magistrate Judge for a Final Decision (Exhibit A). If such consent is given by all Parties, Rule 25 will no longer apply, and the Magistrate Judge's determination will become the final decision of the Court as described in Rule 26.

Rule 16. Issues in Dispute. The issues in dispute will be limited to those originally raised by the Parties in the Statements of Dispute, as described in Rule 17, absent some extraordinary circumstance.

Rule 17. Statement of Dispute.

(a) Each Attorney Lienholder and the current attorney, if the SCM is represented, must serve the Claims Administrator with a Statement of Dispute including:

(1) A statement of all issues in dispute;

(2) A chronology of the tasks performed by the attorney, the date each task was performed, and the time spent on each task;

(3) A list of costs with a brief explanation of the purpose of incurring these costs and the date the costs were incurred;

(4) The relief sought;

(5) A summary of the attempts to reach an agreement with the opposing Party;

(6) Any exhibits; and

(7) A statement signed by the submitting Party declaring under penalty of perjury pursuant to 28 U.S.C. § 1746 that the information submitted in the Statement of Dispute is true and accurate to the best of that Party's knowledge and that the submitting Party understands that false statements made in connection with this process may result in fines, sanctions, and/or any other remedy available by law. The statement may be signed by a current attorney on behalf of the SCM. The signature may be an original wet ink signature, a PDF or other electronic image of an actual signature, or an electronic signature.

(b) The current attorney must also include with the Statement of Dispute a copy of his or her retainer agreement signed by the SCM, any modifications to that agreement, and a signed copy of the Statement of Fees and Costs (Exhibit B). Failure of an SCM's current attorney to provide the dollar amount of its costs on the Statement will result in waiver of the attorney's right to seek reimbursement of any costs incurred during representation of the SCM in the NFL concussion litigation or the Settlement Program.

(c) If the SCM is not represented by a lawyer in this process, he or she must serve the Claims Administrator with a Statement of Dispute that:

(1) Explains his or her best understanding of the issues;

(2) Provides a summary of the attempts to reach an agreement with the Attorney Lienholder;

(3) Includes any information the SCM believes would be useful to the Magistrate Judge about the work performed, any suggested resolution, and any documents or exhibits he or she wants the Magistrate Judge to consider; and

(4) Includes a statement signed by the SCM declaring under penalty of perjury pursuant to 28 U.S.C. § 1746 that the information submitted in the Statement of Dispute is true and accurate to the best of the SCM's knowledge and that the SCM understands that false statements made in connection with this process may result in fines, sanctions, and/or any other remedy available by law. The signature may be an original wet ink signature, a PDF or other electronic image of an actual signature, or an electronic signature.

Rule 18. Response Memorandum. Each Party may serve the Claims Administrator with a Response Memorandum to the opposing Party's Statement of Dispute. Any request for a hearing must be made in the Response Memorandum. After a Response Memorandum has been submitted, a Party may not provide any further submissions unless requested by or approved by the Magistrate Judge. Any Party's request to include supplemental submissions in the Dispute Record must be made in writing to the Claims Administrator.

Each Response Memorandum must contain a statement signed by the submitting Party declaring under penalty of perjury pursuant to 28 U.S.C. § 1746 that the information submitted in the Response Memorandum is true and accurate to the best of that Party's knowledge and that the submitting Party

understands that false statements made in connection with this process may result in fines, sanctions, and/or any other remedy available by law. The statement may be signed by a current attorney on behalf of the SCM. The signature may be an original wet ink signature, a PDF or other electronic image of an actual signature, or an electronic signature.

If a Party fails to submit a Statement of Dispute, the opposing Party may not submit a Response Memorandum unless requested by the Magistrate Judge. However, the opposing Party may submit a request for a hearing within 15 days after the date the Claims Administrator serves that Party's Statement of Dispute.

Rule 19. Schedule of Document Submissions. The Claims Administrator will serve the Parties with a Schedule of Document Submissions as determined by the Magistrate Judge.

(a) Statement of Dispute: Each Party must submit a Statement of Dispute within 30 days after the date of the Schedule of Document Submissions. The Claims Administrator will serve each Party with the opposing Party's Statement of Dispute.

(b) Response Memorandum: Each Party may submit a Response Memorandum within 15 days after the date the Claims Administrator serves the Statements of Dispute on the Parties. The Claims Administrator will serve each Party with the opposing Party's Response Memorandum.

(c) Additional Evidence or Information: The Magistrate Judge in his own discretion may request additional evidence or information from a Party or the Claims Administrator if he determines such evidence would aid him in the resolution of the Dispute.

(d) The Dispute Record: Within 20 days after the date the Claims Administrator serves the Response Memoranda on the Parties, the Claims Administrator will provide the complete Dispute Record to the Magistrate Judge, along with a statement of the amount of any Award funds withheld pending resolution of the Dispute.

(e) Exclusions from the Dispute Record: Any documents received after the Claims Administrator provides the Dispute Record to the Magistrate Judge will be excluded from the Dispute Record, unless directed otherwise by the Magistrate Judge.

(f) Extensions of Time: Extensions of deadlines are discouraged and should not be filed on the Court's docket. Upon a Party's written request to the Claims Administrator and a showing of good cause, however, the Magistrate Judge may exercise discretion to extend or modify any submission deadline established by these Rules. Before the Claims Administrator presents any such request to the Magistrate Judge, the Parties must confer and include a statement of any opposition to the request in the written submission. The Magistrate Judge will advise the Claims Administrator of any extension or modification of a submission deadline. The Claims Administrator will notify the Parties.

Rule 20. Dispute Record.

(a) The Dispute Record to be considered by the Magistrate Judge will consist of:

(1) A copy of the Notice of Monetary Award Claim Determination or Notice of Derivative Claimant Award Determination;

(2) The Notice of Lien to the SCM with the attachments (a copy of the Attorney Lienholder's retainer agreement signed by the SCM, a copy of the notice of Attorney's Lien filed in the Court, and the amount of any costs provided by the Attorney Lienholder);

(3) The SCM's response, if any, to the Notice of Lien that he or she disputes the Lien;

(4) If the SCM is represented, a copy of the current attorney's retainer agreement signed by the SCM and a signed copy of the Statement of Fees and Costs as provided in Rule 17(b);

(5) The Statements of Dispute from each Party as provided in Rule 17;

(6) The Response Memoranda from each Party as provided in Rule 18; and

(7) Any additional evidence produced by either Party or the Claims Administrator in response to a request of the Magistrate Judge pursuant to Rule 19(c).

(b) The Claims Administrator will assemble the complete Dispute Record and provide it to the Magistrate Judge, along with a statement of the amount of the Award withheld pending resolution of the Dispute.

Rule 21. Appointment of Counsel. The Magistrate Judge has the discretion to appoint counsel for any unrepresented SCM pursuant to the Court's January 8, 2018 Order (ECF No. 9561). An unrepresented SCM must serve the Claims Administrator with a written request showing good cause for appointment of counsel. The Claims Administrator will present the request to the Magistrate Judge and inform the SCM of the determination.

Rule 22. Hearing.

(a) Hearing Request: Any Party may request a hearing with the Magistrate Judge in accordance with Rule 18. The Magistrate Judge in his own discretion may order a hearing, if he determines that such proceeding would aid him in the resolution of the Dispute. The Magistrate Judge will determine if such hearing will be in-person, by video conference, or by telephone.

(b) Hearing Schedule: If the Magistrate Judge determines a hearing is necessary, the Claims Administrator will serve a Hearing Schedule on the Parties. The hearing will be scheduled promptly, but no sooner than 20 days after the date of the Hearing Schedule. No provision of the Schedule will be modified except upon written request for modification within 14 days of the date of the Schedule. Thereafter, the Schedule may be modified only upon a

showing of good cause that the deadline cannot reasonably be met despite the diligence of the Party seeking modification. Any requests for modification must be submitted to the Claims Administrator and should not be filed on the Court's docket. The Claims Administrator will submit the request to the Magistrate Judge and notify the Parties of the determination.

(c) Telephonic or Video Conference Access for Hearing: The Claims Administrator will make the necessary arrangements for telephone or video conference access if the Magistrate Judge orders a hearing.

(d) Accommodations: If a Party needs special accommodations for this process, that Party must make the necessary arrangements for those accommodations.

Rule 23. Hearing Procedure. If the Magistrate Judge orders a hearing, the following procedure will apply.

(a) Evidence: The evidence that the Magistrate Judge may consider is limited to the Dispute Record, testimony, and any additional documentation properly presented during the hearing.

(b) Testimony Under Oath or Affirmation: Hearing testimony must be submitted under oath or affirmation administered by the Magistrate Judge or by any duly qualified person. If a Party wants to present live testimony of anyone other than a Party, he or she must submit a written request to the Claims Administrator no later than three (3) business days before the hearing that includes:

(1) The individual's name and relationship to the requesting Party;

(2) The nature and scope of the testimony to be provided;

(3) The length of time the testimony will take; and

(4) Whether the essence of the testimony could be presented in any other manner.

The Claims Administrator will present the request to the Magistrate Judge and inform the Parties of the determination.

All information presented at the hearing is provided in accordance with the certifications submitted with the Statement of Dispute and/or the Response Memorandum.

(c) Audio Recording of Hearing: The hearing proceedings will be audio-recorded. The recording will be available through the Clerk's Office at the United States District Court for the Eastern District of Pennsylvania. Pursuant to 28 U.S.C § 753(b), the Parties may listen to the recording at the Clerk's Office during normal business hours without charge. The Parties may also order a transcript of the proceedings at their own expense.

(d) Participation: All Parties and their counsel, if any, must participate in the hearing. Failure to participate without prior approval from the Magistrate Judge will result in the

Magistrate Judge issuing a decision based on the Dispute Record at the time of the hearing, together with any other evidence presented at the hearing.

(e) Advocates: The Parties may, but are not required to, be represented by a lawyer. An SCM who does not have a lawyer for the hearing may, with the Magistrate Judge's permission, be represented by a non-attorney advocate.

Rule 24. Withdrawal of Attorney's Lien Dispute. If the Parties reach an agreement at any time before the Magistrate Judge issues a Report and Recommendation or a final decision, and each Party serves a signed Withdrawal of Attorney's Lien Dispute ("Withdrawal") (Exhibit C) on the Claims Administrator, the dispute process will be stayed, and the Claims Administrator will submit the Withdrawal Record to the Magistrate Judge.

(a) Requirements for the Submission of a Withdrawal. The Parties must submit the Withdrawal to the Claims Administrator. The Withdrawal must include:

(1) A statement of the allocation of the attorneys' fees between the Parties that is consistent with the Presumptive Fee Cap (unless a Petition for Deviation upward is timely filed);

(2) A statement of costs from the current attorney for the SCM, if represented, with an itemized list of those costs including a brief explanation of the purpose of incurring the costs;

(3) A statement of the Attorney Lienholder's costs, if costs were asserted as part of the Lien, with an itemized list of those costs including a brief explanation of the purpose of incurring the costs;

(4) If the SCM is represented in the Program, a statement of how each Party will allocate responsibility for the 5% deduction for common benefit fees, and a statement allocating any potential future refund of common benefit fees between the Parties; and

(5) The signature of the Party submitting the Withdrawal. The Withdrawal may be signed by a current attorney on behalf of the SCM. The signature may be an original wet ink signature, a PDF or other electronic image of an actual signature, or an electronic signature.

(b) Upon receipt of documentation that complies with Rule 24(a), the Claims Administrator will submit the Withdrawal Record to the Magistrate Judge. The Withdrawal Record will include:

(1) A copy of the Notice of Monetary Award Claim Determination or Notice of Derivative Claimant Award Determination;

(2) The Notice of Lien to the SCM with the attachments (a copy of the Attorney Lienholder's retainer agreement signed by the SCM, a copy of the notice of Attorney's Lien filed in the Court, and the amount of any costs provided by the Attorney Lienholder);

(3) The SCM's response, if any, to the Notice of Lien that he or she disputes the Lien;

(4) If the SCM is represented, a copy of the current attorney's retainer agreement signed by the SCM and a signed copy of the Statement of Fees and Costs as provided in Rule 17(b); and

(5) The signed Withdrawals of Attorney's Lien Dispute.

(c) Upon receipt of the Withdrawal Record, the Magistrate Judge will enter a Report and Recommendation or a final decision consistent with Rule 12. The District Judge will enter a final decision if required by Rule 26. The Claims Administrator will pay the withheld portion of the Award to the SCM or to the current attorney (if the SCM is represented) and any Attorney Lienholder(s) in accordance with the final decision, and according to the provisions of the Settlement Agreement and all relevant Court orders.

Rule 25. Magistrate Judge Report and Recommendation.

(a) Issuance: The Magistrate Judge will issue a Report and Recommendation after consideration of the Dispute Record or the Withdrawal Record, and any evidence properly submitted during a hearing, if any.

(b) Content: The Report and Recommendation will be in writing and will set forth a recommended disposition of the Dispute.

(c) Service: The Claims Administrator will serve the Report and Recommendation on the Parties.

(d) Objections to Report and Recommendation: In accordance with Fed. R. Civ. P. 72(b)(2), the Parties will have 14 days from the date the Claims Administrator serves the Report and Recommendation to file specific written objections with the District Judge. The Claims Administrator will serve copies of the written objections on the Parties. The Parties will have 14 days from the date the Claims Administrator serves any objections to file a written response to the opposing Party's objections. The Claims Administrator will serve copies of any responses to the objections on the Parties.

Rule 26. Final Decision of the Court. Except where Rule 15 may apply, the District Judge will, in accordance with Fed. R. Civ. P. 72(b)(3), enter a final decision after consideration of the Report and Recommendation from the Magistrate Judge and any objections from the Parties. Where Rule 15 does apply, the Magistrate Judge will issue the final decision of the Court.

Upon issuance of the final decision by the Court, the Dispute Record or the Withdrawal Record will be transferred to the Claims Administrator. The Claims Administrator will serve copies of the final decision on the Parties. Any Party may appeal the final decision.

Within seven (7) days after the date of the final decision, the Court may exercise discretion to modify or correct the final decision if there was a mathematical error or an obvious material mistake in computing the amount to be paid to the Attorney Lienholder and/or the SCM.

After any timely appeals are resolved, the Claims Administrator will disburse the withheld funds in accordance with the final decision, the provisions of the Settlement Agreement, and Court orders regarding implementation.

Rule 27. Change of Address. If a Party changes its mailing address, email address, or phone number at any time during this process, the burden will be on that Party to notify the Claims Administrator and the opposing Party immediately. The Claims Administrator will keep all addresses on file, and the Parties may rely on these addresses until the Claims Administrator notifies them of a change.

Rule 28. Exclusive Retained Jurisdiction. The Court retains continuing and exclusive jurisdiction over the interpretation, implementation, and enforcement of these Rules.

Rule 29. Implementation of These Amended Rules. The Claims Administrator has discretion to develop and maintain internal policies and procedures it deems necessary to implement these Rules.

NFL CONCUSSION SETTLEMENT

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
No. 2:12-md-02323 (E.D. Pa.)

NOTICE, CONSENT, AND REFERENCE OF AN ATTORNEY'S LIEN DISPUTE TO A MAGISTRATE JUDGE FOR A FINAL DECISION

I. PARTIES TO THE DISPUTE

Dispute:	[Settlement Class Member v. Attorney Lienholder]
Lien ID:	[XXXXX]

II. NOTICE OF A MAGISTRATE JUDGE'S AVAILABILITY

A United States Magistrate Judge of this Court is available to conduct all proceedings and enter a final decision dispositive of each Dispute. A Magistrate Judge may exercise this authority to resolve a Dispute over an Attorney's Lien only if all Parties voluntarily consent.

III. CONSENT

Both Parties to the Dispute may consent to have the Dispute referred to a Magistrate Judge for entry of a final decision, or either Party may withhold consent without adverse substantive consequences. The name of any Party withholding consent will not be revealed to a Magistrate Judge who may otherwise be involved with your Dispute.

If either Party does not consent to have the Dispute referred to a Magistrate Judge for final disposition, the District Judge will enter a final decision resolving the Dispute after consideration of the Report and Recommendation from the Magistrate Judge and any objections from the Parties.

IV. HOW TO SERVE THIS CONSENT ON THE CLAIMS ADMINISTRATOR

If you wish to consent to have the Magistrate Judge enter a final order as to the resolution of this Attorney's Lien Dispute, send the signed form to the Claims Administrator in one of these ways:

By Email:	ClaimsAdministrator@NFLConcussionSettlement.com
By Facsimile:	(804) 521-7299; ATTN: NFL Liens
By Mail:	NFL Concussion Settlement Claims Administrator P.O. Box 25369 Richmond, VA 23260 ATTN: NFL Liens
By Delivery:	NFL Concussion Settlement c/o BrownGreer PLC 250 Rocketts Way Richmond, VA 23231 ATTN: NFL Liens

V. How to Contact Us with Questions or for Help

If you are represented by a lawyer, consult with your lawyer if you have questions or need assistance. If you are unrepresented and have any questions about this Notice or need help, contact us at 1-855-887-3485 or send an email to ClaimsAdministrator@NFLConcussionSettlement.com. If you are a lawyer, call or email your designated Firm Contact for assistance. For more information about the Settlement Program, visit the official website at www.NFLConcussionSettlement.com where you can read or download the Amended Rules Governing Attorneys' Liens, Frequently Asked Questions, and the complete Settlement Agreement.

VI. Certification

Both the Settlement Class Member or his or her attorney, if represented, and the Attorney Lienholder must submit a signed copy of this form to the Claims Administrator to allow a Magistrate Judge to enter a final order resolving the Dispute. The statement may be signed by a current attorney on behalf of the Settlement Class Member. The signature may be an original wet ink signature, a PDF or other electronic image of an actual signature, or an electronic signature.

By signing below, the following Party consents to have a United States Magistrate Judge conduct any and all proceedings and enter a final decision as to the Notice of Attorney's Lien (ECF No. ____).

Signature			**Date**	
Printed Name	First	M.I.	Last	
Law Firm				

NFL CONCUSSION SETTLEMENT

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
No. 2:12-md-02323 (E.D. Pa.)

STATEMENT OF ATTORNEY'S FEES AND COSTS

REQUEST DATE: [DATE]

DEADLINE TO RESPOND: [REQUEST DATE + 10]

This Statement of Attorney's Fees and Costs ("Statement") is required pursuant to the Amended Rules Governing Attorneys' Liens adopted by the District Court (Doc. No. XXXXX). An attorney from each law firm representing a Settlement Class Member who is a Party to an Attorney's Lien Dispute must complete a Statement within 10 days after the Claims Administrator's request.

Submit the Statement to the Claims Administrator by email to ClaimsAdministrator@NFLConcussionSettlement.com and include ATTN: NFL Liens in the subject line.

I. SETTLEMENT CLASS MEMBER INFORMATION

Settlement Program ID			
Name	First	M.I.	Last
Settlement Class Member Type			
Primary Counsel			

II. ATTORNEY'S FEES AND COSTS

A.	**Contingency Fee Percentage** Fees to all Individually Retained Plaintiffs' Attorneys ("IRPAs") are capped at 22% of the Award plus reasonable costs unless the contingency fee contract reflects a lower rate or you filed a Petition for Deviation (Doc. No. 9863). The Claims Administrator will deduct 5% of the Award for Common Benefit Fees and deposit it into the Attorneys' Fees Qualified Settlement Fund, which reduces the IRPAs' percentage to 17% (Doc. No. 10104). When you list your fee percentage on this Statement, list your full fee percentage. We will then make the applicable 5% adjustment. If your law firm is under a flat fee or hourly fee arrangement with the affected Settlement Class Member, indicate the total amount of fees incurred.	
B.	**Amount of Costs** If you do not provide the dollar amount of your costs on this Statement, we will not withhold any funds to reimburse you for those costs, and you waive the right to seek reimbursement of those costs from the Settlement Class Member (Doc. No. XXXXX, Rule 17(b) and Doc. No. 10103).	

III. CERTIFICATION				
By signing below, I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that all information provided in this Statement of Attorney's Fees and Costs is true and correct to the best of my knowledge, information and belief.				
Signature			**Date**	
Printed Name	First	M.I.	Last	
Law Firm				

NFL CONCUSSION SETTLEMENT

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
No. 2:12-md-02323 (E.D. Pa.)

WITHDRAWAL OF ATTORNEY'S LIEN DISPUTE

This Withdrawal Form ("Withdrawal") must be submitted to the Claims Administrator if the Parties to an Attorney's Lien Dispute reach an agreement resolving the Dispute at any time before the Magistrate Judge issues a Report and Recommendation or a final decision. Each Party to a Dispute must submit a Withdrawal that includes:

1. The agreed amount or percentage allocation of the Monetary Award funds withheld for attorneys' fees to be paid to each Party;
2. Any costs of the current attorney as reflected in the Statement of Fees and Costs with an itemized list of those costs including a brief explanation of the purpose of incurring the costs and the date the costs were incurred;
3. Any costs of the attorney lienholder(s) as set forth in the Lien assertion(s) with an itemized list of those costs including a brief explanation of the purpose of incurring the costs and the date the costs were incurred;
4. If the Settlement Class Member is represented in the Program, the allocation of responsibility for the 5% deduction for Common Benefit Fees among the Parties, and the allocation of a refund, if any, of the 5% deduction for Common Benefit Fees among the Parties.

The Withdrawal must be approved by the Court.

I. SETTLEMENT CLASS MEMBER INFORMATION

Name	First	M.I.	Last
Settlement Class Member Type			
Primary Counsel			
Address	Street		
	City	State	Zip
Email Address			

II. ATTORNEY LIENHOLDER INFORMATION (#1)

Name	Full Name or Law Firm Name		
Address	Street		
	City	State	Zip
Email Address			

III. ATTORNEY LIENHOLDER INFORMATION (#2) (IF APPLICABLE)			
Name	Full Name or Law Firm Name		
Address	Street		
	City	State	Zip
Email Address			

IV. SUMMARY OF DISPUTE RESOLUTION		
The Parties to the Dispute must complete the boxes below to reflect the amounts to be distributed to the Settlement Class Member or his or her attorney (if represented) and to the Attorney Lienholder(s). The total fees cannot exceed the Presumptive Fee Cap unless the Court granted a Petition for Deviation.		
To be Paid to Settlement Class Member or his or her Attorney	**Amount or Percentage of Fees**	**Amount of Reasonable Costs****
To be Paid to Attorney Lienholder #1	**Amount or Percentage of Fees**	**Amount of Reasonable Costs****
To be Paid to Attorney Lienholder #2	**Amount or Percentage of Fees**	**Amount of Reasonable Costs****
**** Costs for the current attorney or Attorney Lienholder(s) must have been provided to the Claims Administrator in the Statement of Fees and Costs and the Lien assertion(s), respectively. Each attorney must attach to this Withdrawal an itemized list of costs with a brief description of each cost and the date each cost was incurred.**		

The Claims Administrator is obligated to pay 5% of all Awards into the Attorneys' Fees Qualified Settlement Fund pending further order of the Court. If and only if the Settlement Class Member is represented in the Program, explain how the Parties wish to distribute those funds or a portion thereof, if they are refunded by the Court at a future date.	
Agreed Percentage of 5% Deduction to be Allocated to Settlement Class Member's Attorney	
Agreed Percentage of 5% Deduction to be Allocated to Attorney Lienholder #1	
Agreed Percentage of 5% Deduction to be Allocated to Attorney Lienholder #2	
Agreed Percentage of any Refund of 5% to be Paid to Settlement Class Member's Attorney	
Agreed Percentage of any Refund of 5% to be Paid to Attorney Lienholder #1	
Agreed Percentage of any Refund of 5% to be Paid to Attorney Lienholder #2	
Note: It is understood that the Claims Administrator will pay the Parties these amounts according to the provisions of the Settlement Agreement and Court orders regarding settlement implementation.	

V. HOW TO SERVE THIS WITHDRAWAL ON THE CLAIMS ADMINISTRATOR

By Email	ClaimsAdministrator@NFLConcussionSettlement.com
By Facsimile	(804) 521-7299; ATTN: NFL Liens
By Mail	NFL Concussion Settlement Claims Administrator P.O. Box 25369 Richmond, VA 23260 ATTN: NFL Liens
By Delivery	NFL Concussion Settlement c/o BrownGreer PLC 250 Rocketts Way Richmond, VA 23231 ATTN: NFL Liens

VI. How to Contact Us with Questions or For Help

Settlement Class Member: If you are represented by a lawyer, consult with your lawyer if you have questions or need assistance. If you are unrepresented and have any questions or need help, contact us at 1-855-887-3485 or send an email to ClaimsAdministrator@NFLConcussionSettlement.com. If you are a lawyer, call or email your designated Firm Contact for assistance. For more information about the Settlement Program, visit the official website at www.NFLConcussionSettlement.com to read the Frequently Asked Questions or download a copy of the complete Settlement Agreement.

Lienholder: Contact us at 1-855-877-3485 or email ClaimsAdministrator@NFLConcussionSettlement.com. For more information about the Settlement Program, visit the official website at www.NFLConcussionSettlement.com to read the Frequently Asked Questions or download a copy of the complete Settlement Agreement.

VII. Signature

Both the Settlement Class Member or his or her attorney, if represented, and Attorney Lienholder(s) must submit a signed copy of this Withdrawal to the Claims Administrator. By signing this Withdrawal, each Party certifies the following:

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the information provided in this Withdrawal is true and accurate to the best of my knowledge and that I understand that false statements made in connection with this process may result in fines, sanctions, and/or other remedy available by law.

I certify that I have/will serve a copy of this signed Withdrawal on the Claims Administrator.

By submitting this Withdrawal, I consent to the payment of the withheld funds according to the terms in Section IV.

Signature		**Date**	
Printed Name	First	Middle Initial	Last
Law Firm			

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
Kevin Turner and Shawn Wooden, on behalf of themselves and others similarly situated, Plaintiffs, v. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants
THIS DOCUMENT RELATES TO: ALL ACTIONS

No. 2:12-md-02323-AB
MDL No. 2323

Hon. Anita B. Brody

ORDER

Pursuant to the Court's continuing jurisdiction over this action as set out in the Court's Amended Final Order and Judgment (Doc. No. 6534, paragraph 17), it is hereby **ORDERED** that the attached Amended Rules Governing Petitions for Deviation from the Fee Cap are **ADOPTED.**

BY THE COURT:

David R. Strawbridge, USMJ

Date: October 9, 2018

Approved.

Anita B. Brody, J.

Date: 10/10/18

Copies via ECF on 10/10/18

NFL CONCUSSION SETTLEMENT

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
No. 2:12-md-02323 (E.D. Pa.)

AMENDED RULES GOVERNING PETITIONS FOR DEVIATION FROM THE FEE CAP

TABLE OF CONTENTS

AMENDED RULES GOVERNING PETITIONS FOR DEVIATION FROM THE FEE CAP

TITLE I: GENERAL

Rule 1. Purpose of These Rules. These Rules govern the process for submitting a petition seeking an upward or downward deviation from the Presumptive Fee Cap on Individually Retained Plaintiffs' Attorneys' fees as set forth in the Court's April 5, 2018 Order and Memorandum (ECF Nos. 9863 and 9862, respectively) and the process to resolve the Petition for Deviation.

Rule 2. Court Approval of These Rules. The Court has approved these Amended Rules pursuant to its continuing and exclusive jurisdiction under Article XXVII of the Settlement Agreement and Paragraph 17 of the Court's May 8, 2015 Amended Final Approval Order and Judgment (ECF No. 6534). The Court may amend these Rules at any time.

Rule 3. Definitions Used in These Rules. All capitalized terms used in these Rules will have the meanings given to them in the Settlement Agreement. In addition:

(a) "Award" means a Monetary Award, Supplemental Monetary Award, or a Derivative Claimant Award.

(b) "Court" is defined in the Settlement Agreement in Section 2.1(x).

(c) "District Judge" means the Honorable Anita B. Brody, U.S.D.J., or any successor judge.

(d) "Hearing Schedule" establishes the date, time, and place of the hearing, as described in Rule 20(b). The Claims Administrator will serve the Hearing Schedule on the Parties.

(e) "Individually Retained Plaintiffs' Attorney" ("IRPA") means any attorney or law firm that is or was individually retained by a Settlement Class Member and performed work in connection with representing the Settlement Class Member in the NFL concussion litigation and/or in the Settlement Program.

(f) "Magistrate Judge" means the Honorable David Strawbridge, U.S.M.J., appointed by the District Judge in the April 5, 2018 Order regarding a cap on attorneys' fees for Individually Retained Plaintiffs' Attorneys (ECF No. 9863) to resolve all Petitions for Deviation or any other United States Magistrate Judge for the Eastern District of Pennsylvania appointed by subsequent order of the District Judge for this purpose.

(g) Memorandum in Support" is the information served on the Claims Administrator by the Petitioner in support of the Petition for Deviation, as described in Rule 15.

(h) "Party or Parties" means the Settlement Class Member or IRPA presenting or opposing a Petition for Deviation. Either Party may be represented by counsel. The Claims Administrator is not a Party to the proceedings.

(i) "Petition for Deviation" or "Petition" means a petition filed in the United States District Court for the Eastern District of Pennsylvania, Case No.: 2:12-md-02323-AB, seeking a deviation from the Presumptive Fee Cap on IRPAs' fees set forth in the Court's April 5, 2018 Order and Memorandum (ECF Nos. 9863 and 9862, respectively) due to exceptional or unique circumstances.

(j) "Petition Record" is the compilation of information provided by the Claims Administrator to the Magistrate Judge for his consideration when resolving a Petition, as described in Rule 18.

(k) "Petitioner" means either a Settlement Class Member or an IRPA who files the Petition for Deviation.

(l) "Presumptive Fee Cap" means the presumptive cap on attorney's fees imposed by the Court's April 5, 2018 Opinion and Order (ECF Nos. 9862 and 9863), as described in Rule 7.

(m) "Report and Recommendation" is the Magistrate Judge's recommendation to the District Judge for ruling on the Petition for Deviation, as described in Rule 22.

(n) "Respondent" means either a Settlement Class Member or an IRPA who responds to the Petition for Deviation.

(o) "Response Memorandum" is the information submitted to the Claims Administrator by the Respondent, as described in Rule 16.

(p) "Reply Memorandum" is the information that may be submitted to the Claims Administrator by the Petitioner, as described in Rule 17.

(q) "Settlement Class Member" ("SCM") means a Retired NFL Football Player, the Representative Claimant of a deceased or incompetent Retired NFL Football Player, or a Derivative Claimant.

(r) "Settlement Program" means the program for benefits for SCMs established under the Settlement Agreement.

Rule 4. Referral to Magistrate Judge. The District Judge has referred all Petitions for Deviation to the Honorable David Strawbridge, U.S.M.J., pursuant to the Court's April 5, 2018 Order (ECF No. 9863) and as authorized under 28 U.S.C. § 636(b)(3). The Court will issue a final decision in accordance with these Rules.

Rule 5. How Things are Submitted and Served Under These Rules. Where these Rules require service to the Claims Administrator, such service shall be by one of the following methods:

(a) Email to ClaimsAdministrator@NFLConcussionSettlement.com, by a secured and encrypted method and include "Petition for Deviation" in the subject line;

(b) Facsimile to (804) 521-7299, ATTN: Petition for Deviation;

(c) Mail to NFL Concussion Settlement, Claims Administrator, P.O. Box 25369, Richmond, VA 23260, ATTN: Petition for Deviation; or

(d) Delivery by overnight carrier to NFL Concussion Settlement, c/o BrownGreer PLC, 250 Rocketts Way, Richmond, VA 23231, ATTN: Petition for Deviation.

Rule 6. How to Count Time Periods and the Date Something is Submitted Under These Rules.

(a) How to Count Time Periods: Any time period set by these Rules will be computed as follows, which is based on Rule 6 of the Federal Rules of Civil Procedure:

(1) Do not count the day that starts the running of any period of time. The first day of the period is the day after this trigger day.

(2) Count every day, including Saturdays, Sundays, and legal holidays.

(3) Count the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(4) Legal holidays are New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President of the United States or the United States Congress.

(5) An additional three days will be added to any time period specified by these Rules for an action or submission where the acting or responding Party was served by mail with the Notice or submission requiring action or response rather than by service on a Portal or delivery.

(b) How to Mark the Date Something is Submitted: Any document submitted by email or facsimile will be considered submitted on the date emailed or faxed at the local time of the submitting Party. Documents submitted by mail will be considered submitted on the postmark date. Documents submitted by overnight delivery will be considered submitted on the date delivered to the carrier.

TITLE II: SUBMISSION OF PETITION FOR DEVIATION

Rule 7. Presumptive Fee Cap. Pursuant to the Court's April 5, 2018 Order and Memorandum establishing the Presumptive Fee Cap (ECF Nos. 9863 and 9862, respectively), fees to IRPAs are capped at 22% of the Award (unless the contractually-agreed upon amount is less than 22%, in which case the fee cap is the contractual amount), plus reasonable costs, less the amount (not to exceed 5% of the total Award) that the Court determines must be paid into the Attorneys' Fees Qualified Settlement Fund pursuant to the Court's June 27, 2018 Order Regarding Withholdings for Common Benefit Fund (ECF No. 10104).

Rule 8. Claims Administrator Communications with Represented SCMs. The Claims Administrator may communicate directly with represented SCMs in this process where necessary to ensure an understanding of and compliance with these Rules. An SCM's current IRPA must provide the SCM's current email address, mailing address, and phone number to the Claims Administrator upon request.

Rule 9. Petitions for Deviation Must be Filed in the Court. If an SCM or an IRPA seeks a departure from the Presumptive Fee Cap, he or she must file a Petition for Deviation in the United States District Court for the Eastern District of Pennsylvania, Case No.: 2:12-md-02323-AB. A Petition for Deviation served on the Claims Administrator or filed with any other court is not effective in the Settlement Program and will not be considered by the Court.

If the IRPA no longer represents the SCM at the time the Petition for Deviation is filed, the Petition must be filed in the Court along with a Notice of Attorney's Lien as required by Rule 7 of the Amended Rules Governing Attorneys' Liens (ECF No. 10283).

Personal information such as Social Security Number, Taxpayer Identification Number, or Foreign Identification Number MUST NOT be included in the Petition for Deviation filed with the Court, pursuant to the Local Rules of Civil Procedure for the Eastern District of Pennsylvania, Rule 5.1.3.

Rule 10. Filing Deadline for a Petition for Deviation. A Petition for Deviation can be filed by either an IRPA or an SCM.

(a) SCMs and IRPAs who currently represent the SCM must file a Petition for Deviation no later than (1) 40 days after the date of the Notice of Monetary Award Claim Determination or Notice of Derivative Claimant Award Determination, or (2) 10 days after issuance of the Post-Appeal Notice of Monetary Award Claim Determination or any post-appeal Notice of Derivative Claimant Award Determination, whichever is later.

(b) IRPAs who no longer represent the SCM at the time the Petition for Deviation is filed must file such Petition no later than 10 days after the filing of a Notice of Attorney's Lien in the Court. The Court will not consider any Petition for Deviation from an IRPA that no longer represents the SCM if the attorney has not asserted an Attorney's Lien in the Settlement Program pursuant to the Amended Rules Governing Attorneys'

Liens (ECF No. 10283 or any subsequent amendments to those Rules as approved by the Court).

Rule 11. Requirements for a Petition for Deviation. The Petition must include:

(a) The extent of the deviation sought;

(b) A brief statement of the exceptional or unique circumstances for which the Court should allow a deviation from the Presumptive Fee Cap;

(c) The payment terms in the original contingency fee agreement as understood by the Petitioner; and

(d) A statement declaring under penalty of perjury that the Petitioner has informed the Respondent, or his or her attorney, if represented, that the Petition for Deviation is being filed with the Court and that the Petitioner has served the Respondent with a copy of the Petition for Deviation.

Because personal information must not be included in the Petition for Deviation filed with the Court pursuant to Rule 9, the Claims Administrator will inform the Petitioner if it requires further identifying information or documentation to support the Petition for Deviation.

Rule 12. Referral of Petition for Deviation. If and when an SCM becomes eligible for an Award, the Claims Administrator shall:

(a) Withhold an appropriate amount, to the extent funds are available, sufficient to pay:

(1) The full fee amount sought under the Petition for Deviation if an upward deviation is sought; or

(2) The lower of the amount specified in the IRPA's fee contract signed by the SCM or 22% of the Award (reduced by an amount not to exceed 5% of the total Award to be paid into the Attorneys' Fees Qualified Settlement Fund), if a downward deviation is sought;

(3) Plus reasonable costs.

(b) Refer the Petition to the Magistrate Judge. If consent to Magistrate Judge jurisdiction is given pursuant to Rule 13, the Magistrate Judge will issue a final decision granting or denying the Petition in accordance with these Rules and as authorized by 28 U.S.C. § 636(c). Otherwise, the Magistrate Judge will prepare a Report and Recommendation in accordance with these Rules and pursuant to the Court's April 4, 2017 Order (ECF No. 7446) and as authorized by 28 U.S.C. § 636(b)(3). The District Judge will enter a final decision deciding the Petition for Deviation.

The Claims Administrator shall disburse the withheld funds in accordance with the Court's final decision, the provisions of the Settlement Agreement, and any Court orders regarding implementation.

TITLE III: RESOLUTION OF PETITION FOR DEVIATION

Rule 13. Agreement to Consent Jurisdiction. Pursuant to 28 U.S.C. § 636(c), the Parties may consent to have the Magistrate Judge enter a final order granting or denying the Petition for Deviation by signing and returning to the Claims Administrator the Notice, Consent, and Reference of a Petition for Deviation to a Magistrate Judge for a Final Decision (Exhibit A). If such consent is given, Rule 22 will no longer apply, and the Magistrate Judge's determination will become the final decision of the Court as described in Rule 23.

Rule 14. Timing of Document Submissions.

(a) Memorandum in Support: Within 30 days after the date of the Petition for Deviation, the Petitioner must submit to the Claims Administrator a Memorandum in Support of the Petition for Deviation, as provided in Rule 15. The Claims Administrator will serve the Respondent with the Memorandum in Support.

(b) Response Memorandum: The Respondent must submit to the Claims Administrator a Response Memorandum, as provided in Rule 16, within 30 days after the date the Claims Administrator serves the Memorandum in Support. The Claims Administrator will serve the Petitioner with the Response Memorandum. Any request for a hearing by the Respondent must be made in the Response Memorandum.

(c) Reply Memorandum: The Petitioner may submit to the Claims Administrator a Reply Memorandum, as provided in Rule 17, within 20 days after the date the Claims Administrator serves the Response Memorandum. Any request for a hearing by the Petitioner must be made in the Reply Memorandum. If the Petitioner decides not to submit a Reply Memorandum but wishes to request a hearing, the hearing request must be made in writing to the Claims Administrator within 20 days after the date the Claims Administrator serves the Response Memorandum.

(d) The Petition Record: Within 30 days after the date of a Response Memorandum or a Reply Memorandum, whichever is later, the Claims Administrator will provide the Petition Record to the Magistrate Judge, as described in Rule 18, along with a statement of the amount of the Award funds withheld pending determination of the Petition for Deviation.

(e) Exclusions from the Record: Any documents received after the Claims Administrator provides the Petition Record to the Magistrate Judge will not be considered by the Court, unless required by or approved by the Magistrate Judge. Any request to include supplemental submissions in the Petition Record must be in writing to the Claims Administrator.

(f) Extensions of Time: Extensions of deadlines are discouraged and should not be filed on the Court's docket. Upon written request to the Claims Administrator and a showing of good cause, however, the Magistrate Judge may exercise discretion to extend or modify any submission deadline established by these Rules. Before the Claims Administrator presents any such request to the Magistrate Judge, the Parties

must confer and include a statement of any opposition to the request in the written statement. The Magistrate Judge will advise the Claims Administrator of any extension or modification of a submission deadline. The Claims Administrator will notify the Parties.

Rule 15. Memorandum in Support. The Petitioner must serve the Claims Administrator with a Memorandum in Support of the Petition for Deviation.

(a) If the Petitioner is an attorney, his or her Memorandum in Support shall include:

(1) A copy of the attorney's retainer agreement signed by the SCM and any modifications to that agreement;

(2) The extent of the deviation sought;

(3) A chronology of the tasks performed by the attorney, the date each task was performed, and the time spent on each task;

(4) A list of costs with a brief explanation of the purpose of incurring these costs and the date the costs were incurred;

(5) A statement of the total number of clients that he or she has represented in the Settlement Program;

(6) Any exhibits; and

(7) A statement signed by the Petitioner declaring under penalty of perjury pursuant to 28 U.S.C. § 1746 that the information submitted in the Memorandum in Support is true and accurate to the best of that Party's knowledge and that the Petitioner understands that false statements made in connection with this process may result in fines, sanctions, and/or any other remedy available by law. The signature may be an original wet ink signature, a PDF or other electronic image of an actual signature, or an electronic signature.

(b) The Court will not consider fees and/or costs for tasks undertaken for the Settlement Class as a class, or for tasks performed by an attorney or law firm that replicate such common benefit tasks, or for any other tasks performed for the common benefit of the Settlement Class Members. The common benefit fees and/or costs are addressed through Article XXI of the Settlement Agreement and as addressed in the Court's April 22, 2015 Opinion under the heading "Attorney's Fees." (ECF No. 6509).

(c) If the Petitioner is an SCM, his or her Memorandum in Support shall include:

(1) The retainer agreement with the attorney Respondent, and any modifications to that agreement, if the SCM has a copy;

(2) The extent of the deviation sought;

(3) Any information the SCM believes would be useful to the Magistrate Judge about the work performed by the attorney Respondent and any details regarding the SCM's interactions with the attorney Respondent;

(4) Any documents or exhibits the SCM wants the Magistrate Judge to consider; and

(5) A statement signed by the Petitioner declaring under penalty of perjury pursuant to 28 U.S.C. § 1746 that the information submitted in the Memorandum in Support is true and accurate to the best of that Party's knowledge and that the Petitioner understands that false statements made in connection with this process may result in fines, sanctions, and/or any other remedy available by law. The signature may be an original wet ink signature, a PDF or other electronic image of an actual signature, or an electronic signature.

Rule 16. Response Memorandum. The Respondent must serve the Claims Administrator with a Response Memorandum to the Memorandum in Support. Any request for a hearing by the Respondent must be made in the Response Memorandum.

(a) If the Respondent is an attorney, his or her Response Memorandum shall include:

(1) A copy of the attorney's retainer agreement signed by the SCM, and any modifications to that agreement, if not provided by the Petitioner;

(2) A chronology of the tasks performed by the attorney, the date each task was performed, and the time spent on each task;

(3) A list of costs with a brief explanation of the purpose of incurring these costs and the date the costs were incurred;

(4) A statement of the total number of clients that he or she has represented in the Settlement Program;

(5) Any exhibits; and

(6) A statement signed by the Respondent declaring under penalty of perjury pursuant to 28 U.S.C. § 1746 that the information submitted in the Response Memorandum is true and accurate to the best of that Party's knowledge and that the Respondent understands that false statements made in connection with this process may result in fines, sanctions, and/or any other remedy available by law. The signature may be an original wet ink signature, a PDF or other electronic image of an actual signature, or an electronic signature.

(b) The Court will not consider fees and/or costs for tasks undertaken for the Settlement Class as a class, or for tasks performed by an attorney or a law firm that replicate such common benefit tasks, or for any other tasks performed for the common benefit of the Settlement Class Members. The common benefit fees and/or costs are addressed

through Article XXI of the Settlement Agreement and as addressed in the Court's April 22, 2015 Opinion under the heading "Attorney's Fees." (ECF No. 6509).

(c) If the Respondent is an SCM, his or her Response Memorandum shall include:

(1) Any information regarding the retainer agreement with the attorney Petitioner, or any modifications to that agreement;

(2) Any information the SCM believes would be useful to the Magistrate Judge about the work performed by the attorney Petitioner and any details regarding the SCM's interactions with the attorney Petitioner;

(3) Any documents or exhibits the SCM wants the Magistrate Judge to consider; and

(4) A statement signed by the SCM declaring under penalty of perjury pursuant to 28 U.S.C. § 1746 that the information submitted in the Response Memorandum is true and accurate to the best of the SCM's knowledge and that the SCM understands that false statements made in connection with this process may result in fines, sanctions, and/or any other remedy available by law. The signature may be an original wet ink signature, a PDF or other electronic image of an actual signature, or an electronic signature.

Rule 17. Reply Memorandum. The Petitioner may serve the Claims Administrator with a Reply Memorandum, which shall be limited to five (5) pages. The Petitioner may not raise new allegations in a Reply Memorandum. He or she may only respond to assertions presented in the Response Memorandum. Any request for a hearing by the Petitioner must be made in the Reply Memorandum. If the Petitioner decides not to submit a Reply Memorandum but wishes to request a hearing, the hearing request must be made in writing to the Clams Administrator within 20 days after the date the Claims Administrator serves the Response Memorandum.

The Reply Memorandum must include a statement signed by the Petitioner declaring under penalty of perjury pursuant to 28 U.S.C. § 1746 that the information submitted in the Reply Memorandum is true and accurate to the best of that Party's knowledge and that the Petitioner understands that false statements made in connection with this process may result in fines, sanctions, and/or any other remedy available by law. The signature may be an original wet ink signature, a PDF or other electronic image of an actual signature, or an electronic signature.

Rule 18. Petition Record.

(a) The Petition Record to be considered by the Magistrate Judge will consist of:

(1) A copy of the Notice of Monetary Award Claim Determination or Notice of Derivative Claimant Award Determination;

(2) The Petition for Deviation, as provided in Rules 9, 10, and 11;

(3) Memorandum in Support, as provided in Rule 15;

(4) Response Memorandum, as provided in Rule 16;

(5) Reply Memorandum, if any, as provided in Rule 17; and

(6) Any additional evidence produced by either Party or the Claims Administrator in response to a request of the Magistrate Judge pursuant to Rule 14(e).

(b) The Claims Administrator will assemble the complete Petition Record and provide it to the Magistrate Judge, along with a statement of the amount of the Award withheld pending resolution of the Petition for Deviation.

Rule 19. Appointment of Counsel. The Magistrate Judge has the discretion to appoint counsel pursuant to the Court's January 8, 2018 Order (ECF No. 9561) for (1) *pro se* SCMs, and (2) SCMs who are unrepresented in these proceedings because the Parties are the SCM and his or her current IRPA. The SCM must serve the Claims Administrator with a written request showing good cause for appointment of counsel. The Claims Administrator will present the request to the Magistrate Judge and inform the SCM of the determination.

Rule 20. Hearing.

(a) Hearing Request: Any Party may request a hearing with the Magistrate Judge, provided that such request is submitted in the Response Memorandum or the Reply Memorandum, as required by Rules 16 and 17. The Magistrate Judge in his own discretion may order a hearing, if he determines that such proceeding would aid him in his resolving the Petition. The Magistrate Judge will determine if such hearing will be in-person, by video conference, or by telephone.

(b) Hearing Schedule: If the Magistrate Judge determines a hearing is necessary, the Claims Administrator will serve a Hearing Schedule on the Parties. The hearing will be scheduled promptly, but no sooner than 20 days after the date of the Hearing Schedule. No provision of the Schedule will be modified except upon written request for modification within 14 days of the date of the Schedule. Thereafter, the Schedule may be modified only upon a showing of good cause that the deadline cannot reasonably be met despite the diligence of the Party seeking modification. Any request for modification must be submitted to the Claims Administrator and should not be filed on the Court's docket. The Claims Administrator will present the request to the Magistrate Judge and notify the Parties of the determination.

(c) Telephonic or Video Conference Access for Hearing: The Claims Administrator will make the necessary arrangements for telephone or video conference access if the Magistrate Judge grants a hearing.

(d) Accommodations: If a Party needs special accommodations for this process, that Party must make the necessary arrangements for those accommodations.

Rule 21. Hearing Procedure. If the Magistrate Judge grants a hearing, the following procedure will apply.

(a) Evidence: The evidence that the Magistrate Judge may consider is limited to the Petition Record, testimony, and any additional documentation properly presented during the hearing.

(b) Testimony Under Oath or Affirmation: Hearing testimony must be submitted under oath or affirmation administered by the Magistrate Judge or by any duly qualified person. If a Party wants to present live testimony of anyone other than a Party, he or she must submit a written request to the Claims Administrator no later than three (3) business days before the hearing that includes:

(1) The individual's name and relationship to the requesting Party;

(2) The nature and scope of the testimony to be provided;

(3) The length of time the testimony will take; and

(4) Whether the essence of the testimony could be presented in any other manner.

The Claims Administrator will present the request to the Magistrate Judge and inform the Parties of the determination.

All information presented at the hearing is provided in accordance with the certifications submitted with the Memorandum in Support, the Response Memorandum, and the Reply Memorandum, if any.

(c) Audio Recording of Hearing: The hearing proceedings will be audio-recorded. The recording will be available through the Clerk's Office at the United States District Court for the Eastern District of Pennsylvania. Pursuant to 28 U.S.C § 753(b), the Parties may listen to the recording at the Clerk's Office during normal business hours without charge. The Parties may also order a transcript of the proceedings at their own expense.

(d) Participation: All Parties and their counsel, if any, must participate in the hearing. Failure to participate without prior approval from the Magistrate Judge will result in the Magistrate Judge issuing a determination based on the Petition Record at the time of the hearing, together with any other evidence presented at the hearing.

(e) Advocates: The Parties may, but are not required to, be represented by a lawyer. An SCM who does not have a lawyer for the hearing may, with the Magistrate Judge's permission, be represented by a non-attorney advocate.

Rule 22. Magistrate Judge Report and Recommendation.

(a) Issuance: The Magistrate Judge will issue a Report and Recommendation after consideration of the Petition Record.

(b) Content: The Report and Recommendation will be in writing and will set forth a recommended disposition of the Petition for Deviation.

(c) Service: The Claims Administrator will serve the Report and Recommendation on the Parties.

(d) Objections to Report and Recommendation: In accordance with Fed. R. Civ. P. 72(b)(2), the Parties will have 14 days from the date the Claims Administrator serves the Report and Recommendation to file specific written objections with the District Judge. The Claims Administrator will serve copies of the written objections on the Parties. The Parties will have 14 days from the date the Claims Administrator serves any objections to file a written response to the opposing Party's objections. The Claims Administrator will serve copies of any responses to the objections on the Parties.

Rule 23. Final Decision of the Court. Except where Rule 13 may apply, the District Judge will, in accordance with Fed. R. Civ. P. 72(b)(3), enter a final decision after consideration of the Report and Recommendation from the Magistrate Judge and any objections from the Parties. Where Rule 13 does apply, the Magistrate Judge will issue the final decision of the Court.

Upon issuance of the final decision by the Court, the Petition Record will be transferred to the Claims Administrator. The Claims Administrator will serve copies of the final decision on the Parties. Any Party may appeal the final decision.

Within seven (7) days after the date of the final decision, the Court may exercise discretion to modify or correct the final decision if there was a mathematical error or an obvious material mistake in computing the amount to be paid to the attorney and/or the SCM.

After any timely appeals are resolved, the Claims Administrator will disburse the withheld funds in accordance with the final decision, the provisions of the Settlement Agreement, and Court orders regarding implementation.

Rule 24. Change of Address. If a Party changes its mailing address, email address, or phone number at any time during this process, the burden will be on that Party to notify the Claims Administrator and the opposing Party immediately. The Claims Administrator will keep all addresses on file, and the Parties may rely on these addresses until the Claims Administrator notifies them of a change.

Rule 25. Exclusive Retained Jurisdiction. The Court retains continuing and exclusive jurisdiction over the interpretation, implementation, and enforcement of these Rules.

Rule 26. Implementation of These Rules. The Claims Administrator has discretion to develop and maintain internal policies and procedures it deems necessary to implement these Rules.

NFL CONCUSSION SETTLEMENT

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
No. 2:12-md-02323 (E.D. Pa.)

NOTICE, CONSENT, AND REFERENCE OF A PETITION FOR DEVIATION FROM THE FEE CAP TO A MAGISTRATE JUDGE FOR A FINAL DECISION

I. PARTIES TO THE PETITION FOR DEVIATION

Petitioner:	
Respondent:	

II. NOTICE OF A MAGISTRATE JUDGE'S AVAILABILITY

A United States Magistrate Judge of this Court is available to conduct all proceedings and enter a final decision dispositive of each Petition for Deviation. A Magistrate Judge may exercise this authority to resolve a Petition for Deviation only if all Parties voluntarily consent.

III. CONSENT

Both Parties to the Petition for Deviation may consent to have the Petition referred to a Magistrate Judge for entry of a final decision, or either Party may withhold consent without adverse substantive consequences. The name of any Party withholding consent will not be revealed to a Magistrate Judge who may otherwise be involved with the Petition.

If either Party does not consent to have the Petition for Deviation referred to a Magistrate Judge for final disposition, the District Judge will enter a final decision resolving the Petition after consideration of the Report and Recommendation from the Magistrate Judge and any objections from the Parties.

IV. HOW TO SERVE THIS CONSENT ON THE CLAIMS ADMINISTRATOR

If you wish to consent to have the Magistrate Judge enter a final order as to the resolution of this Petition for Deviation, send the signed form to the Claims Administrator in one of these ways:

By Email:	ClaimsAdministrator@NFLConcussionSettlement.com
By Facsimile:	(804) 521-7299; ATTN: NFL Liens
By Mail:	NFL Concussion Settlement Claims Administrator P.O. Box 25369 Richmond, VA 23260 ATTN: NFL Liens
By Delivery:	NFL Concussion Settlement c/o BrownGreer PLC 250 Rocketts Way Richmond, VA 23231 ATTN: NFL Liens

V. How to Contact Us with Questions or for Help

If you are represented by a lawyer, consult with your lawyer if you have questions or need assistance. If you are unrepresented and have any questions about this Notice or need help, contact us at 1-855-887-3485 or send an email to ClaimsAdministrator@NFLConcussionSettlement.com. If you are a lawyer, call or email your designated Firm Contact for assistance. For more information about the Settlement Program, visit the official website at www.NFLConcussionSettlement.com where you can read or download the Rules Governing Petitions for Deviation, Frequently Asked Questions, and the complete Settlement Agreement.

VI. Certification

Both the Settlement Class Member or his or her attorney, if represented, and the Attorney Lienholder must submit a signed copy of this form to the Claims Administrator to allow a Magistrate Judge to enter a final order resolving the Petition for Deviation. The statement may be signed by a current attorney on behalf of the Settlement Class Member. The signature may be an original wet ink signature, a PDF or other electronic image of an actual signature, or an electronic signature.

By signing below, the following Party consents to have a United States Magistrate Judge conduct any and all proceedings and enter a final decision as to the Petition for Deviation (ECF No. _____).

Signature			**Date**	
Printed Name	First	M.I.	Last	
Law Firm				

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
Kevin Turner and Shawn Wooden, on behalf of themselves and others similarly situated, Plaintiffs, v. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	
THIS DOCUMENT RELATES TO: Podhurst Orseck, P.A. v. Turner Attorneys' Lien Dispute (Doc. No. 7071) Podhurst Orseck, P.A. v. Smith Attorneys' Lien Dispute (Doc. No. 7064) Cummings, McClorey, Davis & Acho, PLC v. Johnson Attorneys' Lien Dispute (Doc. No. 7449)	

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

January 7, 2019

The Honorable Anita B. Brody, presiding judge responsible for the NFL Concussion Litigation referred to us "all petitions for individual attorneys' liens." (Doc. No. 7446). Pursuant to that Order of Reference we published rules governing the handling of these Liens. These Rules were approved and adopted by the District Court on March 6, 2018, with amendments approved

and adopted on October 3, 2018. ("Lien Rules" at Doc. No. 9760, as amended at Doc. No. 10283). On April 5, 2018, the District Court determined that "fees paid to [Individually Retained Plaintiff's Attorneys ("IRPAs")] will be presumptively capped at 22%." ("Fee Cap"). (Doc. No. 9862 at 6). On that same day, the District Court referred any Petitions seeking a deviation from that 22% cap to us as well. *Id* at 8-9. Pursuant to that Order, we published rules governing Petitions for Deviation. These Rules were approved and adopted by the District Court on May 3, 2018, with amendments approved and adopted on October 10, 2018. ("Deviation Rules" at Doc. No. 9956, as amended at Doc. No. 10294).

As of this writing, 723 petitions for Attorney Liens have been filed by IRPAs who formally represented Settlement Class Members ("SCMs"). These matters become ripe upon the issuance of a Monetary Award. The prospective volume of this litigation, as well as the expected delay between the filing of the Lien and the issuance of an Award, has made the Lien and Deviation Rules that we have issued necessary to provide what we hope is clarity to counsel and SCMs on how these matters will be resolved. Interested counsel will note that our Rules require the Parties to file their pleadings with the Claims Administrator as we anticipate that in many cases counsel will have been involved in a medical review and we may also have a need to review some of those medical records. It would be inappropriate to have these records published on ECF. The Claims Administrator has already set up processes that allow for the secure submission of such records.

Presently before us for Report and Recommendation are three Attorney Lien ("Lien") claims being asserted against SCM Awards. They are:

(1) A Lien filed by Podhurst Orseck, P.A. ("Podhurst") seeking fees and costs

against the Award granted to Paul Turner, as a Representative Claimant,[1] authorized to represent Kevin Turner ("Turner" or the "Estate"). Podhurst is seeking payment of attorneys' fees up to the presumed maximum allowed under the Fee Cap imposed by the District Court. The Estate, through current counsel Polsinelli, P.C. ("Polsinelli"), disputes the Lien, claiming that Podhurst is not entitled to collect any fees against this Award, given the significant fee it received as Class Counsel and the *de minimus* work done for Turner individually;

(2) A Lien filed by Podhurst seeking fees and costs against the Award granted to Chie Smith, as a Representative Claimant, authorized to represent her husband Steven Smith ("Smith" or "the Smiths"). Podhurst is seeking payment of attorneys' fees up to the maximum allowed under the Fee Cap imposed by the District Court. Smith, through her current counsel Catherina Watters, Esq. and Tucker Law Group, LLC ("Watters"), disputes the Lien, claiming that Podhurst is not entitled to collect any fees against this Award, given the significant fee received as Class Counsel and the *de minimus* work done for Smith individually;

(3) A Lien filed by Cummings, McClorey, Davis & Acho, PLC ("CMDA"), seeking fees and costs against the Award granted to Levi Johnson ("Johnson"). Cummings is seeking payment of attorneys' fees of 20% of the Monetary

[1] Under the terms of the Settlement Agreement, a Representative Claimant is an authorized representative of a deceased, legally incapacitated or incompetent Retired NFL Football Player. Settlement Agreement, Article II, Section 2.1(eeee).

Award paid to Johnson, as well as the reimbursement of $2,617.20 in costs associated with their representation. Johnson disputes the Lien generally, but has failed to submit pleadings to this Court setting out the specifics of his objection.

As we consider these three Liens individually, we acknowledge that there are differences in the particular circumstances presented. But we also acknowledge that there are important similarities. This leads us to the decision to address these matters in a single opinion, so we may set out the legal constructs that apply generally to this lien litigation that has been referred to us. Before doing so, we provide the relevant procedural and factual background of the NFL Concussion Litigation, so that we may discuss the work of these IRPAs against the backdrop of the obligations of counsel generally. In this recitation we take care to distinguish the work performed by IRPAs from the work performed by attorneys for the benefit of the class as a whole ("Class Counsel").[2] We also provide the procedural background as related to the District Court's Attorney Fee decisions that have issued to date.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History of the Class Action Settlement

This case began as an aggregation of lawsuits brought by former Players against the NFL Parties for head injuries sustained while playing NFL football. On July 19, 2011, *Maxwell, et al.*

[2] The attorneys working for the common benefit of all plaintiffs in the Multi-District Litigation ("MDL") were not formally considered Class Counsel until the Settlement Agreement, which established a class action for purposes of Settlement, was approved. We, however, use the phrase to mean any lawyer who was paid by the District Court for work performed for the common benefit of the collective group of plaintiffs in this MDL, which ultimately became a class action.

v. NFL, et al. was filed in the Superior Court of the State of California, Los Angeles County.[3] Soon thereafter, *Pear, et al. v. NFL, et al.* (August 3, 2011)[4] and *Barnes et al. v. NFL, et al.* (August 26, 2011)[5] were filed in the same court. On October 11, 2011, all three matters were removed to federal court by the NFL Defendants, (ECF No. 11-cv-8394 (C.D. Cal.); ECF No. 11-cv-8395 (C.D. Cal.); ECF No. 11-cv-8396 (C.D. Cal.)), who argued preemption under section 301 of the Labor Management Relations Act, "because plaintiffs' claims arise from or are substantially dependent upon the terms of the collective bargaining agreements . . . pursuant to which the vast majority of players played in the NFL." (MDL No. 2323, Doc. No. 1-1 at 2). On December 8, 2011, the motion for remand was denied on the basis that a least one state law claim was preempted by federal law. Upon concluding that one claim was preempted, the Court determined that its review of the preemption issue on the remaining claims was best left to the motion to dismiss stage of the proceedings. (ECF No. 11-cv-8394 (C.D. Cal.), Doc. No. 58 at 3).

On August 17, 2011, while these matters were being joined in state court, the first putative class action in what became this MDL, *Easterling, et al. v. NFL*, 11-cv-5209 (E.D. Pa), was filed by Anapol Weiss in this Court. On November 9, 2011, the NFL filed a Motion to Dismiss the amended complaint, raising preemption, as well as other defenses. (ECF No. 11-cv-5209, Doc. No. 19).

On November 15, 2011, the NFL Parties then filed a motion in the United States Judicial Panel on Multidistrict Litigation ("JPML") (MDL No. 2323), seeking to transfer all four matters

---

[3] *Maxwell* was filed by Girardi Keese and Goldberg, Persky and White, P.C.

[4] *Pear* was filed by Girardi Keese and Goldberg, Persky and White, P.C.

[5] *Barnes* was filed by Rose, Klein and Marias LLP.

for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. On December 6 and 7, 2011, the plaintiffs in these proceedings filed memoranda in support of the NFL's Motion for Transfer.[6] On December 21, 2011, the Panel on Multidistrict Litigation ordered a hearing for January 26, 2012. By the end of December seven similar proceedings were filed in courts throughout the country. (MDL No. 2323, Doc. No. 31).

On January 31, 2012, the Panel granted the motion and issued an order that the matter be transferred to the Eastern District of Pennsylvania and assigned to Judge Brody for "coordinated and consolidated pretrial proceedings." The MDL was formed. (MDL No. 2323, Doc. No. 61). On March 6, 2012, the District Court issued the first Case Management Order in the MDL, which governed the 32 cases that had been consolidated as of that date. By the Order, counsel for plaintiffs were directed to meet and confer and file a Proposed Case Management Order by April 5, 2012, in anticipation of the Initial Organization Conference that would be held on April 25, 2012. (Doc. No. 4). The attorneys who had appeared in the Transferor Courts were admitted to the Eastern District of Pennsylvania *pro hac vice* in this litigation and were advised that they were obligated to comport themselves "in accordance with the Pennsylvania Rules of Professional Conduct and the Rules of this Court." (*Id.* at 5).

On April 3, 2012, the plaintiffs provided the Court with a proposed Organizational Structure, which included the creation of a Plaintiffs' Executive Committee ("PEC") and a Plaintiffs' Steering Committee ("PSC"). (Doc. No. 54). On April 26, 2012, the Court appointed Christopher Seeger, Esq. as Co-Lead Counsel and ordered the plaintiffs to select an attorney from

[6] Only the Riddell defendants, which had not been sued in the class action, but had been sued in the three other cases, opposed the motion.

the Philadelphia-based lawyers to be Co-Lead Counsel. (Doc. No. 64). In the same order, the Court made the appointments to the Plaintiff's Committees as had been proposed in the April 3rd request. The NFL's Motion to Dismiss on preemption grounds was designated to be heard on an expedited basis, and a briefing schedule was issued pertaining to this issue. (*Id.*)

Class Counsel then filed a Master Administrative Long-Form Complaint and a Master Administrative Class Action Complaint for Medical Monitoring. Thereafter, IRPAs submitted individual short-form complaints for their individual clients. Class Counsel filed a series of responses to the Motions to Dismiss and Motion to Sever that were filed by the NFL and Riddell. (Doc. Nos. 4130-4134, 4136-4137, 4589, 4591). Argument on the contested motions was held on April 9, 2013.

On July 8, 2013, while the contested motions were pending, the District Court Ordered the Parties to mediation before retired U.S. District Court Judge Layn Phillips. (Doc. No. 5128). Intense negotiations followed, ultimately leading to the Settlement Agreement that was approved by the District Court on April 22, 2015.

As it is relevant to our resolution of these Lien claims, we set out chronologically key dates of activities taking place throughout these negotiations:

- August 29, 2013: The Parties signed a Term Sheet (Doc. No. 5235);
- January 6, 2014: Class Counsel moved for entry of a preliminary order approving the proposed settlement and conditionally granting class certification (Doc. No. 5634);
- January 14, 2014: The motion was denied without prejudice due primarily to the Court's concerns about the cap on the Monetary Award Fund (Doc. No. 5658);
- June 25, 2014: An Amended Settlement Agreement was submitted to the Court (Doc. No. 6073);
- July 7, 2014: The District Court issued an Opinion and Order granting preliminary approval (Doc. Nos. 6083 and 6084);

- November 19, 2014: The Fairness Hearing was held;
- February 2, 2015: The District Court proposed additional changes to the Settlement Agreement (Doc. No. 6479);
- February 13, 2015: The Parties submitted a new Settlement Agreement (Doc. No. 6481);
- April 22, 2015: The District Court approved the Settlement Agreement (Doc. No. 6508 and 6509).

On May 13, 2015, the first of 11 appeals challenging the Settlement Agreement was filed (Doc. No. 6539). On April 18, 2016, the Court of Appeals for the Third Circuit affirmed the District Court's approval of the Settlement Agreement. Petitions for certiorari were denied by the United States Supreme Court on December 12, 2016.

On January 7, 2017, the Effective Date of the Settlement, the Class was able to move ahead with the implementation of the Settlement Agreement. On February 6, 2017, the six-month period to register as a class member opened. On April 7, 2017, the Claims Administrator began accepting claim submissions for an Award from the Monetary Award Fund.

B. Procedural History of the Attorneys' Fees Litigation

This Settlement Agreement came about as a result of "hard-fought" negotiation between Class Counsel and the NFL. (Doc. No. 6509 at 8). For the plaintiffs, the efforts of these attorneys led to a claims process that eliminated significant legal risks in this litigation, including the NFL's preemption defense and the complexities surrounding causation for the individual claimants. *See* (Doc. No. 6073-4 at 6-8 (Declaration of Mediator, Retired District Court Judge Layn Phillips, discussing the litigation risks for the class and the NFL)). As the District Court summarized, "[t]he Settlement allows Class Members to choose certainty in light of the risks of litigation." (Doc. No. 6509 at 74). Under the Terms of the Settlement Agreement, Class Counsel is paid through the Attorneys' Fees Qualified Settlement Fund (the "AFQSF"). The District Court has reserved for

itself the decisions that relate to the funding of the AFQSF and the allocation of payment to Class Counsel. (Doc. No. 7446). It is not part of our remit.

As is seen in the three cases that are before us today, there are disputes that arise out of contingent fee agreements ("CFAs") between a SCM and an IRPA where the IRPA also worked as Class Counsel and has benefited from the payments authorized by the District Court's May 24, 2018 Order. (Doc. No. 10019). We have found in addressing these claims, setting out the distinctions between work done for the common benefit from the work done for an individual client is challenging. We consider the parties' submissions and, in many instances, will look to Class Counsel's statements to the District Court about the work performed for the class benefit, as well as the District Court's opinions, to distinguish between class benefit work and work completed for the individual claimant. It is our hope and expectation that this opinion shall provide guidance to counsel as to how to distinguish this work on an ongoing basis.

1. <u>The Common Benefit Fund</u>

The Settlement Agreement allowed for funding of the AFQSF through two sources: a payment of up to $112.5 million by the NFL Parties and up to a 5% deduction from all Awards (the "5% Holdback Request"). On April 5, 2018, the District Court granted Class Counsel's request, approving the $112.5 million dollars to be paid by the NFL Parties for work done by Class Counsel in securing the settlement and implementing the Settlement Agreement. (Doc. No. 9860). Understanding that there is further work to be done to implement the Settlement Agreement, the District Court reserved decision on the 5% Holdback Request until such time as the Court believes it can accept an assessment of the extent of the funds to be needed. (*Id.* at 17-18).

2. <u>Allocation of the AFQSF</u>

Due to the nature of the settlement, which will require work from Class Counsel over the

65-year term, the AFQSF has been used to pay Class Counsel for their work in securing the Settlement Agreement but also will be used to pay Class Counsel for their work in implementing the Settlement Agreement over its full term.

On May 24, 2018, a portion of the AFQSF was allocated to Class Counsel for their work in implementing the Agreement. At the request of the District Court, Co-Lead Class Counsel submitted a proposed allocation of common benefit attorneys' fees. Any other attorneys seeking payment or objecting to the proposal submitted by Co-Lead Class Counsel were granted leave to file a counter-declaration with the Court. (Doc. No. 8448). Ultimately, the District Court approved Class Counsel's request for costs incurred in securing the Settlement (Doc. No. 9860 at 5) and allocated the funds to be paid to 26 separate law firms for work performed for the benefit of the class in securing the Settlement. (Doc. No. 10019 at 25-26).

Upon payment of those fees for securing the Settlement, approximately $23 million remained in the AFQSF to pay counsel who work for the benefit of the Class through the implementation of the Settlement over its 65-year term. (Doc. No. 10019 at 25). The question of what percentage, if any, of each Monetary Award that will be needed to pay for the implementation of the Settlement remains undetermined. When there is sufficient information, the District Court will address this point, through its ruling on the 5% Holdback Request.

3. <u>The Fee Cap</u>

The District Court appointed Professor William B. Rubenstein of Harvard Law School as an expert witness on attorneys' fees to aid the Court. *See* (Doc. No. 8376 (Order Appointing Professor Rubenstein); (Doc. No. 9526 ("Rubenstein's Report")); (Doc. No. 9571 ("Rubenstein's Reply")). After considering the recommendations of Professor Rubenstein and the viewpoints of interested parties, the District Court adopted Professor Rubenstein's conclusions and capped

IRPAs' fees at 22% plus reasonable costs. (Doc. No. 9862 at 2). This conclusion was based on a two-part analysis. First, the Court adopted Professor Rubenstein's conclusion that "a one-third contingent fee best approximate[s] the risk and work that the two sets of attorneys (Class Counsel and IRPAs) undertook in this case." (Doc. No. 9862 at 6, *quoting* Doc. No. 9571 at 3). Having already concluded that the payment of $112.5 million by the NFL into the AFQSF constituted 11% of the estimated overall class recovery, the Court determined that presumptively no IRPA could or should receive more than 22% in fees from a Monetary Award. As the District Court explained, the Fee Cap was necessary "to prevent a 'free-rider problem'—enabling IRPAs to financially benefit from the work of Class Counsel even though they did not bear the costs." (Doc. No. 9862 at 4-5).[7]

II. THE APPLICABLE LEGAL PRINCIPLES

While none of the Parties before us have specifically challenged our authority to review the fee agreements, we confirm that proposition and discuss the ample authority supporting it. As the District Court explained, "Third Circuit law unequivocally supports the proposition that this Court possesses the inherent authority to regulate the contingent fees of lawyers appearing before it and any lawyer representing a class member in this Settlement is clearly subject to this authority." (Doc No. 9862 at 3-4 (relying on Rubenstein's Report 19; *McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97, 100 (3d Cir. 1985) ("*McKenzie I"*); *Dunn v. H. K. Porter Co.*, 602 F.2d 1105, 1110 (3d Cir. 1979)).

[7] As was discussed above, the District Court has reserved judgement on whether an additional amount (not to exceed 5%) must be heldback from all Awards to ensure there are sufficient funds to pay Class Counsel for future work. Whatever percentage is ultimately selected, the District Court has indicated that it must be taken from the IRPA Award for the same reasons that the 11% reduction is necessary. (Doc. No. 9860 at 18 n.12; Doc. No. 9862 at 8 n.5).

Contingency fee agreements ("CFAs") are a "special concern" for Courts and "are not to be enforced on the same basis as ordinary commercial contracts." *McKenzie I*, 758 F.2d at 101. Under Third Circuit precedent, we are obligated to review CFAs to determine if the fee sought is reasonable in light of the five factors enumerated by the Third Circuit in *McKenzie*.

It is also well established that District Courts have the power to monitor CFAs based upon the court's "supervisory power over the members of its bar." *Dunn*, 602 F.2d at 1109. This review is "part and parcel of the process a federal court follows both in supervising members of its bar and in meeting the obligations imposed on it by Fed.R.Civ.P. 23(e)." *Id.* at 1110 n.8. From the outset, counsel were advised that they were obligated to comport themselves "in accordance with the Pennsylvania Rules of Professional Conduct and the Rules of this Court." (Doc. No. 4 at 5).

A. The *McKenzie* "reasonableness" analysis

The *McKenzie* five-part reasonableness analysis obligates us to evaluate the "performance of the attorney's contractual obligations [with consideration of] the circumstances surrounding the engagement of the attorney." *McKenzie I*, 758 F.2d at 101. We must first assess both (1) the circumstances existing at the time the Parties entered into the agreement and (2) whether subsequent events have rendered an agreement—however fair it may have been at the time of contracting—unfair at the time of enforcement. We then turn to our consideration of the attorney's performance, where we examine: (3) the results obtained; (4) the quality of the work performed; and (5) whether the attorney's efforts substantially contributed to the result. *McKenzie Constr., Inc. v. Maynard*, 823 F.2d 43, 45 (3d Cir. 1987) ("*McKenzie II*"); s*ee also* Doc. No. 9862 at 7 (District Court's discussion of the *McKenzie* factors).

We accept, as other Courts have recognized, that "the reasonableness standard, when employed in an attorney-client fee dispute is, by its very nature, difficult to define, much less

apply." *McKenzie I,* 758 F.2d at 102. But where the reasonableness of the CFA is presented to us, either through a Lien Dispute or a Petition for Deviation, we must assess the *McKenzie* factors and apply them to the specific circumstances of each case. In so doing, we discern that there are markers within the history of this litigation from which we will be better able to evaluate the case-by-case specifics of the IRPA representation.

Our Lien Rules and Deviation Rules were drafted with the *McKenzie* factors and the related burden of proof in mind. Lien Rule 17 and Deviation Rule 14 require a recitation of "[a] chronology of the tasks performed by the attorney, the date each task was performed, and the time spent on each task." (Doc. No. 9760 at 9). The implementation of these rules provides us a vehicle for attorneys to present evidence as we and they work through the *McKenzie* factors.

1. <u>The CFA at time of contracting</u>

As we see it, there are two primary factors that we must examine when we review the reasonableness of the contract at signing: (1) the legal challenges in the plaintiff's pursuit of a monetary award and (2) the time-intensive nature of the litigation. It is clear that the risk for attorneys as to both of these factors changed significantly over the years that this litigation has progressed.

The presence of risk in the attorney-client relationship is the critical factor with any CFA. *See generally Restatement (Third) of The Law Governing Lawyers* § 35 cmt c. (2000) (noting that it is reasonable for a contingency fee to exceed an hourly rate for similar representation because "[a] contingent-fee lawyer bears the risk of receiving no pay if the client loses and is entitled to compensation for bearing that risk."). "[T]he obvious but critical characteristic of a contingent fee arrangement [is] the presence of risk." *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 290 F. Supp. 2d 840, 850 (N.D. Ohio 2003).

Here it is accepted that there were significant risks at the outset of this litigation. *See generally* (Doc. No. 6073-4 at 6-7 (discussing the litigation risks for the class and the NFL)). The plaintiffs faced "stiff challenges surmounting the issues of preemption and causation." (Doc. No. 6509 at 67-68 (cataloguing the issues as they related to preemption and the prior law)). Causation would have been similarly challenging, since the claims involved "complex scientific and medical issues not yet comprehensively studied." (*Id.* at 60, 69-71 (discussing the evolving science at length)). In describing the complexity of the case absent a settlement, the District Court noted:

> Absent settlement, Class Members would have to conclusively establish what and when the NFL Parties knew about the risks of head injuries. This would require voluminous production from the NFL Parties, and time to sort through decades of records. Non-party discovery would be inevitable; Class Members would seek documents from individual NFL Member Clubs. To fully investigate scientific causation, the Parties would have to continue to retain costly expert witnesses…. In turn, the NFL Parties would seek discovery about the medical history of 20,000 Retired Players.

(*Id.* at 61) (citation omitted).

Further, Class Members also faced issues relating to specific causation. As the District Court explained:

> Class Members argue that the cumulative effect of repeated concussive blows Retired Players experienced while playing NFL Football led to permanent neurological impairment. Yet the overwhelming majority of Retired Players likely experienced similar hits in high school or college football before reaching the NFL…. Isolating the effect of hits in NFL Football from hits earlier in a Retired Player's career would be a formidable task.

(*Id.* at 71).

The Settlement Agreement neutralized these risks. By way of stark example, the reasonableness of a contingent fee agreement at the time of contracting must be evaluated based on the timing of the contract signing in reference to the presence or absence of the Settlement Agreement.

Risk as it related to overall workload also varied over time in this litigation. When law

firms undertake large-scale litigation, they are obligated to decline to take on other litigation. *See Dunn*, 602 F.2d at 1111. The cost to law firms in deciding to participate and thus forego alternative matters must be recognized. Professor Rubenstein noted the significant disparity of obligations for law firms undertaking the representation of claimants in each of three major phases in this litigation. These landmark moments in the litigation provide clear guideposts for us as we evaluate the reasonableness of the contracts when they were entered:

- Phase 1: Individual Litigation;
- Phase 2: Litigation with the MDL;
- Phase 3: Litigation within the Class Action Settlement.

(Doc. No. 9526 at 25-26). In each phase the risks for the law firm entering into the fee agreement varied greatly.

In the first phase of the litigation, the law firms undertaking representation of players individually, without the benefit of the efficiencies contained within an MDL, faced monumental challenges. Those lawyers risked having to "pursuing the entire case themselves, perhaps even through trial, and fee arrangements reflecting those large contingencies would have been expected and appropriate." (Doc. No. 9526 at 25-26).

Once the individual cases were consolidated into an MDL, the risk, as it related to the volume of work to be undertaken by the law firm, changed dramatically.[8] Once an MDL was formed, "lawyers contracting to represent clients were well aware that the costs of doing so had been greatly reduced: pre-trial proceedings would now be consolidated and undertaken once and

[8] We recognize that at this phase in the litigation, the risks as to the legal challenges faced by the plaintiffs remained largely the same. This case remained a "high-risk, long-odds litigation." (Doc. No. 9860 at 10).

the likelihood that any case would be remanded for trial declined significantly." (Doc. No. 9526 at 26 (*relying on In re TJX Companies Retail Sec. Breach Litig*., 584 F. Supp. 2d 395, 405 (D. Mass. 2008) ("Multi-district litigation is like the old Roach Motel ad: 'Roaches [the transferred cases] check in—but they don't check out.'") (quoting Professor Samuel Issacharoff)).

The formation of an MDL resulted in the formation of the PEC, PSC and committees that took over the primary work in the case, as would have been expected. Case Management Order Number 5 provides a detailed list of the type of work that was shifted from the IRPAs to the Plaintiffs' Committees, work that was to be compensated not through IRPA fee contracts, but through a common benefit fund:

- investigation and research;
- conducting discovery (e.g., reviewing, indexing and coding documents);
- drafting and filing pleadings, motions, briefs and orders;
- preparation and attendance at non-case specific depositions;
- preparation for and attendance at state and federal Court hearings;
- attendance at PEC- or PSC-sponsored meetings and addressing lawyers on the status of the litigation;
- other PEC or PSC activities, including committee work;
- work with expert witnesses; trial preparation and trial;
- performance of administrative matters; and
- performance of conventional administrative, scheduling, coordination and related liaison tasks performed by Plaintiffs' Liaison Counsel.

(Doc. No. 3710 at 3).[9]

As Professor Rubenstein recognized, there is no clear demarcation line between Phase 1

[9] The efficiencies inherent in an MDL, and the benefits to the IRPA, are well known. The stated role of the transferee court is to "promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). *See generally In re Vioxx Prod. Liab. Litig.*, 650 F. Supp. 2d at 562-63 (discussing the benefit to IRPAs of not having to "pursue individual discovery, nor . . . to file individual motions, engage in individual settlement negotiations, or prepare individual trial plans").

and Phase 2 of this litigation. The NFL filed its motion to consolidate the first four cases into an MDL on November 15, 2011, but the motion to consolidate was not granted until January 31, 2012. On the date the cases were transferred, the MDL Panel indicated it had already been notified of sixteen additional actions. (MDL 2323, Doc. No. 28). As with all of our reasonableness evaluations, we recognize the evaluation of contracts in this time period will require a sliding scale analysis. The risk was clearly at its highest before the motion; it clearly dropped after the motion was granted; how much the risk was reduced in the time between the two requires the exercise of informed discretionary judgment.

Finally, in Phase 3, attorneys entered into fee contracts with the knowledge that the cases in this phase had the benefit of the negotiated Settlement Agreement and "it became apparent that IRPAs would be primarily responsible only for processing their clients' claims through the claims facility." (Doc. No. 9526 at 26). At this point in the litigation, it became clear that there was no risk that the case would be dismissed based on the significant legal challenges set out above. For most players with Pre-Effective Date Diagnoses, the claims process would be a straightforward application of the matrices from the Settlement Agreement. For some individuals, this means that the claim submission process will be more streamlined and efficient; for others the process still presents complexity as the Settlement Agreement contains various terms, factors and circumstances that have been subject in some cases to significant post-settlement litigation. The evaluation of the reasonableness of a fee contract signed even after the adoption of the Settlement Agreement will still require an evaluation of the specific facts and circumstances of each case.

As with the start date of Phase 2, Phase 3 has no clear start date, but rather a period of time where the risks began to be reduced. With each new event, it became more likely that all individual cases would be resolved as a part of a class action settlement agreement. *See* (Doc. No. 10019 at

5, 13-14 (discussing the complexity of the litigation on appeal, and implicitly, the risk that remained in the case)). On August 29, 2013, the Parties signed a Term Sheet. On July 7, 2014, the District Court granted preliminary approval. On April 22, 2015, the District Court approved the final Settlement Agreement. On April 18, 2016, the Third Circuit affirmed the District Court's decision. And on December 12, 2016, the petitions for writ of certiorari were denied. We consider the risk in this time-period as Phase 2 ended and Phase 3 began as a sliding scale as well.

Separate and apart from the foregoing, we must recognize the "economies of scale" that are present in this litigation. As Professor Rubenstein noted, law firms who represented hundreds of clients "should be able to provide IRPA services at reduced contingent fee rates given the economies of scale." (Doc. No. 9526 at 33). The Third Circuit has recognized the difficulties with contingent fee contracts in cases where a law firm's collection of a high volume of clients "escalat[es] the attorneys' fees without a proportionate increase in the effort and expense of litigation." *Dunn*, 602 F.2d at 1113, n.12. In cases like this, the Circuit Court has stated that "[a] fair and equitable contingent fee agreement generally provides for a sliding scale in which fees based on a percentage of the total recovery decrease as the amount of the recovery increases." *Id.*

2. <u>The CFA at time of execution – impact of changed circumstances</u>

Even where the CFA may be considered reasonable at the time of signing, we are obligated to consider whether events arose in the litigation that rendered an otherwise reasonable contract unreasonable. "It should… be the unusual circumstance that a court refuses to enforce a contractual contingent attorney's fee arrangement because of events arising after the contract's negotiation." *McKenzie II*, 823 F.2d at 45. Nonetheless, the risks here varied significantly from the outset of the original litigation to the circumstances when the fee awards were ultimately issued. We must give consideration to those circumstances, sometimes present here, "where the

lawyer's retention of [the originally negotiated fee] would be unjustified and would expose him to the reproach of oppression and overreaching." *McKenzie I*, 758 F.2d at 102.

The District Court has already concluded that the change of circumstances here are such that contingent fee contracts must be reduced through the imposition of a Fee Cap. We conclude that further evaluation of the impact of these changed circumstances is best accounted for on a case-by-case basis, through an assessment of the remaining three factors in the *McKenzie* analysis, understanding that no contingent fee agreement can be in excess of 22% in the absence of exceptional and unique circumstances.

In conducting this case-by-case analysis, however, we cannot use a strict lodestar analysis to evaluate a CFA. *McKenzie II*, 823 F.2d at 47, n.3 (stating that lodestar analysis is inapplicable to contingency fee contracts); s*ee also Dunn*, 602 F.2d at 1111 (rejecting the argument that it was inappropriate to assess the reasonableness of an IRPA fee agreement by comparing it to the fee paid by unrepresented class members (calculated under a *Lindy* analysis)). These are CFAs, so it is not proper to use the rates that could have been obtained based under an hourly fee agreement to evaluate their reasonableness.

Nonetheless, in our Lien Rules, we indicated that IRPAs should provide written evidence of "the time spent on each task." We seek this information only to the extent that the amount of time spent on a project can be an indicator of the substantiality of the effort required by the IRPA to perform the task.[10] This does not mean that we are assessing contingent fee contracts based on

[10] For example, review of a loan agreement might be a matter of course for counsel and could be undertaken quite easily with minimal time for review, or in some cases the review might require extensive negotiations with the lender that consume a much greater effort. We appreciate that some IRPAs may not have prepared contemporaneous billing records given the terms of the CFA, but estimates of time dedicated to a task will be an aid in assessing the nature of the work performed.

billable hours submitted or that we intend to "disallow" work that is not evidenced by contemporaneous time entries. As is explained below, an assessment of the substantiality of the contribution provided by the IRPA will ultimately be the most important factor in the *McKenzie* analysis as it applies to this case.

3. The results obtained

The final three *McKenzie* factors work together, but we look at them individually to provide clarity in our analysis. Ultimately, we must evaluate "[3] the results obtained, [4] the quality of the work, and [5] whether the attorney's efforts substantially contributed to the result." *McKenzie I*, 758 F.2d at 101. The first part of this analysis is straightforward.

Both the District Court and the Third Circuit have already endorsed the result obtained through the Settlement Agreement. As a general matter, this Settlement was widely endorsed by the Class, with only 1% of class members opted out of the litigation. *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 438 (3d Cir. 2016), *as amended* (May 2, 2016). That overall result was obtained through the solid work of Class Counsel, but it intertwines with our evaluation of an IRPA's work in obtaining the individual result for their particular clients.

As to the result for each individual SCM, we are provided with the Notice of Monetary Award, which is presented to the SCM at the time an Award is issued. This Notice provides us with evidence of the nature of the class member's diagnosis, as well as the extent of the Award for that SCM. We will evaluate each on a case-by-case basis.

4. The quality of the work performed

Before we can evaluate the degree that an attorney's overall performance contributed to the SCM's Award, we must consider the quality of the work performed by each IRPA. It is also helpful as a general matter to evaluate the quality and necessity of the work performed for the

SCM individually by other attorneys, or by the SCM him or herself, that contributed to the Award obtained. The record before us does not lend itself to discussing the "quality" of the attorney's work in any real sense.[11] Rather, we look to whether the work was necessary, or justified based upon the circumstances at the time. This evaluation naturally morphs into an assessment of whether and to what degree that effort contributed to the result. Ultimately, our assessment of the "quality" of the work performed will always be influenced by the degree to which that work contributed to the result obtained.

We recognize that under this Settlement Agreement there are circumstances where the SCM's Award is based on a pre-existing diagnosis and obtaining an Award might not be particularly difficult, and subject to only the completion of the forms processed by the Claims Administrator.[12] However, the District Court has already included the tasks of "shepherding of their clients through the claims process" as a factor in its conclusion that IRPAs provided a sufficiently substantial contribution to the Awards as to justify a reasonable fee not to exceed the 22% Fee Cap. (Doc. No. 9862 at 7). As Co-Lead Class Counsel has explained, the claims process in this case is not "routine or mechanical. . . . [T]he claims process here requires the involvement of designated medical experts in personally examining Retired NFL Football Players, and . . . in

[11] We assess "quality" not so much as in the context of how a particular task was undertaken, but rather by assessing the degree to which the work was undertaken as part of the effort to garner the highest award, in light of the circumstances at the time the task was undertaken. For example, the careful examination of medical records to ensure the highest Award is obtained, or facilitating a fair lending arrangement to maintain the client's quality of life as the claims process is unfolding.

[12] Because of the factors discussed here, we do not expect that the many IRPAs will have provided only perfunctory service to their clients. However, we note that where the nature of a lawyer's work is "basically administrative in nature" we would expect that the fee agreement would account for that fact. *See, e.g.*, *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 290 F. Supp. 2d at 853–54 (greatly restricting fee contracts where the lawyer merely "monitor[ed] the case" and "timely and properly fill[ed] out claims forms.").

many instances has been and will continue to be adversarial, especially given the uncapped nature of the [Monetary Award Fund]." (Doc. No. 9552 at 8-9, n.15). Implementation of the Settlement Agreement has not been without challenge. We are aware of the administrative appeals that have been necessary to clarify terms in the Settlement Agreement, which have necessitated sometimes extensive work to be performed by IRPAs.

Furthermore, IRPAs must be credited for work performed for their client that was reasonably deemed necessary at the time, even where the work ultimately became unnecessary under the Settlement Agreement. For example, in the early stages of this litigation, there was a realistic possibility that IRPAs might have to pursue these claims through individual cases. That meant that the attorneys were obligated to file lawsuits against the NFL Parties to ensure the IRPA's client would be a party within the consolidated MDL case. Similarly, we anticipate that law firms might have taken actions on behalf of their client to preserve testimony or evidence that could be used if the individual case eventually went to trial. Such actions, not duplicative of work done by Class Counsel, were actions taken for the advancement of the individual player. The fact that such evidence was not ultimately used does not mean it cannot be considered in our evaluation of the overall work performed by each IRPA. While these activities might be defensive in nature, we will properly acknowledge them as worthy of compensation.

We also recognize that there are instances where work that is performed by an attorney is best considered both as work done as an IRPA and work done for the common benefit. In these cases, where the service is for a mixed purpose, we must again exercise our discretion to allocate the value of that work between the two roles.

Additionally, we expect that in some instances IRPAs will have performed work for their individual clients on matters that were collateral to the NFL Concussion Litigation and on other

personal matters. Where those matters are related to this litigation and the services were performed based on the expectation that payment would be covered by the CFA, these services will be considered.

Recognizing that the burden of demonstrating that the fees requested are reasonable rests with the attorney, we rely on the attorneys seeking fees to present evidence through their Lien Dispute Submissions that would demonstrate to us the quality, or rather the value or necessity, of the work performed on behalf on the individual client.

5. <u>The substantiality of the work</u>

Ultimately, we must evaluate the degree to which the attorney's efforts substantially contributed to the result obtained. As with any case where multiple attorneys represented a client, we review the work performed by each attorney and allocate the total fees on a proportionate basis. This litigation is somewhat complicated by the fact that one set of responsible attorneys are Class Counsel, who were already paid for their services and are not a Party to this Attorney Lien Litigation. Further, in some instances, the final claims process was performed by an attorney working *pro bono* or by a class member acting *pro se*. Ultimately, however, the evaluation is the same. We will exercise our best judgment to determine the substantiality of the contribution by each attorney.

The District Court has stressed the importance of "compartmentaliz[ing] the fees sought by Class Counsel for the work done to advance the interests of the Class and the work done by IRPAs to advance the interests of their individual clients." (Doc. No. 9860 at 13). We have the benefit of the District Court's opinions as they related to the Common Benefit Award and Allocation (Doc. No. 9860; Doc. No. 10019), as well as the fee requests submitted by each law firm who sought payment from the AFQSF, which provide us some details of the work performed

by IRPAs when working as Class Counsel. We must ensure these attorneys who are both IRPA and Class Counsel are not paid "twice for the same work." (Doc. 9862 at 5). As we evaluate the contribution of the IRPA to the Award, we will take care to consider only IRPA work and not include common benefit work that was already paid through the AFQSF.

In its establishment of a Fee Cap, the District Court has already taken action to reduce IRPA fees, accounting for the general benefit provided by Class Counsel. This cap takes into account (1) the value of the work provided by Class Counsel in their negotiation of a Settlement Agreement; (2) the benefits of Class Counsel's work as the legal team in filing pleadings, framing the Settlement Agreement, and handling the complex appellate process that followed; and (3) the efficiencies provided when the case was resolved without formal discovery, with limited motion practice, and with no bellwether trials. We strongly consider the willingness of the IRPA to accept varying degrees of risk depending upon the timing of the representation. Such is particularly the case when the earliest cases were filed, before the MDL was established. Additionally, we have identified seven ways that IRPAs have supported their individual clients:

(1) review of medical records and necessary actions to taken to ensure medical conditions were identified and diagnosed at the earliest possible date;

(2) support of their individual clients in ensure their lawsuit would have evidentiary support should the matter proceed to trial;

(3) review of other litigation that was related to ensure claims in this litigation would not be negatively impacted;

(4) support of their individual clients in understanding the on-going settlement negotiations and risks, and in ultimately making the determination of whether to opt out of the class,

(5) shepherding the individual client through a claims process from registration to receipt of a Monetary Award,

(6) support of clients who were seeking loans and were exposed to predatory lending practices; and

(7) providing necessary support in other personal matters collaterally related to this litigation.

This is not an exhaustive list of factors. We recognize that there will likely be other examples, which we will consider as each is presented. With this as a starting point, however, we will be able to incorporate our findings that relate to the quality and value of the work performed by the IRPA and determine whether or to what degree that work substantially contributed to the Award issued.

B. The impact of the 22% Fee Cap on the reasonableness analysis

The District Court's Fee Cap does not relieve us of the obligation to review the *McKenzie* factors. Just as a CFA provides a starting point in a fee dispute, the District Court's presumptive Fee Cap provides a starting point in our litigation. However, the Court's ruling on this general point does not, and cannot, shift from the attorney the burden of proof to establish that the amount sought in the fee agreement is reasonable.

It has long been acknowledged that the nature of the relationship between attorney and client obligates attorneys to carry the burden of proof to demonstrate that the fee awarded "is reasonable under the circumstances." *Dunn,* 602 F.2d at 1111-13 (discussing deference to fee contracts, but cautioning that attorneys always bear the burden of demonstrating the reasonableness of their contracts). The District Court's prior opinions in no way relieved attorneys of this obligation. Indeed, the Court explained that all attorneys seeking fees – whether those fee requests are submitted through a Lien or otherwise – are obligated to ensure their fees are "reasonable" under the standards articulated in *McKenzie*. (Doc. No. 9862 at 8-9 (noting the requirement and indicating the attorney's burden of showing reasonableness by a preponderance of the evidence)). Where we are presented with a valid fee contract, we are required to assess if the payment of the fee would "result[] in such an enrichment at the expense of the client that it

offends a court's sense of fundamental fairness and equity." *McKenzie I*, 758 2d at 101.

In two of the cases before us a Party in the Lien litigation also filed a Petition for Deviation downward from the presumptive Fee Cap. In each of these cases, we concluded that the filing of this petition was unnecessary, as the arguments were duplicative of the arguments contained in the Lien litigation that was already before us. As a general matter, we believe that a downward deviation petition will typically be unnecessary where there is already a pending Lien Dispute. As is detailed below, the question before us in this context is simply this: Is the fee sought by the contracting attorney reasonable under the analysis set forth in *McKenzie*; understanding that presumptively the fee cannot be more than 22%? A petition for downward deviation sets forth the same analysis, and the arguments will therefore be subsumed in that larger Lien analysis.[13]

With these standards in mind, we turn to the individual cases before us.

III. DISCUSSION OF PODHURST v. TURNER

Podhurst seeks 22% of the Award issued to Turner, through his father, Paul Raymond Turner, the Representative Claimant for the Estate. The Estate challenges the Lien, arguing that Podhurst did not perform any individual work here and is therefore not entitled to any fee as an IRPA. Podhurst argues that they performed all of the work necessary to obtain the Award and are therefore entitled to the full 22% available under the Fee Cap. We reject both positions. Rather, we hold that we must assess the reasonableness of the fee in light of the five factors enumerated by the Third Circuit in *McKenzie*.

We begin with a consideration of "the reasonableness of the contingent fee arrangement"

[13] In an instance where the attorney is seeking a deviation upward from the presumptive Fee Cap, we believe that a petition for deviation will be necessary. However, no such petition is before us for our evaluation today.

at the time of the contact's signing. *McKenzie II*, 823 F. 2d at 45, n.1 and then determine whether the circumstances compel a different evaluation of the CFA at the time of its execution. We then look to the third, fourth and fifth *McKenzie* factors: "the results obtained, the quality of the work, and whether the attorneys' efforts substantially contributed to the result." *McKenzie I*, 750 F.2d at 101.

Within our evaluation of the attorney's overall performance, we are aware of our obligation to distinguish work performed for Turner as an individual SCM from work performed for the class as a whole. To the extent the work performed by Podhurst was already compensated, in whole or in part, we cannot consider it as a part of our reasonableness evaluation of the IRPA fee sought by Podhurst.

A. Facts and Procedural History

Turner first met with Podhurst about possible representation on September 26, 2011. Lienholder's Statement of Dispute at 2. He did not sign a CFA with the firm however, until January 18, 2012. (Doc. No. 7071-2). Under the terms of the agreement, Turner agreed to pay 40% of any monetary award recovery, plus an additional 5% for any appellate proceeding. Payment was contingent on Turner's success in the litigation. At that point, Podhurst had already filed a lawsuit against the NFL on behalf of 21 retired players. *Jones, et al. v. NFL*, 11-cv-24594 (S.D. Fla. filed on December 22, 2011). Turner was added to that lawsuit through an amended complaint on January 20, 2012. *Id.* at Doc. No. 14. As of January 2012, Turner had already been diagnosed with Amyotrophic Lateral Sclerosis ("ALS").[14]

Turner was the representative of the symptomatic subclass, Subclass 2, which contained

[14] Turner was diagnosed in June of 2010.

the group of retired NFL players who had received a Qualifying Diagnosis prior to the date of preliminary approval. He began working with Class Counsel in this role in July of 2013, during the negotiations that led to the submission of the first term sheet. (Doc. No. 6423-7 at 4 (Turner's affidavit submitted to the District Court explaining the nature of his role as Subclass Representative and indicating his endorsement of the Settlement Agreement)). As Turner explained, he was extensively advised by Class Counsel about the settlement negotiations and the terms of the Settlement Agreement. (*Id.* at 3). He was formally appointed to be the Subclass Representative on June 25, 2014, upon the submission of the operative Settlement Agreement.

Over the course of this representation, a dispute arose between Podhurst and Turner about attorneys' fees. On June 2, 2015, Polsinelli agreed to represent Turner *pro bono* to advise him about the fee agreement with Podhurst. Although Turner sent inquiries about his fee agreement concerns to Podhurst, he did not advise the firm that he had engaged separate counsel. On March 24, 2016, Turner died after his long battle with ALS.

After Turner's death, his father, Raymond Turner, became the personal representative of the Estate. N.T. 10/3/2018 at 4.[15] Podhurst sought a new fee agreement with the Estate, but those attempts failed. On April 15, 2016, the Estate terminated Podhurst's representation. N.T. 10/3/2018 at 51. Polsinelli then took over Turner's representation in the claim process. They are representing the Estate *pro bono* in this fee dispute as well.

On December 14, 2016, Polsinelli filed a Motion to Resolve Attorney Fee Dispute, asking the District Court to preclude Podhurst from collecting any fees as an IRPA, given that they were also receiving fees as Class Counsel. (Doc No. 7029). Podhurst filed a Response on January 11,

[15] As citations referencing "N.T." throughout this Report and Recommendation are citations to the Notes of Testimony to hearings held before us in the course of these attorney lien hearings.

2017 (Doc. No. 7071), and the Estate submitted a Reply on January 30, 2017 (Doc. No. 7114). On May 14, 2018, following the District Court's Opinion relating to the Fee Cap, the District Court dismissed the Motion without prejudice to the Estate's right to file a Petition for Deviation raising the same issues, which they have now done. (Doc. No. 9984). On May 29, 2018, Turner filed the Petition seeking a downward departure from the 22% presumptive Fee Cap to 0%, arguing that Podhurst had already been compensated for any work performed for Turner by the common benefit fee they received. (Doc. No. 10025).

On June 9, 2017, while those matters were pending in District Court, the Claims Administrator issued a Notice that the Lien had been filed and provided the Estate twenty days to consent to or dispute the Lien. On June 17, 2017, the Estate advised the Claims Administrator of its intention to dispute the Lien. On June 22, 2017, the Claims Administrator issued a Notice of Monetary Award Claim Determination to Turner.

On June 11, 2018, upon conclusion of the common benefit fee litigation, the issuance of the District Court's Fee Cap Opinion, and the issuance of the Attorney Lien and Deviation Rules, the Claims Administrator issued a Schedule of Document Submissions setting the deadlines for the pleadings that needed to be submitted to resolve the Lien Dispute. On July 11, 2018, pursuant to Lien Rule 14 (Doc. No. 9760 at 9),[16] the Parties submitted their Statements of Dispute to the Claims Administrator ("Lienholder Statement of Dispute" and "SCM Statement of Dispute"). On August 6, 2018, pursuant to Lien Rule 15 (Doc. No. 9760 at 10), they submitted their Response Memoranda ("Lienholder Response" and "SCM Response"). Both Parties then requested a hearing, which we granted. On July 24, 2018, with the consent of the Parties, having concluded

[16] The pleadings were filed under our original Lien Rules, not the Lien Rules as later amended.

that the arguments in the Petition for Deviation were already before us in the pleadings filed in the Attorney Lien litigation, we denied the Petition for Deviation as moot. (Doc. No. 10161). Pursuant to Lien Rule 17, the Record of Dispute was transferred to this Court. On October 3, 2018, we held an evidentiary hearing, allowing the admission of evidence and argument for both sides.

B. The Turner CFA

It is undisputed that on January 18, 2012, Turner signed a CFA with Podhurst for the firm to represent him in his claim for damages against the NFL. (Doc. No. 7071-2). The Parties agree that the original contract was an agreement to pay 40% recovery of any monetary award, plus an additional 5% for any appellate proceeding. It is further agreed that Podhurst later reduced its contingency fee percentage to 25% but that following the District Court's presumptive Fee Cap Order, Podhurst's maximum fee cannot exceed 22%, absent the submission of Petition for Deviation demonstrating unique and extraordinary circumstances. (Doc. No. 7071 at 2).

The Estate has not argued that the CFA is invalid. They argue, rather, that the 22% fee requested is "unreasonable" because Podhurst performed only *de minimus* work on behalf of Turner. Polsinelli Statement of Dispute at 9-10. We discuss the "reasonableness" of the total fee in detail below.

Podhurst argues that they "should be awarded its full contractual fee because the contingency occurred." Lienholder Statement of Dispute at 5. As we discuss within we are unwilling to give credence to this concept, as it is only a small part of the more expansive *McKenzie* reasonableness test.[17] Whether the contract was fully completed or not, Podhurst is obliged to

[17] In any event, we reject Podhurst's argument that the contingency was met in this case. As is discussed in detail below, there was still work to be done when Podhurst's representation was terminated. To consider otherwise would be contrary to the conclusions in the District Court's Fee Cap Opinion, which specifically included "shepherding of their clients through the claims

demonstrate that the contingent fee they were seeking was "reasonable" under the standards articulated by the Third Circuit in *McKenzie*.

Podhurst also challenges the applicability of Third Circuit law in this context, arguing that we are bound by state law, not federal law, in our evaluation of the reasonableness of the fee agreement here. Podhurst relies on dicta in *Novinger v. E.I. DuPont de Nemours & Co.*, 809 F.2d 212, 217 (3d Cir. 1987). This reliance is misplaced. This dicta from *Novinger* stated only that as a general matter state law applies to review of attorney fee contracts. In *Mitzel v. Westinghouse*, 72 F.3d 414 (3d Cir. 1995), the Circuit Court addressed the issue with greater particularity, explaining that while "generally" state law applies to the review of attorney fee contracts, contingent fee contracts are "treated differently." *Id.* at 417.

Third Circuit has made clear however that in evaluating IRPA contracts that exist in a class action, that we must apply federal law and review these fee contracts for reasonableness. *Dunn*, 602 F.2d at 1110, n.8. "Rules regulating contingency fees pertain to conduct of members of the bar, not to substantive law which determines the existence or parameters of a cause of action." *Mitzel*, 72 F.3d at 417 (*quoting Elder v. Metropolitan Freight Carriers, Inc.*, 543 F.2d 513, 519 (3d Cir. 1976)). Since "federal courts have the power to prescribe requirements for admissions before them and to discipline attorneys who have been admitted to practice before them . . . 'such

---

process" as a factor in its conclusion that IRPAs provided a sufficiently substantial contribution to the Awards as to justify the conclusion that, as a general matter, a fee up to 22% could be reasonable. (Doc. No. 9862 at 7); *see also* (Doc. No. 9552 at 8-9, n.15 (Class Counsel's discussion of the complexities of the claims process)).

Podhurst provides this Court with a series of cases setting forth the unremarkable proposition that if all the work is done in case, but the Award has not yet been issued, a client cannot fire his attorney and then claim that the contingency was not met. Lienholder Statement of Dispute at 7-8. The issue here is whether the work was completed or so closely completed that the contingency was met. The answer, considering the facts of this case, is no.

rules are of deep concern to the court which promulgated them.'" *Id*. This is why "contingency fee agreements in diversity cases are to be treated as matters of procedure governed by federal law." *Id.*

In *Dunn*, the Third Circuit was presented with a similar circumstance to the one presented here. 602 F.2d at 1109. Many of the members of a class had individual fee contracts with private attorneys. The Circuit concluded that the District Court had the authority to set aside private CFAs between attorneys and class members. As the Court explained, the District Court had the power to monitor CFAs generally based on the court's "supervisory power over the members of its bar." *Dunn*, 602 F.2d at 1109. Federal law applies as our review is "part and parcel of the process a federal court follows both in supervising members of its bar and in meeting the obligations imposed on it by Fed.R.Civ.P. 23(e)." *Id.* at 1110, n.8. Additionally, the Court explained that when a fee is to be paid through a settlement fund approved by the court, Rule 23 imposes an even greater responsibility on the Court to review the fee contracts. *Id*.

The fact that this is an MDL does not change the analysis. As the District Court noted in the *Vioxx* litigation, "the MDL statute's mandate of fairness requires a uniform, consistent result for all attorneys and their clients. Any other result would be impractical from the standpoint of judicial economy. Conducting fifty independent analyses of reasonableness would drain judicial resources and would eliminate the efficiency that the MDL was designed to create." *In re Vioxx Prod. Liab. Litig.*, 650 F. Supp. 2d 549, 563 (E.D. La. 2009).[18]

Ultimately, we observe that the Third Circuit's rule requiring that contingent fees be

[18] As is discussed in the discussion of the CFA between Smith and Podhurst, where the Parties are disputing the validity of the contract or disputing the interpretation of a clause in the contract, state law may provide the relevant precedent to evaluate the claim.

"reasonable" is not unique. In the context of mass tort litigation, "a court that exercised inherent power to prevent a violation of the lawyers' professional responsibility to charge only reasonable rates would be acting within the parameters of inherent authority as described by the Supreme Court." *Contingent Fees in Mass Tort Litigation*, 42 Tort Trial & Ins. Prac. L.J. 105, 127 (2006). "Any analysis of a fee agreement between an attorney and his client begins with the general rule that an attorney may not charge 'in excess of a reasonable fee.'" *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 290 F. Supp. 2d at 850. "Courts that have considered the issue have nearly unanimously concluded that the power to consider the reasonableness of contingent fees is inherent in a federal court." *In re Vioxx Prod. Liab. Litig.*, 650 F. Supp. 2d at 559. Indeed, *Dunn* itself relied on the Canons of Professional Ethics as promulgated by the American Bar Association for the Court's conclusion that contingent fee agreements are permissible "subject to the 'supervision of the courts, as to their reasonableness.'" *Dunn*, 602 F.2d at 1108 (*quoting Fitzgerald v. Freeman*, 409 F.2d 427 (7th Cir. 1969)).

In any event, Florida law, which Podhurst claims is applicable, does not appear to require a different result, even if it did apply. Podhurst points to a multi-factor analysis in *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*, 652 So. 2d 366, 369, n.4 (Fla. 1995) which the Florida Court describes as a "good starting point." We have reviewed this seven-factor reasonableness test and consider these factors as a part of the totality of circumstances of the particular case. *Id.* We observe that even if we were to consider this test, which we do not, we expect that the result would not likely be different than the result we come to here using the *McKenzie* factors.[19]

[19] The Florida Court pointed to Rule Regulating the Florida Bar 4-1.5, which lists the following factors:

Finally, Podhurst has asserted that Turner's termination of the CFA was for "an avowed purpose to avoid the contractual fee." Lienholder Statement of Dispute at 10. While this assertion has little effect upon our analysis, we reject the implication. We see this as a misunderstanding by the estate over what the impact of the substantial common benefit fees coming to Podhurst would have upon their IRPA fees. *See* (Doc. No. 7029-11, Exhibits C through J (correspondence between the Parties detailing the dispute)).

C. Applying *McKenzie* "reasonableness"

Having established that there is a valid CFA in place and that we are obligated to review the fee under the *McKenzie* factors, we turn to the *McKenzie* analysis. Our inquiry begins "by

---

> (1) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee, or rate of fee, customarily charged in the locality for the legal services of a comparable or similar nature;
>
> (4) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
>
> (8) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

Id.

scrutinizing the reasonableness of the contingent fee arrangement" at the time of the contract's signing and comparing it to the circumstances at the time of execution. *McKenzie II*, 823 F.2d at 45 n.1. Recognizing that the District Court has already adjusted fee agreements through the Fee Cap to account for the changed circumstances that occurred over the course of this litigation, we must determine if there were other factors specific to this individual case that should be considered in our assessment of the reasonableness of the fee at the time of the contract's execution. We will then review (1) the result in the case, (2) the quality of the work performed by the attorneys, and (3) the substantiality of that contribution on the overall result.

As is discussed in greater detail below, circumstances here, at the time of contracting and the time of execution, changed significantly, necessitating an adjustment to the fee beyond that contemplated within the District Court's presumptive Fee Cap. In evaluating the remaining three prongs, we are satisfied that both Podhurst and Polsinelli provided quality work and made substantial contributions to the ultimate Award received in this case. Considering the substantiality of Podhurst's contribution as an IRPA, as reduced to account for the contributions of Class Counsel and Watters, we recommend that Podhurst receive a fee of 15½ %, which will be reduced by the amount of the 5% holdback that the District Court deems necessary.

1. <u>The CFA at time of contracting</u>

Our inquiry begins "by scrutinizing the reasonableness of the contingent fee arrangement" at the time of the contract's signing. *McKenzie II*, 823 F.2d at 45 n.1. Here, there are two primary factors that we must examine: (1) the legal challenges in the plaintiff's pursuit of a monetary award and (2) the time-intensive nature of the litigation. Podhurst signed a fee agreement with Turner very early in this litigation, when consolidation as an MDL was likely, but not certain. The legal challenges to the litigation remained substantial, but there was a strong likelihood that much of the

considerable time-intensive work that counsel were facing would be streamlined by the creation of the benefits of the MDL.

(a) Filing before MDL consolidation

Podhurst's initial meeting with Turner occurred on September 26, 2011, but he did not sign his fee agreement until January 18, 2012. This was arguably at the very end of what Professor Rubenstein described as Phase 1, but effectively in the earliest stages of Phase 2. (Doc. No. 9526 at 25-26).

The initial meeting with Turner occurred before the NFL filed its motion to consolidate, but after the first four cases in this MDL had been filed.[20] On December 16, 2011, about a month after the NFL filed the motion to consolidate the cases as an MDL, Podhurst spoke again with Turner about representation. Although Turner did not sign with Podhurst at that time, Podhurst filed the initial complaint seeking damages against the NFL on behalf of 21 other retired players on December 22, 2011. At that point, it was nearly certain that Podhurst's lawsuit was going to proceed within the MDL, as the NFL and all plaintiffs in the first four suits had sought consolidation. (MDL No. 2323, Doc. Nos. 17, 18, and 19 (all filed Dec. 7, 2011)).[21]

By January 18, 2012, when the CFA was signed, the fact that the case was almost certain to proceed jointly through an MDL necessarily changed the dynamic when assessing fees. The formation of the MDL committees allowed a central group to perform the work for the class, and

[20] *Maxwell, et al. v. NFL, et al.* was filed on July 19, 2011; *Pear, et al. v. NFL, et al.* was filed on August 3, 2011; and *Barnes et al. v. NFL, et al.* was filed on August 26, 2011. The three cases were removed to federal court on October 11, 2011. On August 17, 2011, *Easterling, et al. v. NFL*, was filed in the District Court for the Eastern District of Pennsylvania.

[21] The only opposition to the MDL formation came from the Riddell defendants. But Podhurst's complaint was solely against the NFL.

relieved IRPAs from having to complete the work independently. Podhurst was aware of the benefits of consolidation. As they explained in their Class Benefit Fee request, the firm hosted an organizational meeting prior to the JPML hearing. "The purpose and result of the meeting was to facilitate tentative agreements on coordination and leadership among the majority of counsel representing former players." (Doc. No. 7151-8 at 4).

Consolidation, however, did not eliminate risk. Despite the opportunity to spread out the workload, there were still substantial risks for Turner, including challenges relating to causation, preemption, and statute of limitations, to name a few. *See* (Doc. No. 9860 at 10 (describing this as a "a high-risk, long-odds litigation.")).

Additionally, Podhurst's work in drafting and filing a lawsuit against the NFL and including Turner as a plaintiff was a necessary part of this litigation when Turner retained the law firm. To participate in the MDL, Turner needed to be a party in a lawsuit, which could be transferred into the soon-to-be-created MDL. Podhurst took on these risks when they filed the necessary pleadings.

(b) Pre-MDL work as IRPA work

Podhurst lawyers, like other firms who were involved in the early filings in this litigation, spent months prior to the filing of their initial lawsuit researching the legal issues that would be faced in the litigation. N.T. 10/3/2018 at 28. Since this voluminous upfront work creates a collateral loss of opportunity, which is an appropriate and necessary consideration for lawyers when negotiating the terms of the CFA. When Podhurst entered into the CFA with Turner, the fee could reasonably be considered to compensate the firm for this upfront work, as well as future work. We consider this work as a factor in evaluating the reasonableness of the contract at its drafting, but recognize that, as discussed below, circumstances changed over time.

(c) The clarity of Turner's Diagnosis

Turner was diagnosed with ALS in June of 2010, before this litigation began. To some degree the presence of that diagnosis reduced the complexity of the litigation for Podhurst at the time of contract signing. As a result, Podhurst's obligations regarding Turner's medical diagnosis were reduced. Podhurst was not obligated to secure additional neuropsychological or other evaluations for Turner, who was already under the care of well-respected doctors due to his prior diagnosis. (Doc. No. 10134 at 47 (explaining that Turner was being treated by Dr. Cantu prior to the initiation of the lawsuit)). Further, the early onset for Turner's diagnosis relieved Podhurst of the obligation of reviewing medical records for earlier symptom presentation. As Podhurst explained in argument, Turner's case was "an out of the ordinary case because there's less to do. He had a clear qualifying diagnosis." N.T. 10/3/2018 at 65.

Ultimately, under the Settlement Agreement, the ALS diagnosis and the number of years that Turner played in the NFL were the only facts necessary to obtain an Award. But at the time of contract signing, the proof required for an Award was not known. We recognize that in these early stages Podhurst undertook responsibility to review Turner's extensive medical history and obtained a full history relating to Turner's playing career and history of concussions.

(d) Conclusion

Polsinelli does not challenge the reasonableness of the contract at the time of signing, nor do we. The complexity of the litigation at this early stage is apparent as are the risks. The articulation of the factors known at the time of contracting that demonstrate the significant change of circumstances by the time of execution of the contract.

2. <u>The CFA at time of execution – impact of changed circumstances</u>

The fee contract between Podhurst and Turner remained in place for more than four years,

between January 18, 2012 and April 15, 2016. Between contract signing and the issuance of the fee award, the individual cases filed were consolidated into an MDL, and the litigation, broadly speaking, was resolved through a Class Action Settlement Agreement that relieved plaintiffs of their obligations relating to causation and resolved other significant legal obstacles that had existed at the outset. Further, this work anticipated in the CFA was accomplished by Class Counsel (including Podhurst), rather than Podhurst, working as an IRPA. Finally, Podhurst's services were terminated before the completion of the contract, relieving the firm of the obligation of performing the tasks required to submit a claim through the administrative process set out in the Settlement Agreement.

(a) Payment for pre-MDL work

Podhurst lawyers, like other firms who were involved in the early filings, spent months prior to filing researching the legal issues that would be faced in the litigation. N.T. 10/3/2018 at 28. Since this voluminous upfront work and collateral loss of opportunity is a consideration for lawyers when CFAs are drafted, we believe it is a necessary consideration for us as we evaluate the reasonableness of the contract at its signing. When Podhurst entered into the CFA with Turner, the fee could reasonably be considered to compensate the firm for this upfront work, as well as future work. We consider this work as a factor in evaluating the reasonableness of the contract at its drafting, but recognize that, as discussed within, circumstances changed over time.

At the time the CFA was signed, Podhurst reasonably anticipated that it would need to rely on its individually retained clients to obtain compensation for the extensive work it performed in advance of filing the complaints against the NFL. However, over the term of the contract, two things became clear: (1) that Podhurst and other law firms would be able to seek payment from what became the AFQSF to compensate them for this pre-MDL work and (2) Podhurst's stable of

individual clients grew, allowing them to benefit from economies of scale.

Podhurst included this pre-MDL work as part of the firm's request for common benefit fees, stating that the "firm began investigating the possibility of a suit against the NFL in the Summer of 2011, after receiving inquiries on behalf of several former players. After investigating the history of the NFL's handling of the problem and researching the law applicable to potential claims and likely defenses, our firm make the commitment to devote the considerable resources of personnel, time, and funds that would be necessary to take on the goliath of the NFL on an issue of vital importance to its business." (Doc. No. 7151-8 at 3). This time was not included in the firm's lodestar, as Class Counsel did not to include pre-MDL time in that calculation.[22] However, we accept, as the District Court did when it allocated common benefit fees (*see* Doc. No. 10019), Podhurst's own assertion that this was, at least in part, common benefit work, and we recognize that Podhurst received a 2.25 multiplier for the common benefit work they performed.

This does not mean that at least some of this work did not also benefit Podhurst's individual clients. We recognize that Turner benefited from his inclusion in this MDL prior to the establishment of the class. This individual work, however, was not performed exclusively for Turner, or any single client, but rather for all Podhurst's clients. Recognizing the benefit of this expertise generated by the firm's undertaking of this work, requires us to also consider economies of scale.

At one point in this litigation, Podhurst represented 569 clients. (ECF No. 18-md-2323 (E.D. Pa.), Doc. No. 28 at 4). Although that number has reduced as the litigation has progressed, the fact of the matter is that Podhurst has benefited greatly from the economies of scale. Podhurst's

[22] The MDL was established by the panel on January 31, 2012.

initial complaint, filed in late December of 2011, was filed on behalf of 21 plaintiffs. (ECF No. 11-cv-24594 (S.D. Fla.), Doc. No. 1). On January 20, 2012, the complaint was amended to add Turner as well as others, increasing the number of plaintiffs to 98. (ECF No. 11-cv-24594 (S.D. Fla.), Doc. No. 14). It was amended one final time on February 3, 2012, increasing the number of plaintiffs to 135. (ECF No. 11-cv-24594 (S.D. Fla.), Doc. No. 14). The work researching, drafting and filing this lawsuit benefited all of these clients and must be distributed between them. Only a portion of the weight of this work is fairly attributable to our reasonableness analysis of the fee agreement with Turner.

(b) Change due to Class Counsel's work

Through the Fee Cap, the District Court has already adjusted attorney fee contracts to account for the changes in circumstances that are attributable to Class Counsel's contribution generally. Podhurst benefited from those changes of circumstance, as did other firms. But, in addition, the common benefit work altered Podhurst's role in Turner's case even more significantly.

Because of Turner's role as Subclass Representative,[23] work that would have ordinarily been the responsibility of the IRPA was instead performed by attorneys working for the common benefit. Class Counsel supported Turner by advising him of the details of the settlement, helping him to present an effective media message, and by reviewing his medical records in depth. In some instances, it was Podhurst, acting as Class Counsel, who was performing these tasks. We know from Podhurst's common benefit fee request that the firm deemed this work to be common

[23] The Settlement Agreement addresses two Subclasses. Subclass 2 contained the group of retired NFL players who had received a Qualifying Diagnosis prior to the date of preliminary approval.

benefit work, not IRPA work. Since Podhurst's work performed for the common benefit subsumed work that would have otherwise been IRPA work, the changed circumstance must be considered in the evaluation of the reasonableness of the agreement at the time of its execution.

Conveying information about the negotiations and providing detailed information about the terms of the Settlement Agreement is an important obligation of the IRPA from the formation of the MDL through the start of the claims process. Here, however, as Turner was a Subclass Representative, it was Podhurst as Class Counsel, not an IRPA, who advised Turner about the intricacies of the negotiations and about the terms of the settlement. Podhurst recognized this when they submitted their work supporting Turner as a part of their common benefit claim. (N.T. 10/3/2018 7/13/2018 at 51; Doc. No. 7151-8 at 9).

Further, as Podhurst explained, Turner "wanted to make sure there was public awareness of this problem." (Doc. No. 7151-8 at 5). Ordinarily, the advice provided by counsel to a client about public appearances in light of pending litigation is best characterized as IRPA work, as the time was submitted for the benefit of the individual, not the common benefit. However, Podhurst submitted this work as a part of their common benefit declaration due to the nature of their role of Class Counsel. Podhurst partner Steven Marks ("Marks") was Co-Chair of the Communications and Ethics Committee, which "developed a communications and media plan" for the class. In that role, Marks "worked along with an outside consultant which the PEC/PSC engaged on messaging, talking points, media strategies and OpEds to reinforce the significance of this litigation and the risks involved at all levels." (Doc. No. 7151-8 at 5).

Marks' representations about this common benefit work specifically note his work with Turner to help advance this strategy for the benefit of the Class. Further, as Marks explained, his work with Turner as one of the "two main spokespersons" for the class:

> I traveled to New York and Philadelphia on multiple occasions with Kevin Turner and Shawn Wooden and assisted with the preparation of talking points and primed them for questioning. Along with the two class representatives, I also did this with many other players, and their loved ones, including Herb Orvis, Chie Smith, and others. I also spearheaded identifying suitable players and in the preparation of the "Day in the Life" video that was prepared for potential use at the Final Fairness hearing. That professionally prepared video showed firsthand the devastating effects of multiple head trauma in the daily lives of these former players. My partners also assisted with some of these tasks, which formed part of the coordinated communications and media plan.

(Doc. No. 7151-8 at 6).

Turner's selection as Subclass Representative and the co-extensive responsibilities taken on by Podhurst in its work for the common benefit were significant changes in circumstance that impact the reasonableness of the overall fee agreement. The impact of these changes will be addressed below in our discussion of the substantiality of the contribution by Podhurst as an IRPA.

(c) Termination of the CFA

Podhurst's expected role was further reduced when their contract was terminated before the litigation was completed. Podhurst urges us to conclude that all essential work was done before their fee agreement was terminated. We disagree. For the reasons set forth below, in our discussion of the work performed by Polsinelli, we conclude that the fact that Podhurst did not represent Turner during the claim submission process resulted in a reduction in their obligation to their client.

(d) Conclusion

Collectively, these are all significant changes of circumstance that we need to consider in our evaluation of the fee requested. These circumstances impact upon Turner's individual representation more than the circumstances anticipated by the District Court in its Fee Cap opinion. We therefore need to make adjustments beyond those implemented through the cap itself.

3. The results obtained

Having determined that we are dealing with a marked difference in circumstance from the time of the creation of the contract to the time of the execution – hastened by Podhurst's termination – we look to the result obtained, the quality of the work performed and the substantiality of the efforts of Podhurst as IRPA. We first observe that on June 22, 2017, Turner's Estate was Awarded a Monetary Award grid amount of $5 million, based on Turner's ALS diagnosis at the age of 42. This is the highest amount payable under the Settlement Agreement.

4. The quality of the work performed

The Parties both urge us to conclude that opposing counsel did not provide quality work for Turner: Polsinelli argues Podhurst's IRPA work was merely *de minimus*; and Podhurst argues that "the contingency was met," as there was no work left to perform after their termination. As is discussed in detail below, Podhurst provided quality work for Turner, performing many necessary tasks in this litigation. Polsinelli provided quality work as well. We accept the representations of both law firms that they maintained a quality relationship with Turner and the Estate, providing necessary individual support in navigating the legal complexities of the litigation. We suggest however that the question of "the quality of the work" does not standing alone assist our analysis. We accept that Podhurst performed at the highest level. The more important question here is to look at the substantiality of the work – that is to say what work did Podhurst do that had a substantial effect on achieving the result obtained. Polsinelli characterizes their efforts – not as Class Counsel but as an IRPA – as *de minimus,* not that it was lower quality, but that it did not make much difference in the ultimate outcome. We agree with Polsinelli that this is the right approach, but we disagree with their characterization of how substantial the work was. We

therefore lay out the quality work performed by both attorneys, to aid in our evaluation of the final factor in the *McKenzie* analysis.

We turn to the work performed by Podhurst, which provided the necessary support to Turner early in this litigation. Podhurst represented Turner for more than four years – from before the MDL was formed through much of the appellate process. Podhurst has presented evidence that they: (a) performed extensive legal research in advance of the litigation; (b) filed the lawsuit against the NFL; (c) assembled and reviewed his medical records; (d) created a Day in the Life video for use in future litigation, (e) advised Turner on collateral litigation that might impact this case and attempted to obtain an *in extremis* deposition to preserve Turner's testimony for future litigation; (f) supported Turner in his understanding of the negotiations and the Settlement Agreement; (g) assisted the family in obtaining a loan while they awaited payment of the Award; and (h) other personal matters. Although some work for Turner was co-extensive of work performed by Podhurst as Class Counsel, we reject Turner's argument that all the work performed in that time was exclusively common benefit work for which Podhurst has already been paid. As detailed here, these were services that benefited Turner individually.

(a) Legal research pre-MDL

Podhurst has asserted that the pre-MDL work performed to research the legal bases necessary to file a successful lawsuit against the NFL should be compensated. We recognize the skill and quality of the legal work performed by Podhurst in this capacity. Indeed, that skill was the reason that Podhurst partner Stephen Rosenthal was a Co-Chair of the Legal and Briefing Committee. (Doc. No. 7151-8 at 4). While we accept that Turner benefited from this expertise, we recognize that the work was performed for all Podhurst's clients and for the class at large. We consider this individual work, but we must prorate the value among these other Podhurst clients.

(b) Filing the lawsuit

Podhurst was involved in this litigation early in the process when they filed a lawsuit in the Southern District of Florida on December 22, 2011. The firm then filed an amended complaint on January 20, 2012 that included Turner. This work was clearly undertaken for Turner's benefit. Even considering that we need to divide the value among Podhurst's clients, we consider this work in part applied to Turner individually.

(c) Medical Records

Podhurst obtained and reviewed Turner's medical records. Although the medical records review in this case was less labor intensive than it might have been in other cases due to the clarity of the diagnosis, Podhurst was not entirely relieved of obligations to Turner. Prudent counsel would make certain to review and understand what is in the medical records as they could have some bearing upon the onset and progression of the disease process. The firm reports a meeting with several individuals including Dr. Cantu.[24] We accept Podhurst's representation that this meeting was about Turner's individual case.

Ultimately, it is clear that this work was performed for Turner's individual benefit exclusively. We acknowledge that early in the litigation, it was unclear what details in the medical history would prove necessary for the litigation. We expect, as was done here, that prudent counsel would diligently pursue and review of these records as a part of Podhurst's obligations to Turner in his individual capacity. Recognizing that the prior diagnosis reduced Podhurst's obligations,

[24] The Estate argues that this must be common benefit time as Dr. Cantu and the others at the meeting provided guidance on other global common benefit issues. We do not accept that to be that case. In his testimony before the District Court at the allocation hearing, Podhurst's representative noted that Dr. Cantu treated Turner. SCM Response at 11-12.

we conclude that this was significant work performed on his behalf.

(d) The Day in the Life Video

Podhurst also created a Day in the Life video documenting Turner's condition. Podhurst detailed the preparation of Day in the Life videos in their common benefit petition, submitting that this work was done for the class "for potential use at the Final Fairness hearing. . . . [as a] part of the coordinated communications and media plan." (Doc. No. 7151-8 at 6). We recognize that these videos benefited the class. But this work also would have benefited Turner had this case proceeded independently from the class action. Recognizing the realities of Turner's ALS diagnosis, prudent counsel would have wanted to preserve a demonstrative aid to show the jury a day in the life of the Turner's family, so they could understand the day-to-day difficulties of his condition. The video served a dual purpose and we credit it as such.

(e) The workers' compensation litigation and in extremis deposition

Similarly, Podhurst has urged us to include work they performed relating to the workers' compensation case that Turner had pending during this litigation. As Podhurst explained at the evidentiary hearing, during the course of the firm's representation of Turner, Podhurst advised Turner about pending workers' compensation litigation that was occurring in another jurisdiction, specifically as it related to the pending claims against the NFL. N.T. 10/3/2018 at 59. This was important work. At the time there was no way to know that this litigation would resolve through settlement. It was important for Podhurst to ensure the testimony would not undercut legal positions in this litigation. This was clearly work for Turner's individual benefit.

In the workers compensation litigation, there was a pending deposition. Podhurst attempted to get an agreement with the NFL to use the already scheduled matter as an *in extremis* deposition to be used in this litigation. N.T. 10/3/2018 at 59. When those efforts failed, Podhurst

still participated in the deposition via telephone to assist Turner in participating in such a way as to assist the workers compensation claim, but not harm his position in the NFL litigation. N.T. 10/3/2018 at 61-62. We accept that this time is properly construed as an effort to support Turner's case against the NFL.

(f) Advice to Turner throughout the litigation

We next address Podhurst's argument that their interactions with Turner were extensively relating to this litigation in an individual capacity and should be considered as support for the IRPA claim.[25] As is discussed above, due to Podhurst's interaction with Turner in its role as Class Counsel given to the firm's leadership position on various plaintiffs committees and the support that Turner received in his role of Subclass Representative, we conclude that Podhurst's IRPA obligations relating to supporting Turner while negotiations and appeals were pending must be reduced. Where an attorney – be it Podhurst or another attorney acting for the common benefit – has already been paid for the work performed supporting Turner, we may not consider a duplication of that time or work on our review of an IRPA fee for reasonableness.

(g) Loan agreement negotiation

Podhurst also argues that they helped Turner when he was seeking a loan to advance funds for his family while he awaited the receipt of his Monetary Award. The issues with predatory lending practices are well-documented through this litigation and need not be discussed here. As was discussed at the hearing, however, Podhurst's representation in this matter was not pro forma,

[25] Specifically, Podhurst submitted 2.0 hours of time for a January 25, 2012 conference with Turner, a telephone conference for an unspecified time on May 5, 2012, telephone calls and emails for an unspecified time on June 9, 2013, 2.0 hours of time for a meeting with Turner on August 15, 2013, and a telephone call for an unspecified time on August 23, 2013. Marks testified that these time entries are only a small sample, stating that "there are hundreds of hours… not accounted for." N.T. 10/18 at 107.

but rather they worked intensively in negotiating a fair lending agreement for Turner. N.T. 10/3/2018 at 50.

We recognize, however, that Polsinelli also argues that they played an active role in negotiating the loan, arguing that Podhurst only "made the introduction" and Polsinelli handled the remaining negotiations. We have reviewed the time submitted by each law firm and the exhibits admitted at the hearing on this point. It is clear to us that both law firms assisted Turner in this process and the work cannot be solely credited to Podhurst or Polsinelli. We divide the work equally between the two firms.

(h) Support in personal matters

Podhurst reports services that relate to several personal matters that are properly characterized as IRPA work. Specially, Podhurst notes that they advised Turner with respect to matters relating to his ex-wife and regarding the NFL's "Plan '88" and a disability application. As to the communications about Turner's ex-wife, the Estate argues that the time was for services provided to Turner's ex-wife, as opposed to Turner himself. We disagree. Podhurst stated that the time submitted related to their efforts in advising Turner about his ex-wife's requests. As to the completion of the disability form, the Estate is critical of the work because it is "administrative." We disagree. Much like the workers' compensation claim, the statements submitted on the form could have impacted Turner's recovery in this litigation. Prudent counsel would have taken an interest in order to protect Turner's individual award. See N.T. 10/3/2018 at 62. That said, we observe that very little time is reported to have been spent on these tasks. Other matters discussed here are more significant indicators of the nature and quality of the work performed by Podhurst.

Podhurst has also presented us with evidence of several initial client meetings, which

occurred before the CFA was signed and other time relating to a dispute between Podhurst and another firm relating to Turner's decision to sign on as a Podhurst client, instead of the other firm. We place little weight on these submissions. Work performed in persuading a client to sign with a law firm is not includable in our evaluation of quality work performed for the client's benefit. Similarly, work related to a dispute between firms about representation is not work performed for the client's benefit, but rather for the law firm's benefit.[26]

(i) Remaining work

Recognizing the quality work performed by Podhurst, we turn to the firm's argument that all of the work that needed to be done had been done by the time that their contract was terminated. We disagree and conclude that Polsinelli provided quality legal representation to Turner, which was necessary in support of his claims.

Polsinelli provided legal assistance to the Estate as they worked through the administrative process leading to the Award. The firm has provided us with a detailed accounting of their work completed after Podhurst's representation was terminated. This includes: (1) registering Turner as a member of the class, (2) submitting the claim package to demonstrate entitlement for an Award, (3) working with Esquire Bank to ensure the loan was appropriately repaid, (4) working with Garretson Resolution Group on matters relating to the Medicare reimbursement, and (5) working with the Claims Administrator to obtain the payment of the Award to Turner for acting as Subclass Representative. These were not "mundane legal chores," but rather quality work

[26] Polsinelli urges us to disallow the time as it was performed before the fee agreement was signed. We reject the argument. If a law firm worked closely with a client in its first meeting – prior to the signing of an agreement – to obtain medical records, work history or other relevant information necessary to firm before they can file a lawsuit, that work should be includable even if the fee agreement was signed after the work was performed.

performed that advanced Turner's individual interest. *See McKenzie II*, 823 F.2d at 47.

(j) Conclusion

Recognizing that both firms provided quality work that contributed to Turner obtaining his Monetary Award, we must evaluate on balance the degree to which the attorney's efforts substantially contributed to the result obtained.

5. <u>The substantiality of the work</u>

Three groups of attorneys contributed to the work necessary to obtain the Monetary Award in this case – Podhurst acting for Turner individually, Class Counsel (of which Podhurst was a significant actor), and Polsinelli. In reviewing the degree to which each substantially contributed to the result, we recognize that the District Court has already reduced the IRPA payments to account for Class Counsel's substantial contribution through the application of the Fee Cap. However, there are several factors specific to this case that compel us to conclude that Class Counsel's contribution or rather work done by Podhurst in its Class Counsel role, to this result was more substantial here given Turner's role as Class Representative and including his willingness to put himself forward with Podhurst's substantial support as the "face of the case." N.T. 7/13/2018 at 51. Podhurst's role in this regard together with Polsinelli's meaningful work gives us comfort that Podhurst as IRPA is not entitled to the 22% cap as they have urged.

As is discussed above, we generally expect there to be seven major categories of work for IRPAs who have supported their clients in this litigation. In no way is it expected that as IRPAs work will cover each of these categories. Rather, as we consider the substantiality of the IRPA efforts, we use them as check points, which may or may not have played a role in the SCM's effort to maximize his award. So, we use it as a checklist of factors to consider and weigh on balance, the substantiality of the contribution of the IRPA to the Award obtained.

Looking at Podhurst's work, it is clear they provided high quality services in this litigation, and that there were substantial risks at the time that Podhurst was engaged as counsel. Of our seven factors (*see infra* p. 24), Podhurst argues that they provided as an IRPA services relating to six of them. Polsinelli challenges this assertion in four ways. They argue that: (1) Podhurst's IRPA-services relating to the medical records was insubstantial (factor 1); and (2) Podhurst's support of Turner in his understanding of the negotiations that led to the Settlement Agreement was exclusively common benefit work, not IRPA work (factor 4); (3) Polsinelli's work submitting the claim and processing the award was substantial (factor 5); (4) Polsinelli also provided necessary services in helping Turner obtain a loan (factor 6). We address these points in order.

(a) Factor 1: Review of Medical Records

Polsinelli first argues that the Turner's early and clear diagnosis simplified the important medical issues here and we should discount Podhurst's fee accordingly. We acknowledge that the diagnosis simplified the review of Turner's medical records, as there was no requirement that Podhurst pursue other medical evidence, and ultimately the paperwork needed to submit the final claim was straightforward. But Podhurst argued that if the Settlement Agreement had not been reached and Turner's case had to go to trial, they would have needed to document Turner's condition, as his ability to testify was seriously compromised by the deterioration of his condition. As a result, the firm, acting reasonably, was obligated to take actions to preserve testimony and evidence – in the form of the Day in the Life video and the attempts to secure a deposition. Taking these circumstances as a whole, we consider only a modest reduction in Podhurst's IRPA fee on this basis.

(b) Factor 4: support for individual clients for their understanding of the process and the available options

Podhurst worked extensively with Turner and others as spokespeople for players but it did so primarily as Class Counsel – not as an IRPA, in this litigation. Without the support of Class Counsel, advice to Turner regarding public appearances and the potential impact on the litigation these tasks would have fallen upon the IRPA. Turner was advised extensively about the scope and nature of the settlement negotiations and the terms of the agreement in his role as Subclass Representative. If Turner had not been in that role, the obligation to provide that support would have fallen upon the IRPA. In that way, Class Counsel reduced the work that would have ordinarily been performed by Podhurst.

We recognize that Podhurst performed some services that fall in this category. However, we conclude that this work was substantially performed as Class Counsel and Podhurst was already paid as such.

(c) Factor 5: Shepherding the client through the claims process

We next address Podhurst's argument that Polsinelli's work was insignificant, due to the existence of the Monetary Award Grid. First, we have discussed the quality work performed by Polsinelli, which went beyond the mere submission of paperwork. The law firm provided other substantial legal support to Turner in the final stages of this claim process. Secondly, we are reluctant to disallow payment for services in the Claims process merely because the SCM's condition was previously known. Either way, the simplicity of this process does not result in the conclusion that Podhurst's work was insubstantial, but it was Class Counsel, and not Podhurst as IRPA, who was responsible for the grid. (Doc. No. 6481-1 at 122). We accept that the work done

by Polsinelli contributed to the successful resolution of the claim process. We take this into account.

(d) Factor 6: Support for clients seeking a loan

Both Podhurst and Polsinelli have argued that they provided the necessary support to Turner in his efforts to obtain a loan while he awaited the issuance of his Monetary Award. As is addressed above, based on the arguments of counsel and the documents provided, we conclude that both law firms provided substantial support in this process. We therefore divide the credit for these services equally between the law firms.

D. Conclusion

Overall, we conclude that Podhurst's IRPA contribution to the Award is insufficient to support its lien to the full 22%. The contribution of Class Counsel was more substantial in this individual litigation due to Turner's status. The work performed by Polsinelli also provided a significant contribution in bringing the litigation to a close. Accordingly, we recommend that Podhurst receive 15½ % of the Monetary Award as its fee. The 15½ % fee must still be reduced by the 5% holdback currently applicable to all attorney fee Awards. Therefore, it is our recommendation that Podhurst receive 10½ % of the overall Award at this time. Whatever portion of the 5% holdback is ultimately released by the District Court, will be provided to Podhurst at that time. We recommend that the remaining funds be distributed to Turner promptly.

IV. DISCUSSION OF PODHURST v. SMITH

Podhurst seeks 22% of the Award issued to Smith. Smith challenges the Lien arguing (1) that a second fee contract signed by Chie Smith superseded the original contract signed by Steven Smith and precludes Podhurst from any IRPA fee, and (2) even if this argument fails, Podhurst did not perform any individual work here and is therefore not entitled to any fee as IRPA. Podhurst

argues that the original contract signed by Steven Smith is the binding contract, which remains unaltered, and the firm performed all of the work necessary to obtain the Award and are therefore entitled to the full 22% available under the Fee Cap.

Before we can proceed with the *McKenzie* analysis, we consider the issues raised by the parties over which the CFA applies. We have reviewed the relevant fee agreements under the applicable law and conclude that the original fee contract was not superseded by the contract later signed by Chie Smith. We do nonetheless reject the Podhurst argument that the strict terms of the CFA control. Rather, we hold that we must assess the reasonableness of the fee in light of the five factors enumerated by the Third Circuit in *McKenzie.*

We begin with a consideration of "the reasonableness of the contingent fee arrangement" at the time of the contact's signing. *McKenzie II*, 823 F. 2d at 45, n. 1 and then determine whether the circumstances compel a different evaluation of the CFA at the time of its execution. We then look to the third, fourth and fifth *McKenzie* factors: "the results obtained, the quality of the work, and whether the attorneys efforts substantially contributed to the result." *McKenzie I*, 750 F.2d at 101.

Within our evaluation of the attorney's overall performance we are aware of our obligation to distinguish work performed for Smith as an individual SCM from work performed for the class as a whole. To the extent the work performed by Podhurst was already compensated, in whole or in part, we cannot consider it as a part of our reasonableness evaluation of the IRPA fee sought by Podhurst.

A. Facts and Procedural History

Steven Smith signed a CFA with Podhurst on January 25, 2012. Under the terms of the agreement, he agreed to pay 40% of any recovery, plus an additional 5% for any appellate

proceeding. Payment was contingent on success in the litigation. At the time that Steven Smith signed his agreement with Podhurst he had already been diagnosed with ALS.[27]

On approximately February 3, 2012,[28] Chie Smith signed a second CFA with Podhurst. The two agreements had the same financial terms, but the second CFA added the following:

> Some of the claims may be presented as a class action. If any claims are certified as a class action and successfully resolved through a settlement or final judgment, the attorneys' fees and costs for those claims will be awarded by the Court or other tribunal. Such Court-awarded attorneys' fees and costs shall override the terms of this contract concerning attorneys' fees and costs with respect to those claims, and the client will not be responsible for the above-referenced 40% fee or additional 5% fee for any recovery on those claims. The client shall still be responsible for all attorney's fees and costs applicable to any gross recovery for claims which are not certified as class action claims.

(Doc. No. 7365-6 at 2).

Smith asserts that these agreements should be treated as the operative agreement and it limits Podhurst's fee to its common benefit award. Podhurst contends that this is not the case, and that this second agreement pertains only to Chie Smith's consortium claim.

As of the signing of these agreements, Podhurst had already filed a lawsuit against the NFL on behalf of 21 retired players. *Jones, et al. v. NFL*, 11-cv-24594 (S.D. Fla. filed on December 22, 2011). On January 31, 2012, the NFL's motion for consolidation of the MDL was granted. (MDL No. 2323; Doc. No. 61). On February 3, 2012, the *Jones* complaint was amended to add both Steven Smith and Chie Smith (for loss of consortium), to 135 individuals as plaintiffs in that lawsuit. (ECF No. 11-24594 (S.D. Fla.); Doc. No. 24). *Jones* was among eleven additional cases

[27] Smith was diagnosed in July 2002.

[28] This second CFA is not dated. However, the document has a stamp at the top of the page that indicates that it was faxed on February 3, 2012. (Doc. No. 7365-6). We assume, as the Parties have, that it was signed on or about the February 3, 2012 date.

transferred on the MDL February 6, 2012. (MDL No. 2323, Doc. No. 63).

In April of 2016,[29] Chie Smith signed a third retainer agreement, on behalf of Steven Smith, with NastLaw, LLC ("Nast"), relating to work that Smith agreed to perform as Subclass Representative.[30] Under that agreement, Nast agreed to represent Steven Smith jointly with Podhurst in his role as Subclass Representative, and Nast would be paid exclusively through the common benefit fee award.

On July 19, 2016, three months after the Third Circuit had approved the Settlement Agreement, the Smiths, with Chie Smith acting on Steven Smith's behalf through a Power of Attorney, terminated the fee agreements with Podhurst. She also stated that Steven no longer wished to serve as Subclass Representative.

After the termination, the litigation of Smith's claim under the Settlement Agreement continued. Catherina Watters, Esq. ("Watters") agreed to assist them in registering and moving through the claim process *pro bono*.[31] Watters is representing the Smiths in this fee dispute as well. On March 27, 2017, Watters entered her appearance for the Smiths.

On the same date, Watters filed a notice of joinder in Turner's Motion to Resolve Attorney Fee Dispute which (*see infra* pp. 28-29) asked the District Court to preclude Podhurst from

[29] The CFA was undated, but the Parties agreed that it was signed contemporaneously with Smith's affidavit regarding his potential class representative status. That affidavit was signed on April 15, 2016. N.T. 11/16/2018 at 77.

[30] Smith was never formally appointed as Subclass Representative. The paperwork was completed to ensure an individual was available to replace Kevin Turner, who had died while the matter remained pending on appeal, should a new Subclass Representative be needed. N.T. 10/24/2018 at 182.

[31] The time entries provided by Watters reveal that she began working on the case on August 8, 2016. An engagement letter with local counsel, the Tucker Law Group, dated March 24, 2017 has been provided. SCM Statement of Dispute at Exhibit 5.

collecting any fees as an IRPA, given that they were also receiving fees as Class Counsel. (Doc. Nos. 7363 and 7365). Podhurst filed a Response to the Joinder on April 10, 2017 (Doc. No. 7465). On April 20, 2017, Smith filed a Reply. (Doc. No. 7524). On May 14, 2018, following the District Court's Opinion relating to the Fee Cap, the District Court dismissed the Motion without prejudice to Smith's right to file a Petition for Deviation raising the same issues, which they have now done. (Doc. No. 9984). On June 1, 2018, Smith filed the Petition seeking a downward departure from the 22% presumptive Fee Cap to 0%, arguing that Podhurst had already been compensated for any work performed for Smith by the common benefit fee they received. (Doc. No. 10037).

On October 3, 2017, while those matters were pending in District Court, the Claims Administrator issued a Notice that the Lien that had been filed and provided Smith twenty days to consent to or dispute the Lien. On the same day, Watters advised the Claims Administrator of the Smith's intention to dispute the Lien. On October 4, 2017, the Claims Administrator issued a Notice of Monetary Award Claim Determination to Smith.

On June 11, 2018, upon conclusion of the common benefit fee litigation, the issuance of the District Court's Fee Cap Opinion, and the issuance of the Attorney Lien and Deviation Rules, the Claims Administrator issued a Schedule of Document Submissions setting the deadlines for the pleadings that needed to be submitted to resolve the Lien Dispute. On July 11, 2018, pursuant to Lien Rule 14 (Doc. No. 9760 at 9),[32] the Parties submitted their Statements of Dispute to the Claims Administrator. On August 7, 2018, pursuant to Lien Rule 15 (Doc. No. 9760 at 10), the Parties submitted their Response Memoranda. Both Parties then requested a hearing, which we granted. On July 24, 2018, with the consent of both Parties, having concluded that the arguments

[32] The pleadings were filed under our original Lien Rules, not the Lien Rules as later amended.

in the Petition for Deviation were already before us in the pleadings filed in the Attorney Lien Litigation, we denied the Petition for Deviation as moot. (Doc. No. 10161). Pursuant to Lien Rule 17, the Record of Dispute was transferred to this Court. On October 24, 2018 and November 16, 2018, we held a bifurcated evidentiary hearing, allowing the admission of evidence and argument for both sides.

B. Which CFA Applies

The Smiths argue that the binding language in this case comes from the contract signed by Chie Smith on February 3, 2012, which clearly provides that Podhurst will not be entitled to a contingency fee if the case is resolved as a class action. They argue that it was always Chie Smith's understanding that this language was contained in both agreements, and therefore, they would not now be responsible for any fee. Podhurst disputes this assertion, arguing that the two agreements were always distinct – one between the firm and Steven Smith and a second between the firm and Chie Smith for her consortium claim – and therefore the contract signed by Chie should have no bearing at all on this Court's analysis of this Lien Claim based on the firm's contract with Steven Smith. Further, Podhurst argues that the Smiths always understood these to be separate contracts, and that there was no confusion on the point.

As we must interpret the language of contracts to determine to resolve this dispute we are urged by the parties to look to Florida law. Ultimately, however, we do not get to a choice of law question as we are dealing with a factual dispute, which we resolve in favor of Podhurst based upon the evidence presented at the hearing.

In the first fee contract, the "undersigned client" referenced is Steven Smith.[33] (Doc. No.

[33] Chie Smith signed this agreement on Steven Smith's behalf under her power of attorney. (Doc. No. 7365 at 4).

7365-1 at 2). In second fee contract, the "undersigned client" referenced is Chie Smith. Podhurst has argued that this is consistent with its position that the second fee contract was an agreement to pursue a loss of consortium claim for Chie Smith.

Smith notes that the contract does not state that it is exclusively for the pursuit of a consortium claim and the language of the contract itself is not entirely clear. We acknowledge that the contract itself does not state that it is narrowly for the pursuit of a consortium claim. Rather it says that it is an agreement for representation in a lawsuit against the NFL for "injuries sustained while a player in the NFL." (Doc. No. 7365-6 at 2). Of course, it was Steven, not Chie Smith, who incurred those injuries while a player.

Podhurst has not provided an explanation for this discrepancy or the absence of specific language in the contract. Steven Marks, the Podhurst lawyer responsible for this litigation, did testify, however, that the firm did not automatically pursue consortium claims for most of their clients who were asymptomatic. However, in some instances, the claims were pursued. The first amended complaint in *Jones*, filed on behalf of symptomatic clients but before Podhurst signed a fee agreement with the Smiths, included consortium claims on behalf of some fifteen spouses. The second amended complaint added only Chie Smith to the list of spouses pursuing this claim.

Smith argues that the two contracts were sufficiently unclear that she was confused about the language and that we should consider the ambiguities in our evaluation of the contracts. We are sympathetic to this argument, but conclude that the reference to Chie Smith as the signatory and the "undersigned client" makes it sufficiently clear that the sole purpose of the contract was for the pursuit of a derivative claim for Ms. Smith only. The timing of the contract's signing and the firm's pursuit of the consortium claim on Chie Smith's behalf reinforce this conclusion. Further, the record demonstrates that Ms. Smith understood that these were distinct contracts. In

a July 16, 2016 email to Podhurst, Chie Smith wrote: "I also signed a separate document from Ricardo [Martinez-Cid]. This document is for "Spouse" vs the NFL as the derivative claimant." (Doc. No. 7365-5 at 1). In the Joinder submitted in the District Court, the Smiths again indicated that the agreement signed on January 25, 2012, was signed for Steven Smith and the agreement with the February 3, 2012 was signed by Chie Smith "on her own behalf." (Doc. No. 7365 at 4).

Finally, Watters argues on behalf of Smith that Ms. Smith believed that the terms in the second contract were the same as the terms in the first and therefore superseded the first. This, Smith argues, was a fair assumption because the fee agreement signed by Steven Smith was difficult to read. We have reviewed copies of both contacts and acknowledge that the agreement signed by Steven Smith is somewhat difficult to read, but if examined carefully it can be read. (Doc. No. 7365-1 at 2). Further, a comparison of the agreements makes it clear that the relevant paragraph is an additional paragraph in the second contract only. We do not believe that any difficulty in reading the first contract could provide a sufficient basis to imply conditions in the second agreement should be read into the first.

We reject this claim and conclude that the first fee agreement, signed by Steven Smith in January 2012, is the relevant fee contract for purposes of this litigation. The agreement signed by Chie Smith in February of 2012 controls any claim that Ms. Smith may have had as a Derivative Claimant.[34]

C. The Impact of the CFA

Having determined that the first CFA signed by Steven Smith on January 25, 2012 is the

[34] At the hearing, Podhurst stated that they were not pursuing any separate claim for fees against Ms. Smith's 1% Derivative Claimant Award. N.T. 10/24/2018 at 8. (*See* Doc. No. 6481-1 at 42-43(Article VII of the Settlement Agreement detailing Derivative Claimant Awards)).

proper agreement for us to consider, we review its particular terms. The Parties agree that the original contract was an agreement to pay 40% recovery of any monetary award, plus an additional 5% for any appellate proceeding. It is further agreed that Podhurst later reduced its contingency fee percentage to 25%, but that following the District Court's presumptive Fee Cap Order, the firm accepts that the fee cannot exceed 22%. Lienholder's Statement of Dispute at 14.

Subject only to their argument that the second CFA applies, Smith argues that the 22% fee requested is "unreasonable," because "time [Podhurst] spent on individual legal representation, if any, could only be *de minimus*, thus no separate individual additional fee should be awarded." SCM's Statement of Dispute at 3. We discuss the "reasonableness" of the total fee in detail below.

Podhurst argues that they "should be awarded its full contractual fee because the contingency occurred." Lienholder Statement of Dispute at 5. For the reasons set out in our discussion of CFA between Podhurst and Turner, we are unwilling to give credence to this concept. (*See infra* pp. 30-34). Whether the contract was fully completed or not, Podhurst is obliged to demonstrate that the fee they were seeking was "reasonable" under the standards articulated by the Third Circuit in *McKenzie*. We now turn to *McKenzie*.

D. Applying *McKenzie* "reasonableness"

Our inquiry begins "by scrutinizing the reasonableness of the contingent fee arrangement" at the time of the contract's signing and comparing it to the circumstances at the time of execution. *McKenzie II*, 823 F.2d at 45 n.1. Recognizing that the District Court has already adjusted fee agreements through the Fee Cap to account for the changed circumstances that occurred over the course of this case, we must determine if there were other factors specific to this individual litigation that should be considered in our assessment of the reasonableness of the fee at the time of the contract's execution. We will then review (1) the result in the case, (2) the quality of the

work performed by the attorneys, and (3) the substantiality of that contribution on the overall result.

As is discussed in greater detail below, circumstances here, at the time of contracting and the time of execution, changed significantly, necessitating an adjustment to the fee beyond that contemplated within the District Court's presumptive Fee Cap. In evaluating the remaining three prongs, we are satisfied that both Podhurst and Watters provided quality work and made substantial contributions to the ultimate Award received in this case. Considering the substantiality of Podhurst's contribution as an IRPA, as reduced to account for the contributions of Class Counsel and Watters, we recommend that Podhurst receive a fee of 17%, which will be reduced by the amount of the 5% holdback that the District Court deems necessary.

1. <u>The CFA at time of contracting</u>

Our inquiry begins "by scrutinizing the reasonableness of the contingent fee arrangement" at the time of the contract's signing. *McKenzie II*, 823 F.2d at 45 n.1. Here, there are two primary factors that we must examine: (1) the legal challenges in the plaintiff's pursuit of a monetary award and (2) the time-intensive nature of the litigation. Podhurst signed a fee agreement with Smith very early in this litigation, when consolidation as an MDL was likely, but not certain. The legal challenges to the litigation remained substantial, but there was a strong likelihood that much of the considerable time-intensive work that counsel were facing would be streamlined by the creation of the benefits of the MDL.

(a) Filing before MDL consolidation

Podhurst signed a CFA with Smith on January 25, 2012. This was arguably at the very end of what Professor Rubenstein described as Phase 1, but effectively in the earliest stages of Phase 2. On December 22, 2011, prior to signing the CFA with Smith, Podhurst filed their initial

complaint seeking damages against the NFL on behalf of 21 retired players. Although Smith was not signed as a client at this phase, it was this lawsuit that he eventually joined. Ultimately, however, the difference between the two dates has little impact. On both dates, consolidation into the MDL was virtually certain, considering the agreement of all relevant parties as to the joinder and the volume of cases that had been filed by that point.

Podhurst urges us to conclude that the risks remained unchanged after the formation of the MDL, as the legal obstacles remained the same. As the firm argued, "we were looking at tremendous difficulty with respect to individual causation . . . for each individual player with their own history and medical history . . . plus . . . science of proving the concussions led to these [impairments]." N.T. 10/24/2018 at 38. We agree. But that is only part of the story.

As is discussed in detail above (*see infra* pp. 36-37), the formation of the MDL committees allowed a central group to perform the work for the class, and relieved IRPAs from having to complete the work independently. This certainly benefited IRPAs. Podhurst has acknowledged as much. N.T. 10/24/2018 at 17. The amount of work necessary to carry the litigation to resolution must be a factor in assessing a fee agreement. No matter the odds of success, a case that will require more hours is necessarily riskier than a case that will be resolved with few hours consumed. The consolidation of these cases into an MDL necessarily spread out the volume of necessary work. This impacts the extent of the risk for the law firm.[35]

Despite the reduction of overall workload built into an MDL, we agree with Podhurst that before the Settlement Agreement was reached, the legal risks in this litigation were substantial.

[35] Podhurst also provided services in its role on various Plaintiffs Committees for the MDL. But the firm has already been paid for that time and for the risk incurred in performing the work on a contingent basis. It is not properly considered as a risk attributable to their representation of Smith.

Consolidation, however, did not eliminate risk. Despite the opportunity to spread out the workload, there were still substantial risks for Smith. *See* (Doc. No. 9860 at 10 (describing this as a "a high-risk, long-odds litigation.")).

Furthermore, Podhurst's work in drafting and filing a lawsuit against the NFL was a necessary part of this litigation when Smith retained the law firm. To participate in the MDL, Smith needed to be a party in a lawsuit, which could be transferred into the soon-to-be-created MDL. Podhurst took on that risk when they filed the necessary pleadings.

(b) Pre-MDL work as IRPA work

Podhurst lawyers, like other firms who were involved in the early filings in this litigation, spent months prior to the filing of their initial lawsuit researching the legal issues that would be faced in the litigation. N.T. 10/24/2012 at 42. This voluminous upfront work creates a collateral loss of opportunity, which is an appropriate and necessary consideration for lawyers when negotiating the terms of CFAs. When Podhurst entered into the CFA with Smith, the fee could reasonably be considered to compensate the firm for this upfront work, as well as future work. We consider this work as a factor in evaluating the reasonableness of the contract at its drafting, but recognize that, as discussed below, circumstances changed over time.

(c) The clarity of Smith's Diagnosis

Smith was diagnosed with ALS in July of 2002, before this litigation began. To some degree the presence of that diagnosis reduced the complexity of the litigation for Podhurst at the time of contract signing. As a result, Podhurst's obligations regarding Smith's medical diagnosis were reduced. Podhurst was not obligated to secure additional neuropsychological or other evaluations for Smith, who was already under the care of doctors due to his prior diagnosis.

Ultimately, under the Settlement Agreement, the ALS diagnosis and the number of years

that Smith played in the NFL were the only facts necessary to obtain an Award. But at the time of contract signing, the proof required for an Award was not known. In preparation of potential individual litigation, Podhurst obtained and reviewed approximately 150 pages of medical records obtained from Smith's doctors. Podhurst Hearing Exhibits, Exhibit F. Additionally, the firm obtained a full history relating to Smith's playing career and history of concussions. Podhurst Hearing Exhibits, Exhibit E.

(d) Conclusion

We do not challenge the reasonableness of the contract at the time of signing. The complexity of the litigation at this early stage is apparent as are the risks. The articulation of the factors known at the time of contracting demonstrate the significant change of circumstances during the term of the contract.

2. <u>The CFA at time of execution – impact of changed circumstances</u>

The fee contract between Podhurst and Smith remained in place for more than four years, between January 25, 2012 and July 19, 2016. Between contract signing and the issuance of the fee award, the individual cases filed were consolidated into an MDL, and the litigation, broadly speaking, was resolved through a Class Action Settlement Agreement that relieved plaintiffs of their obligations relating to causation and resolved other significant legal obstacles that had existed at the outset. Further, this work anticipated in the CFA was accomplished by Class Counsel (including Podhurst), rather than Podhurst, working as an IRPA. Finally, Podhurst's services were terminated before the completion of the contract, relieving the firm of the obligation of performing the tasks required to submit a claim through the administrative process set out in the Settlement

Agreement.

(a) Payment for pre-MDL work

Podhurst lawyers, like other firms who were involved in the early filings, spent months prior to filing researching the legal issues that would be faced in the litigation. N.T. 10/3/2018 at 28. Since this voluminous upfront work and collateral loss of opportunity is a consideration for lawyers when CFAs are drafted, we believe it is a necessary consideration for us as we evaluate the reasonableness of the contract at its signing. When Podhurst entered into the CFA with Smith, the fee could reasonably be considered to compensate the firm for this upfront work, as well as future work. We consider this work as a factor in evaluating the reasonableness of the contract at its drafting, but recognize that, as discussed within, circumstances changed over time.

As with their representation of Turner, Podhurst reasonably anticipated that it would need to rely on its individually retained clients to obtain compensation for the extensive work it performed in advance of filing the complaints against the NFL. However, over the term of the contract, two things became clear: (1) that Podhurst and other law firms would be able to seek payment from what became the AFQSF to compensate them for this pre-MDL work and (2) Podhurst's stable of individual clients grew, allowing them to benefit from economies of scale.

Podhurst included this pre-MDL work as part of the firm's request for common benefit fees, stating that the "firm began investigating the possibility of a suit against the NFL in the Summer of 2011, after receiving inquiries on behalf of several former players. After investigating the history of the NFL's handling of the problem and researching the law applicable to potential claims and likely defenses, our firm make the commitment to devote the considerable resources of personnel, time, and funds that would be necessary to take on the goliath of the NFL on an issue of vital importance to its business." (Doc. No. 7151-8 at 3). This time was not included in the

firm's lodestar, as Class Counsel did not to include pre-MDL time in that calculation.[36] However, we accept, as the District Court did when it allocated common benefit fees (*see* Doc. No. 10019), Podhurst's own assertion that this was, at least in part, common benefit work, and we recognize that Podhurst received a 2.25 multiplier for the common benefit work they performed.

This does not mean that at least some of this work did not also benefit Podhurst's individual clients. We recognize that Smith benefited from his inclusion in this MDL prior to the establishment of the class. This individual work, however, was not performed exclusively for Smith, or any single client, but rather for all Podhurst's clients. Recognizing the benefit of this expertise generated by the firm's undertaking of this work, requires us to also consider economies of scale.

At one point in this litigation, Podhurst represented 569 clients. (ECF No. 18-md-2323 (E.D.Pa.), Doc. No. 28 at 4). Although that number has reduced as the litigation has progressed, the fact of the matter is that Podhurst has benefited greatly from the economies of scale. Podhurst's initial complaint, filed in late December 2011, was filed on behalf of 21 plaintiffs. (ECF No. 11-cv-24594 (S.D.Fla.), Doc. No. 1). On February 3, 2012, the complaint was amended for a second time, adding both Steven Smith and Chie Smith, as well as others, increasing the number of plaintiffs to 135. (ECF No. 11-cv-24594 (S.D.Fla.), Doc. No. 14). The work researching, drafting and filing this lawsuit benefitted all of these clients and must be distributed between them. Only a portion of the weight of this work is fairly attributable to our reasonableness analysis of the fee agreement with Smith.

[36] The MDL was established by the panel on January 31, 2012.

(b) Change due to Class Counsel's work

Through the Fee Cap, the District Court has already established that there was a significant change in circumstances largely attributable to Class Counsel's contribution. Podhurst benefited from those changes of circumstance, as other firms did. But, in addition, the common benefit work altered Podhurst's role in Smith's case even with greater significance.

We consider this as we examine whether a portion of Podhurst's work performed for the common benefit is duplicative of work that would normally have been done by the IRPA. The nature of Podhurst's role in working for the common benefit therefore results in a changed circumstance that must be considered in the evaluation of the reasonableness of the agreement at the time of its execution.

Podhurst partner Steven Marks was Co-Chair of the Communications and Ethics Committee, which "developed a communications and media plan" for the class. In that role, Marks "worked along with an outside consultant which the PEC/PSC engaged on messaging, talking points, media strategies and OpEds to reinforce the significance of this litigation and the risks involved at all levels." (Doc. No. 7151-8 at 5). In effectuating this strategy, Marks specifically noted the public work done by Chie Smith to help advance this strategy for the benefit of the Class. In the same Common Benefit Declaration, Marks identifies how the preparation of a Day in the Life video in several of the Podhurst cases provided advantage to the Class during the Fairness hearing. (Doc. No. 7151-8 at 6). Marks stated: "I also spearheaded identifying suitable players and in the preparation of the Day in the Life video that was prepared for potential use at the Final Fairness hearing. That professionally prepared video showed firsthand the devastating effects of multiple head trauma in the daily lives of these former players. My partners also assisted with some of these tasks, which formed part of the coordinated communications and media plan." (Doc.

No. 7151-8 at 6).

Undoubtedly, this work would have benefited Smith had this case proceeded independently from the class action. We accept Marks' testimony that the Day in the Life video was shot in part because they were concerned that something could happen to Smith that would have rendered him unavailable and they wanted to preserve a demonstrative aid to show a day in the life of the Smith family to a jury so that they could understand the "pain and suffering" that was endured. N.T. 10/28/2018 at 89-96, 186. But as Marks himself explained, the video was also procured to benefit the class, and would be available for that purpose as well. (Doc. No. 7151-8 at 6).

Smith notes that Podhurst's common benefit time included work in "vetting the background and medical records of hundreds of former players to identify suitable class representatives. This task entailed investigating their backgrounds, interviewing family and friends, and conducting detailed research into their playing histories to make sure that they were adequate and proper class representatives." (Doc. No. 7151-8 at 9). Smith argues that this work must have included a review of Smith's records, as Smith was chosen as the alternate Subclass 2 representative after Turner's death. Podhurst, however, disputes this point, explaining that Smith's records were not thoroughly reviewed for this purpose as his condition was considered too advanced at the time the initial selection of Subclass Representative was made. N.T. 0/24/208 at 179-183. We accept Podhurst's assertion that it did not perform a thorough review of Smith's medical records in this vetting process, and therefore the time as was spent should not be divided between IRPA and Class Benefit work but should rather be considered IRPA work.

(c) Termination of the CFA

Podhurst's expected role was further reduced when their contract was terminated before the litigation was completed. Podhurst urges us to conclude that all essential work was done before

their fee agreement was terminated. We disagree. For the reasons set forth below, in our discussion of the work performed by Watters, we conclude that the fact that Podhurst did not represent Smith during the claim submission process resulted in a reduction in their obligation to their client.

(d) Conclusion

Collectively, these are all significant changes of circumstance that we need to consider in our evaluation of the fee requested. These circumstances impact upon Smith's individual representation more than the circumstances anticipated by the District Court in its Fee Cap opinion. We, therefore, need to make adjustments beyond those implemented through the cap itself.

3. <u>The results obtained</u>

Having determined that we are dealing with a marked difference in circumstance from the time of the creation of the contract to the time of the execution – hastened by Podhurst's termination – we look to the result obtained, the quality of the work performed and the substantiality of the efforts of Podhurst as IRPA. We first observe that on October 4, 2017, Smith received notice that he would be Awarded $5 million, based on Smith's ALS diagnosis at the age of 37. This represents the highest amount payable under the Settlement Agreement.

4. <u>The quality of the work performed</u>

The Parties both urge us to conclude that opposing counsel did not provide quality work for Smith: Watters argues Podhurst's IRPA work was merely *de minimus*; and Podhurst argues that "the contingency was met," as there was no work left to perform after their termination. As is discussed in detail below, Podhurst provided a high level of service to Smith, performing many

necessary tasks in this litigation. However, after Podhurst was terminated, significant work remained, which was competently undertaken by Watters.

In evaluating the quality of work performed, we recognize the high level of service that Podhurst provided both to the class and to Smith individually. We suggest however that the question of "the quality of the work" does not standing alone assist our analysis. We accept that Podhurst performed at the highest level. The more important question here is to look at the substantiality of the work – that is to say what work did Podhurst do that had the most substantial effect on achieving the result obtained. Watters characterizes their efforts – not as Class Counsel but as an IRPA – as *de minimus*, not that it was lower quality, but that it did not make much difference in the ultimate outcome. We disagree. We therefore layout the quality work performed by both attorneys, to aid in our evaluation of the final factor in the *McKenzie* analysis.

We turn to the work performed by Podhurst, which provided the necessary support to Smith early in this litigation. Podhurst represented Smith for more than four years – from before the MDL was formed through much of the appellate process. Podhurst has presented evidence that they: (a) performed extensive legal research in advance of the litigation; (b) filed the lawsuit against the NFL; (c) assembled and reviewed his medical records; (d) created a Day in the Life video for use in future litigation and attempted to obtain an *in extremis* deposition to preserve Smith's testimony for future litigation, (e) advised Smith on collateral litigation that might impact this case; (f) supported Smith in his understanding of the negotiations and the Settlement Agreement; (g) assisted the family in obtaining a loan while they awaited payment of the Award; and (h) resolved other personal matters. Although some work for Smith was co-extensive of work performed by Podhurst as Class Counsel, we reject Smith's argument that all the work performed was exclusively common benefit work for which Podhurst has already been paid. As detailed here,

these were services that benefited Smith individually.

(a) Legal research pre-MDL

Podhurst has asserted that the pre-MDL work performed to research the legal bases necessary to file a successful lawsuit against the NFL should be compensated. We recognize the skill and quality of the legal work performed by Podhurst in this capacity. Indeed, that skill was the reason that Podhurst partner Stephen Rosenthal was a Co-Chair of the Legal and Briefing Committee. (Doc. No. 7151-8 at 4). While we accept that Smith benefited from this expertise, we recognize that the work was performed for all Podhurst's clients and for the class at large. We consider this individual work, but we must prorate the value among these other Podhurst clients.

(b) Filing the lawsuit

Podhurst was involved in this litigation early in the process when they filed a lawsuit in the Southern District of Florida on December 22, 2011. The firm then filed an amended complaint on February 8, 2012 that included Smith. Although this case was resolved as a Class Action and these initial filings were not ultimately required for the litigation, this work was performed for Smith's benefit. Recognizing the need to divide the value among Podhurst's clients, we consider this work applied to Smith individually.

(c) Medical Records

Podhurst obtained and reviewed Smith's medical records.[37] Although the medical records review in this case were less labor intensive than in other cases, due to the clarity of the diagnosis, Podhurst was not entirely relieved of obligations to Smith. As Marks explained, the medical

[37] Smith argued that Podhurst had not obtained these records based on an affidavit from his doctor. However, Podhurst has provided these documents as an exhibit, so it is clear that the firm did obtain the records.

records obtained were voluminous due to Smith's treatment history. N.T. 10/24/2018 at 117. We acknowledge that early in the litigation, it was unclear what details in the medical history would prove necessary for the litigation. We expect, as was done here, that prudent counsel would diligently pursue and review of these records as a part of Podhurst's obligations to Smith in his individual capacity.

(d) The Day in the Life Video and the in extremis deposition

Podhurst also created a Day in the Life video documenting Smith's condition. Podhurst explained that they obtained a Day in the Life video to preserve evidence of Smith's condition to present to a jury if the opportunity later arose. N.T. 10/24/2018 at 91. As is discussed above, this work was also a part of the common benefit work that Podhurst presented to the District Court. (Doc. No. 7151-8 at 6). We recognize that these videos benefited the class. But recognizing the realities of Smith's ALS diagnosis, prudent counsel would have wanted to preserve a demonstrative aid to show the jury a day in the life of the Smith family, so they could understand the day-to-day difficulties of his condition. The video served a dual purpose and we credit it as such.

Similarly, Podhurst also attempted to obtain an in *extremis* deposition to ensure Smith's testimony could be preserved. Ultimately, these efforts were unsuccessful, but we recognize it as an attempt to advance the interests of their individual client, should the matter proceed as an individual case at a future date. Again, this is the type of quality work that we would expect from prudent counsel in this litigation. We credit this as work performed for Smith's individual case.

(e) Other litigation

During its representation of Smith, Podhurst was asked to review the *Dryer* litigation to assess if there was any possible collateral impact on this litigation. *Dryer v. NFL* was a class action

relating to publicity rights. Smith was a potential class member who needed to assess if he wished to participate or opt out of the litigation. *See generally* Podhurst Hearing Exhibits, Exhibit D (documenting the materials reviewed). Although Podhurst did not represent Smith in that matter, the firm reviewed the litigation to ensure Smith's decisions in that matter did not jeopardize his claims in this litigation against the NFL. N.T. 10/24/2018 at 122. We characterize this, partially at least, as IRPA work.

(f) Advice to Smith throughout the litigation

Podhurst advised Smith about the status of the negotiations and appeals throughout this litigation. Unlike Turner, who was extensively advised due to his status as Subclass Representative, which spanned much of the litigation, Smith was primarily advised of the status of the proceeding in the ordinary course, as were other individuals who ultimately became the Class Members in this litigation.

We recognize that Smith did agree to become a Subclass Representative, when Turner was no longer able to perform the role. Smith took on that responsibility in April of 2016, and although he was never formally appointed Subclass Representative, he was advised as such at that point in the litigation. Where an attorney – be it Podhurst or another attorney acting for the common benefit – has already been paid for the work performed supporting Smith, we may not consider a duplication of that time or work on our review of an IRPA fee for reasonableness. Ultimately, however, this support provided by Class Counsel was less extensive than we discussed with Turner. By April of 2016, the Settlement Agreement had already been signed and the appeals had been briefed and argued. Indeed, the Third Circuit's opinion affirming the District Court's approval of the Settlement was decided in April 2016, which made it almost certain that Smith would not need to step in as Subclass Representative. We, therefore, recognize that almost all of

the support Smith received in understanding the litigation was provided by Podhurst, in their role as IRPA, not Class Counsel.

(g) Loan agreement negotiation

Podhurst also argues that they helped Smith when he was seeking a loan to advance funds for his family while he awaited the receipt of his Monetary Award. The issues with predatory lending practices are well documented through this litigation and need not be discussed here. Smith argues that all of the work negotiating the loan was performed by Co-Lead Class Counsel, and not Podhurst. We disagree. While co-lead Class Counsel may have had a role, Podhurst's representation in this matter was not pro forma. They have demonstrated that they worked intensively in negotiating a fair lending agreement for Smith. *See generally* Podhurst Hearing Exhibits, Exhibit B (documenting the work done in negotiating the loan); N.T. 10/24/2018 at 98-99.

(h) Support in personal matters

Finally, Podhurst reports services that relate to several personal matters for Smith that were not directly related to this litigation – advice relating to copyright on a book and referral for a Trust Attorney. We conclude that there may be some challenges as to whether this is proper IRPA work, and that these efforts were not substantial as conceded by Podhurst at the hearing.

(i) Remaining work

Recognizing the quality work performed by Podhurst, we turn to the firm's argument that all of the work that needed to be done, had been completed by the time that their contract was terminated. We disagree and conclude that Watters provided quality legal representation to Smith, which was necessary in support of his claims.

Watters provided legal assistance to Smith as he worked through the administrative process

leading to the Award. Watters provided us with a detailed accounting of the work completed after Podhurst's representation was terminated. This includes: (1) registering Smith as a member of the class, (2) submitting the claim package to demonstrate entitlement for an Award, (3) preparing Chie Smith, acting on behalf of Steven Smith, for certain interviews with news agencies, (4) assisting the Smiths in the resolution of an issue relating to a Power of Attorney; (5) ensuring that loans against the Award were properly repaid,[38] (6) ensuring that various liens were resolved, and (7) managing the distribution of the Monetary Award. These were not "mundane legal chores," but rather quality work performed that advanced Smith's individual interest. *See McKenzie II,* 823 F.2d at 47.

In defining the role of the IRPA, the District Court noted the need for IRPAs to assist their individual clients through this claim process. Although the medical diagnosis in this case was straightforward, issues relating to the liens and transfers of funds were not. These supports are clearly quality work that advanced Smith's individual interest and aided him in receiving the Award.

(j) Conclusion

Recognizing that both Podhurst and Watters provided quality work that contributed to Smith obtaining his Monetary Award, we must evaluate on balance the degree to which the attorney's efforts substantially contributed to the result obtained.

5. <u>The substantiality of the work</u>

Three groups of attorneys contributed to the work necessary to obtain the Monetary Award

[38] Watters worked with Esquire Bank to resolve issues relating to the loan negotiated by Podhurst. Specifically, the original loan contained a prohibited assignment, and a renegotiation was necessary to obtain the funds and resolve the lien. N.T. 11/6/2018 at 45.

in this case – Podhurst acting for Smith individually, Class Counsel (of which Podhurst was a significant actor), and Watters. In reviewing the degree to which each substantially contributed to the result, we recognize that the District Court has already reduced the IRPA payments to account for Class Counsel's substantial contribution through the application of the Fee Cap. However, there are several factors specific to this case that compel us to conclude that Class Counsel's contribution or rather work done by Podhurst in its Class Counsel role to this result was somewhat more substantial here. Further, substantial work was performed by *pro bono* counsel, which must to be factored into our analysis of the fee to be distributed to Podhurst.

As is discussed above, we generally expect there to be seven major categories of work for IRPAs who have supported their clients in this litigation. In no way is it expected that as IRPAs work will cover each of these categories. Rather, as we consider the substantiality of the IRPA's efforts, we use them as check points, which may or may not have played a role in the SCM's effort to maximize his award. So, we use it as a checklist of factors to consider and weigh on balance, the substantiality of the contribution of the IRPA to the Award obtained.

Looking at Podhurst's work, it is clear that they provided substantial, high quality services in this litigation, and that there were substantial risks at the time that Podhurst was engaged as counsel. Of our seven factors (*see infra* p. 24), Podhurst argues that they provided as an IRPA services relating to six of them. Smith challenges this assertion in four ways. He argues: (1) Podhurst's IRPA-services relating to the medical records were insubstantial (factor 1); and (2) Podhurst's support of Turner in his understanding of the negotiations that led to the Settlement Agreement was exclusively common benefit work, not IRPA work (factor 4); (3) Watters' work submitting the claim and processing the award was substantial (factor 5); and (4) Class Counsel, not Podhurst, negotiated the loan (factor 6). We address these points in order.

(a) Factor 1: Review of Medical Records

Watters first argues that the Smith's early and clear diagnosis simplified the important medical issues here and that we should discount Podhurst's fee accordingly. We acknowledge that the diagnosis simplified the review of Smith's medical records, as there was no requirement that Podhurst pursue other medical evidence, and ultimately the paperwork needed to submit the final claim was straightforward. But Podhurst argued that if the Settlement Agreement had not been reached and Smith's case had to go to trial, they would have needed to document Smith's condition, as his ability to testify was seriously compromised by the deterioration of his condition. As a result, the firm, acting reasonably, was obligated to take actions to preserve testimony and evidence – in the form of the Day in the Life video and the attempts to secure a deposition. Taking these circumstances as a whole, we consider only a modest reduction in Podhurst's IRPA fee on this basis.

(b) Factor 4: support for individual clients for their understanding of the process and the available options

Watters argues that the "only conversations with Podhurst involved Steven Smith's involvement in the common benefit case." SCM's Statement of Dispute at 5. We disagree.

Smith acknowledges that he received emails throughout the negotiations and appellate process about the status of the case. *Id.* We acknowledge that many of these emails were distributed among the firm's many clients and that some discount for the apparent economies of scale is necessary. At the same time, we are also aware that Smith did with some regularity receive advice as to the status of his individual case.

We recognize that for a brief period of time, Smith was being advised by Class Counsel about the status of the proceedings, due to his role as Subclass Representative. In that time period,

Class Counsel reduced the work that would have ordinarily been performed by Podhurst. Therefore, a small reduction to account for this support by Class Counsel is necessary.

(c) Factor 5: Shepherding the client through the claims process

We next address Podhurst's argument that Watters' work was insignificant, due to the existence of the Monetary Award Grid. First, we have discussed the quality work performed by Watters, which went beyond the mere submission of paperwork. Watters provided substantial legal support to Smith in the final stages of this claim process. Second, we are reluctant to disallow payment for services in the Claims process merely because the SCM's condition was previously known. Either way, the simplicity of this process does not result in the conclusion that Podhurst's work was insubstantial, but it was Class Counsel, and not Podhurst as IRPA, who was responsible for the grid. (Doc. No. 6481-1 at 122). We accept that the work done by Watters contributed to the successful resolution of the claim process. We take this into account.

(d) Factor 6: Support for clients seeking a loan

Smith argues that Podhurst did not assist him in obtaining a loan, but rather the loan was secured by Class Counsel. Podhurst has argued that the firm "negotiated with lenders over the course of several months to obtain a substantial loan for the Smiths." Lienholder's Response at 7. Podhurst has provided evidence documenting these negotiations. Lienholder Response Memorandum, Exhibit A. We conclude that these materials demonstrate that Podhurst's work in negotiating the loan provided a substantial benefit to Smith.

We recognize, however, Watters' argument – unchallenged by Podhurst – that she was obligated to work with Esquire Bank to renegotiate the loan agreement, because the agreement contained language which provided that Smith was assigning his interest in the Award to the lender, which was prohibited under the Settlement Agreement. SCM's Statement of Dispute at

125. As such, the terms of the loan had to be renegotiated before it could be paid out. We therefore must recognize the work provided by both Podhurst and Watters relating to this factor.

E. Conclusion

Overall, we conclude that Podhurst's IRPA contribution to the Award is insufficient to support its lien to the full 22%. This was primarily because of the work that was performed by Watters supporting Smith in the claim submission process. We note, however, that the contribution of Class Counsel was slightly more substantial in this individual litigation. Accordingly, we recommend that Podhurst receive 17% of the Monetary Award as its fee. The 17% fee must still be reduced by the 5% holdback currently applicable to all attorney fee Awards. Therefore, it is our recommendation that Podhurst receive 12% of the overall Award at this time. Whatever portion of the 5% holdback is ultimately released by the District Court, will be provided to Podhurst at that time. We recommend that the remaining funds be distributed to Smith promptly.

V. DISCUSSION OF CMDA v. JOHNSON

CMDA has filed a Lien seeking 20% of the Award issued to Johnson, plus $2,617.20 in costs. Johnson has not filed formal pleadings in response. However, he challenges the Lien and has states that he believes CMDA is not entitled to any fees for the services performed. Lienholder's Statement of Dispute, Exhibit F.

Johnson's decision not to provide us with pleadings or any other informed statement to support his position (*see* Lien Rule 15) has hampered on our resolution of this dispute. We do have submissions from CMDA as is appropriate, particularly whereas it is their burden to prove the fees requested are reasonable. We have determined that the record before us is sufficiently clear to allow us to resolve the Dispute.

As is discussed below, the costs asserted by CMDA are untimely asserted and are therefore

rejected. As to the attorneys' fees, we begin with a consideration of "the reasonableness of the contingent fee arrangement" at the time of the contact's signing. *McKenzie II,* 823 F. 2d at 45, n.1 and then determine whether the circumstances compel a different evaluation of the CFA at the time of its execution. We then look to the third, fourth and fifth *McKenzie* factors: "the results obtained, the quality of the work, and whether the attorneys efforts substantially contributed to the result." *McKenzie I,* 750 F.2d at 101.

A. Facts and Procedural History

Johnson signed a CFA with CMDA on September 21, 2015. Johnson retained CMDA for the narrow purpose of pursuing a claim through the NFL concussion class action settlement. Under the terms of the agreement, Johnson agreed to pay CMDA 20% of the amount recovered, contingent on the recovery of an Award from the settlement.

As is clear from the language of the fee agreement, as of the time of contract signing, the final approval of the Settlement Agreement had been granted by the District Court, but the Third Circuit appeals were still pending. Unlike the CFAs in Turner and Smith, the contract here was specifically limited to be for services in pursuit of a claim under the agreement, as opposed to pursuit of a separate lawsuit against the NFL.

In pursuing an award under the Settlement Agreement, CMDA assisted Johnson with identifying and retaining the services of two doctors: Dr. Charles Seigerman, a neuropsychologist/psychologist and Dr. Steven Schechter, a neurologist. Dr. Schechter provided the Alzheimer's diagnosis that provided the basis for the Monetary Award in this case. The firm also reviewed Johnson's medical records and consulted with these doctors.

According to billing records provided by CMDA as a part of our Lien process, the firm prepared the claims package for the Claims Administrator while the appeals of the District Court's

approval of the Settlement Agreement were pending. That claim package included the necessary medical records, a Qualifying Diagnosis Physician Certification from Dr. Schechter, and a HIPAA authorization.

On February 6, 2017, after the appeals were concluded and the Settlement Agreement became final, the six-month period to register as a class member opened. Two days later, on February 8, 2017, Johnson notified CMDA of his decision to terminate their representation. He requested that the firm forward his complete case file. On February 16, 2017, CMDA did so and advised Johnson that his claim had not yet been filed with the Claims Administrator.

On April 10, 2017, Johnson, acting *pro se* filed his own claim package with the Claims Administrator. On December 1, 2017, the Claims Administrator issued a Monetary Award Notice. On January 2, 2018, the NFL appealed the determination to the Special Master. Johnson did not submit any additional pleadings in relation to the appeal. On April 2, 2018, however, the Claims Administrator issued a Post-Appeal Notice of Monetary Award, reaffirming the Award.

CMDA filed a Lien against Johnson's Award on April 5, 2017. (Doc. No. 7450). In the Petition for Lien, CMDA provided a copy of the fee agreement and noted the relevant terms but did not indicate what, if any, of costs that they were seeking. On November 7, 2017, pursuant to Lien Rule 8(d), the Claims Administrator issued a Notice of Lien to Johnson and CMDA, which indicated that the Lien amount was 20% of any Monetary Award. There was no reference to costs in the Notice of Lien, as no costs had been asserted in the original Lien filing.

Pursuant to Lien Rule 10, when Johnson failed to respond to the Notice of Lien, the Claims Administrator withheld full amount of the Lien, 20% of the Monetary Award, and issued a Notice of Duty to Resolve the Lien to the Parties and referred the matter to us. Pursuant to Lien Rule 16 on July 2, 2018, the Claims Administrator issued a Schedule of Document Submissions to the

Parties. CMDA and Johnson were advised that each were obligated to submit a Statement of Dispute by August 1, 2018.

CMDA's Statement of Dispute was timely submitted. Johnson, however, did not meet the deadline. Because of his *pro se* status, we granted him a two-week extension of this deadline and directed the Claims Administrator to contact him to ensure he understood the nature of the process and his rights to file a Statement of Dispute, presenting the facts and circumstances of this matter as he understood them. Johnson advised the Claims Administrator that he did not wish to submit materials.

After the record was transferred to this Court, we initiated a telephone conference with the Parties to advise them of the availability of a Magistrate Judge for a Settlement Conference, if the Parties believed such a conference would be an aid. On the call, Johnson made it clear that he did not want to participate in this litigation, but he still disputes the fee asserted by CMDA.

B. CMDA's untimely request for costs

In its Statement of Dispute, CMDA indicates that they are seeking a 20% contingency fee, as well as costs in the amount of $2,617.20 for work performed on behalf of Johnson. We deny CMDA's request for costs, as the firm failed to provide prompt notice of these costs as associated with their Lien.

To present a valid Lien for costs in this litigation, counsel are required to provide the Claims Administrator with "[t]he dollar amount of the attorney's costs if the attorney is seeking reimbursement of costs in addition to fees." Lien Rule 8(a)(5). The precise dollar amount, as well as the other requirements in Lien Rule 8(a) must be submitted to the Claims Administrator "before it begins processing the Award." Lien Rule 8(c).

This requirement of notice to the Claims Administrator serves an important purpose. Once

a SCM is issued an Award, the Claims Administrator is obligated to "withhold an appropriate amount sufficient to pay the Attorney's Lien." Lien Rule 10. Strict enforcement of these rules is necessary to ensure the Claims Administrator can promptly distribute Monetary Awards to SCMs. If the dollar amount of a Lienholder's costs has not been presented to the Claims Administrator, the amount of the costs will be released to the SCM prematurely. We would be loath to require a SCM to return a portion of their Award to pay a Lienholder's costs when that Lienholder had notice and opportunity, indeed an obligation, to inform the Court of the costs incurred prior to the payment to the SCM.

We acknowledge that the Lien Rules were not adopted by the Court until March 6, 2018, which was after the initial Lien was filed in this case. But notice of these Lien Rules was provided to the Parties, both through their filing on the ECF Docket and through information contained on the NFL Concussion Website. Our Lien Rule requiring timely assertion of costs has already been the subject of two Orders to Show Cause, which were also filed on the docket. (Doc. Nos. 10151 and 10156).

Despite this, CMDA's requested costs are stated for the first time in CMDA's Statement of Dispute filed on July 27, 2018. The assertion is made without any reference to the timeliness of their submission and without any explanation provided for the delay. Given the CMDA's failure to provide timely notice of costs and failure to explain the significant omission, we conclude that the asserted costs must be disallowed.

C. Applying *McKenzie* "reasonableness"

Having established that there is a valid CFA in place and that we are obligated to review the fee under the *McKenzie* factors, we turn to this analysis. Our inquiry begins "by scrutinizing the reasonableness of the contingent fee arrangement" at the time of the contract's signing and

comparing it to the circumstances at the time of execution. *McKenzie II*, 823 F.2d at 45 n.1. Recognizing that the District Court has already adjusted fee agreements through the Fee Cap to account for the changed circumstances that occurred generally over the course of this litigation, we must determine if there were other factors specific to this individual litigation that should be considered in our assessment of the reasonableness of the fee at the time of the contract's execution. We will then review (1) the result in the case, (2) the quality of the work performed by the attorneys, and (3) the substantiality of that contribution on the overall result.

As is discussed in greater detail below, considering the substantiality of CMDA's contribution, we recommend that CMDA receive a fee of 7½ %, which will be reduced by the amount of the 5% holdback that the District Court deems necessary.

1. <u>The CFA at time of contracting</u>

Our inquiry begins "by scrutinizing the reasonableness of the contingent fee arrangement" at the time of contracting. *McKenzie II*, 823 F.2d at 45 n.1. Here, there are two primary factors that we must examine: (1) the legal challenges in the plaintiff's pursuit of a monetary award and (2) the time-intensive nature of the litigation.

CMDA and Johnson entered into the fee agreement on September 21, 2015, five months after the District Court approved the Settlement Agreement. This was what Professor Rubenstein characterized as "Phase 3" of the litigation. It was clear at this stage that IRPAs would be primarily responsible for "processing clients' claims through the claims facility." (Doc. No. 9526 at 26). CMDA bore the risk that Johnson's claim might not have yielded a Monetary Award. But the fee agreement is not an engagement to file a lawsuit against the NFL, but rather exclusively to submit a claim through the already established NFL Class Action Settlement.

As to the legal challenges like causation and preemption, CMDA did not carry any of that

risk. Those issues had already been resolved through the Settlement Agreement. Although the District Court's approval of the Settlement was still being reviewed on appeal, CMDA did not undertake any obligation of the litigation of matters beyond pursuit of a claim through the Settlement.

There did, however, remain some risk in this litigation. Johnson was not diagnosed with Alzheimer's when he engaged CMDA. CMDA undertook the responsibility to get Johnson to appropriate medical professionals and to shepherd Johnson through the process of diagnosis, as well as claim submission. This process required evaluation by two different doctors and the obtaining of sufficient documentation to support a claim to be submitted under the Settlement Agreement. We accept that this work was performed with an eye toward the submission of the paperwork necessary to submit a claim and litigate any necessary appeals. But the firm's services were terminated before the second part of the work was needed.

2. <u>The CFA at time of execution – impact of changed circumstances</u>

The fee contract between CMDA and Johnson remained in place for only 18 months, between September 21, 2015 and February 8, 2017. At the time of initial contract signing, there was still a chance that the District Court's approval of the Settlement Agreement would be rejected on appeal. The risks related to that possibility dropped on April 18, 2016, when the Third Circuit affirmed the District Court's decision.[39]

CMDA's expected role was reduced when their contract was terminated before the claim

[39] As we explained above, CMDA's risk relating to this was contained somewhat by the fact that they had not taken on the obligation of pursuing a lawsuit, but rather were only obligated to pursue a claim under the agreement. If there was no agreement, they would have lost the opportunity to pursue an Award, but they were not also obligated under the fee agreement to spend significantly increased time in pursuing a claim through other means.

submission process began. The fact that Johnson performed these tasks on his own reduced the work that was required of CMDA as had been contemplated by the original CFA.

3. The results obtained

Having determined that there was a difference in circumstance between the time of the creation of the contract to the time of its execution – hastened by CMDA's termination – we look to the result obtained, the quality of the work performed and the substantiality of the efforts of CMDA as IRPA. We first observe that on April 2, 2018, Johnson was Awarded a Monetary Award Grid Amount of $752,000, based on Johnson's Alzheimer's diagnosis at the age of 65.

4. The quality of the work performed

In evaluating the quality of work performed, we recognize the nature of the work performed by CMDA in pursuit of Johnson's award. The District Court has concluded that the process of "shepherding . . . clients through the claims process" is a factor in our reasonableness evaluation.

CMDA guided Johnson through a portion of the claims process, in helping him to identify the appropriate doctors to see that the proper paperwork was completed to ensure the documentation of the diagnosis. However, CMDA, itself noted the limited scope of the work when they expressed to Johnson to limited scope of the law firm's case file, which consisted only of emails and letters between attorney and client and the reports from Doctors Schechter and Seigeman. Ultimately, we recognize that this was important work performed to advance Johnson's claim. Johnson did not have a pre-existing diagnosis when he retained CMDA. Rather the firm guided Johnson through the significant process of obtaining the necessary diagnosis.

That was the full scope of the work performed by CMDA. Because the attorney-client relationship was terminated, CMDA was not obligated to create the claims package for submission to the Claims Administrator and it was not obligated to support Johnson in his defense against the

NFL on the administrative appeal that was submitted. These were also important steps in the process that were handled by Johnson acting *pro se*.

5. <u>The substantiality of the work</u>

Three groups contributed to the work necessary to obtain the Monetary Award in this case – Class Counsel, CMDA and Johnson, himself. In reviewing the degree to which each substantially contributed to the result, we recognize that the District Court has already reduced the IRPA payments to account for Class Counsel's substantial contribution through the application of the Fee Cap. Indeed, CMDA's own decision to provide the firm's services for a 20% contingency fee, is reflective of their understanding of the reduction of the risk for them. However, CMDA's services were terminated while there was still work to be done to ensure the claim was fully processed, and there are factors specific to this case that compel us to conclude that Class Counsel's contribution to this result was more substantial here than in other cases.

As is discussed above, we generally expect there to be as many as seven major categories of work for IRPAs who have supported their clients in this litigation (*see infra* p. 24). In no way is it expected that as IRPAs work will cover each of these categories. Rather as we consider substantiality of the IRPA efforts we use them as check points which may or may not have played a role in the success, or not, in the SCM's effort to maximize his award. So, we use it as a checklist of factors to consider and weigh on balance, the substantiality of the contribution of the IRPA to the Award obtained.

Because CMDA was not engaged until after the settlement was already approved, many of the obligations that are generally placed on IRPAs are not present here. CMDA undertook minimal risk due to the scope of the representation. In reviewing our seven factors, CMDA has provided

evidence exclusively related to (1) review of medical records and support in obtaining Johnson's diagnosis (factor 1) and (2) shepherding Johnson through the claims process (factor 6).

(a) CMDA did not provide any services in support of factors 2, 3, 6 or 7

The CFA between Johnson and CMDA was for a narrow set of circumstances – pursuing a claim through the NFL concussion class action settlement. As is noted above, this type of contract carried limited risk. CMDA undertook no obligation as related to evidentiary support for any potential lawsuit (factor 2). In reviewing the billing entries provided by CMDA, we can discern no indication that the firm was obligated the review any collateral litigation on Johnson's behalf to ensure his claims would not be negatively impacted (factor 3). Indeed, the Settlement Agreement was carefully constructed to avoid those types of pitfalls. Since CMDA did not represent Johnson before the approval of the agreement, these were not likely concerns for the firm. Similarly, CMDA has not argued that they had to provide Johnson with any support on personal matters, including loan agreements (factors 6 and 7).

The nature and scope of these types of services are well represented in the discussions of Turner and Smith in this case. It is significant that CMDA was not required to take on any of these obligations. We do, however, give CDMA credit for assistance in Factor 1 and 4, and nominally in Factor 5.

(b) Factor 1: Review of medical records and support in obtaining medical evaluations

CMDA has not presented any evidence that they searched through pre-existing medical records. Instead, the firm was, however, fully engaged with the process of obtaining a prompt and complete evaluation that would provide a sufficient basis to support a claim when the claims submission process opened. This was an important service, but on the record before us, it was the primary work performed by the law firm.

(c) Factor 4: Advising Johnson as to the terms of the Settlement Agreement

CMDA needed to be familiar with the Settlement Agreement in order to shepherd their clients through the claims process. However, due to the timing of the contract, they had no obligation to advise Johnson over the course of years relating to the evolution of negotiations. Further, CMDA did not need to advise Johnson about his opt-out rights. The deadline to opt-out of the Settlement Agreement was October 14, 2014, almost a year before Johnson retained the firm. Although CMDA did need to advise Johnson of the terms of Settlement Agreement in regard to the process of claims processing, their obligation on this point was quite minimal. When the claims process opened, the final steps were performed by Johnson, acting *pro se*. Johnson completed and submitted the claims package and handled the matter on his own behalf from that point forward.

(d) Factor 5: Shepherding the client through the claims process

When CMDA and Johnson signed the CFA, the parties understood that the firm would take on the obligation of shepherding Johnson through the claims process. However, Johnson, not CMDA, completed and submitted the paperwork necessary to establish his claim.

While we recognize the assistance provided by CMDA in shepherding Johnson through the process of obtaining the relevant diagnosis, we consider the claims submission process as a separate matter. This work was not performed by CMDA.

D. Conclusion

Overall, we conclude that CMDA's contribution to the Award obtained was less substantial than that which was expected by the District Court when it established the Fee Cap. We acknowledge the important role provided by CMDA when they supported Johnson in obtaining the necessary medical diagnoses here. However, we also acknowledge the substantial role of Class

Counsel in establishing and defending the Settlement Agreement that provided the framework for CMDA's litigation here. And we must acknowledge that Johnson completed the claims process himself.

We recommend that CMDA receive 7½ % of the Monetary Award as its fee. The 7½ % fee must still be reduced by the 5% holdback currently applicable to all attorney fee Awards. Therefore, it is our recommendation that CMDA receive 2½ % of the overall Award at this time. Whatever portion of the 5% holdback is ultimately released by the District Court, will be provided to CMDA at that time. We recommend that the remaining funds be disbursed to Johnson promptly.

VI. CONCLUSION

Upon review of the foregoing, we conclude that an attorney asserting a Lien seeking attorneys' fees from a Monetary Award must be able to demonstrate not only a valid CFA, but also that the fees sought are reasonable under the paradigm set forth in *McKenzie.* This requires an evaluation of the CFA's reasonableness both at the time when the contract is signed and upon its execution. Our ultimate resolution of a Liens has been, and will continue to be, an exercise of informed discretion in consideration of "the results obtained, the quality of the work, and whether the attorney's efforts substantially contributed to the result," *McKenzie I,* 758 F.2d at 101, with a focus on the substantially of the contribution to the Award obtained.

BY THE COURT:

/s/ David R. Strawbridge, USMJ
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323 **Hon. Anita B. Brody**
Kevin Turner and Shawn Wooden, *on behalf of themselves and others similarly situated*, Plaintiffs, v. National Football League and NFL Properties LLC, successor-in-interest to NFL Properties, Inc., Defendants.	Civ. Action No. 14-00029-AB
THIS DOCUMENT RELATES TO: ALL ACTIONS	

SECOND VERIFIED PETITION OF CO-LEAD CLASS COUNSEL CHRISTOPHER A. SEEGER FOR AN AWARD OF POST-EFFECTIVE DATE COMMON BENEFIT ATTORNEYS' FEES AND COSTS

Pursuant to this Court's May 24, 2018 Explanation and Order (ECF No. 10019), directing the filing of implementation-phase common benefit fee petitions at six-month intervals, and subsequent to the First Verified Petition for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs (ECF No. 10128) ("First Post-Effective Date Petition"), Co-Lead Class Counsel Christopher A. Seeger ("Co-Lead Class Counsel" or "Seeger Weiss") respectfully submits this Second Verified Petition for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs.

Based on the work undertaken from May 25, 2018, the first date after the close of the time period covered by the First Post-Effective Date Petition,[1] to November 30, 2018, Seeger Weiss and other Class Counsel who have undertaken work for the common benefit of the Class dedicated over 4,378 hours, resulting in a lodestar (calculated using the blended rates set by the Court; *see* ECF No. 10019, at 7 n.4) of $2,895,044.17, and have incurred $300,590.26 in expenses.

SUMMARY OF WORK COMPLETED - MAY 25, 2018 TO NOVEMBER 30, 2018

As was discussed in the First Post-Effective Date Petition, with the launch of the Settlement, Class Counsel undertook several long-term projects to ensure that the Settlement's benefits could be delivered to the Retired NFL Football Players and their families. These efforts ranged from driving registration to exceed projected expectations to the preparation of all the policies, documents, and forms that would be used for registration, the submissions of claims, and the BAP. Although the foundational work necessary to establish this 65-year settlement was largely completed by the time of the First Post-Effective Date Petition, several substantive matters above and beyond the monitoring and oversight of the Settlement continued to demand the attention of Co-Lead Counsel and other Class Counsel. Additionally, monitoring the Settlement Program to ensure that it continues to deliver the promised benefits to the Settlement Class has continued to require sundry efforts.

Among these efforts were revisions to the MAF and BAP policies and documentation, monitoring and oversight of the medical professionals in the network of Qualified MAF Physicians and BAP Providers, support of Class Members not only through the Claims Process but also on

[1] The First Post-Effective Date Petition covered the period from January 7, 2017 to May 24, 2018. *See* ECF No. 10128 at 1.

appeals, ongoing support of unrepresented Class Members and individual counsel, and work toward determining the best use of the $10 million Education Fund toward implementing the programs and research tools contemplated for the Fund.[2]

Additionally, as with the First Post-Effective Date Petition, Co-Lead Class Counsel and other Class Counsel became engaged in certain significant work that was unanticipated, but which was essential to ensure the integrity of the Settlement Program and the benefits negotiated for the Retired NFL Football Players and their families. Most notably, this work included defending the Special Masters' unfettered discretion to consult with members of the AAP when deciding appeals and protecting the clinical judgment of Qualified MAF Physicians to make dementia diagnoses that are "generally consistent" with the negotiated BAP criteria, even if those diagnoses are not "identical" to those under the BAP criteria.

As of November 30, 2018, over 20,500 Class Members had registered for the Settlement Program, over 2,100 Claim Packages had been submitted, 712 Notices of Monetary Awards had been issued, worth over $585 million; and nearly 8,850 BAP examinations had been scheduled for nearly 4,650 players and over 7,950 appointments had been attended as of January 7, 2019.[3] *See*

[2] Much of this continuing work on the Settlement continues to be focused on non-recurring (and often unforeseen) implementation issues rather than purely ongoing oversight and maintenance of the Settlement Program. In its April 5, 2018 Memorandum addressing the aggregate award of common benefit fees and expenses, the Court noted that it hoped to address the question of the nature and amount of ongoing work to determine the funds that will be appropriate for the duration of the program, including the potential need for the imposition of a holdback from monetary awards for the purpose of compensating future implementation-phase work. *See* ECF No. 9860 at 2, 17-18 & n.1. Co-Lead Class Counsel expects to be able to better estimate the nature and amount of work that will be demanded by the Settlement Program on a long-term basis in the next post-Effective Date fee petition, which will be due by July 10, 2019.

[3] Historic statistics related to the MAF are available on the Settlement Website. *See* www.nflconcussionsettlement.com/Reports_Statistics.aspx (last accessed Jan. 8, 2019). Historic BAP statistics are not maintained on the Settlement Website. The Settlement Website however,

www.nflconcussionsettlement.com/Reports_Statistics.aspx (last accessed Jan. 8, 2019). These successes are not mere happenstance. Seeger Weiss has worked tirelessly with other Class Counsel on numerous important matters, in coordination with the Administrators, the Special Masters, and the Court—and both cooperatively with and, as circumstances have warranted, against the NFL—to facilitate and oversee the Settlement. The linchpin of these efforts has been the weekly call that Seeger Weiss hosts with the NFL Parties, the Claims Administrator, the BAP Administrator and the Lien Resolution Administrator, where ongoing issues and progress in resolving them are hashed out. Some 115 of these weekly calls had taken place by the November 30, 2018 closing date of this petition. Work on the Settlement has been a daily matter, requiring the dedication of several Seeger Weiss attorneys and paraprofessionals, and has focused around certain key areas that are summarized in the sections that follow.

Oversight of the Claims Process and Monetary Award Determinations: With the Claims Process in its second year, and hundreds of Monetary Award determinations already issued, Seeger Weiss dedicated hundreds of hours in actively monitoring and supporting the Claims Process to ensure that Class Members are receiving the benefits that were negotiated on their behalf. This oversight included ongoing reporting and requests for information from the Claims Administrator and reviewing every claim determination by a member of the AAP or the Claims Administrator to ensure that they are correctly following the terms of the Settlement Agreement. Co-Lead Class Counsels' and other Class Counsel's continuing engagement with Class Members and their counsel provided further bases and guidance on the needs of the Claims Process.

reported that over 8,500 BAP examinations had been scheduled for nearly 4,500 players and over 7,600 appointments had been attended as of November 30, 2018.

Moreover, Co-Lead Class Counsel is supporting the petitions of Representative Claimants for Retired NFL Players who were diagnosed with a Qualifying Diagnosis but who died before January 1, 2006. For these claims to proceed to review on the merits, the Court needs to determine whether they are timely under the applicable state's law. *See* ECF No. 6481-1 at 35 (Settlement Agreement § 6.2(b)). Co-Lead Class Counsel has submitted many Statements in support of the Representative Claimants' submissions respecting that category of claims.

Furthermore, a sophisticated audit program was negotiated and implemented. Just as it had negotiated protections for the interests of Class Members in the rules and procedures governing the audit process, Seeger Weiss has remained engaged with ongoing audits, including through the submission of Statements regarding referrals to the Special Masters and replies in those proceedings taken up by the Special Masters, to make certain that meritorious claims are not unduly caught up in the audit process and to ensure that the focus of any inquiry be on only those parties (e.g., medical and legal professionals) that have been shown to have undertaken potential fraud against the Settlement program. Besides its work in helping to craft these rules and procedures, Seeger Weiss monitors the progress of audit investigations and provides formal input at each juncture.

Co-Lead Class Counsel has protected and will continue to protect the interests of Class Members by monitoring the wider operation of the Settlement Program and addressing with the Claims Administrator all types of issues as they arise.

Appeals of Claims Determinations: Seeger Weiss continues to monitor all Monetary Award determinations to provide guidance to Class Members; assess whether Co-Lead Class Counsel should appeal any of the adverse determinations; and, in those cases where an appeal from a

determination is taken, either by a Class Member or the NFL Parties, to determine whether Co-Lead Class Counsel should file a Statement respecting the appeal. Through this active engagement, Seeger Weiss' goal is to make sure that Class Members' entitlement to benefits is not restricted or foreclosed outright by parsimonious interpretations of the Settlement Agreement or by meritless appeals taken by the NFL. Whether through submitting Statements in support of a Class Member on appeal or through direct support of unrepresented Class Members and individual counsel, Co-Lead Class Counsel has pursued, among other things: a properly inclusive interpretation of the "generally consistent" standard underpinning diagnoses made outside of the BAP; appropriate deference to diagnosing physicians, particularly those in the BAP and MAF physician networks; assurance that any appeals by the NFL are not taken in bad faith, thereby improperly delaying the payment of Monetary Awards; making sure that evidence offered on appeal, such as social media postings offered by the NFL, is subjected to the scrutiny appropriate to unauthenticated hearsay; the appropriate use of neuropsychological screening tests when reviewing the merits of a claim; and the application of the proper diagnostic standards in cases wherein the Retired Player is deceased, which may differ from the diagnostic standards for living Retired Players.

Ensuring Inclusive, Class Member-Friendly Claims Processes: After first setting up the Claims Process and the development of the fundamental forms and procedures, as well as negotiation and advocacy for the Frequently Asked Questions that serve as the "rules of the road" for the Settlement, Co-Lead Class Counsel continued to engage with the Claims Administrator, the BAP Administrator, the Lien Resolution Administrator, and the NFL Parties to prepare new guidance materials, revise existing forms, and prepare additional forms as new developments demanded.

Co-Lead Class Counsel worked with the Claims Administrator to continually update the Settlement's dedicated website ("Settlement Website"), so as to ensure that Class Members have easy access to the most up-to-date information and clear guidance on the Settlement Program. These efforts included a complete redesign of the Settlement Website late in 2018 to ensure that the increased volume of information concerning the Settlement Program in general and the Claims Process in particular remain easily accessible.

Co-Lead Class Counsel continues to monitor the progress of the Claims Process in order to introduce improvements where possible to guarantee that all eligible claims are paid and all Class Members and (where applicable) their individual counsel receive any needed guidance.

Maintenance of the Networks of Qualified BAP Providers and Qualified MAF Physicians: The vetting process associated with the selection of Qualified BAP Providers and Qualified MAF Physicians including a detailed review of each provider's curriculum vitae and application, as well as in-depth internet searches to verify the qualifications of each candidate, continued after the First Post-Effective Date Petition because the Claims and BAP Administrators are constantly seeking to address unanticipated needs for neurologists and neuropsychologists in certain regions. Seeger Weiss has been engaged in this effort on a continuing basis.

Working with the BAP Administrator, the Claims Administrator, the NFL Parties and its own experts, Co-Lead Class Counsel developed amendments to the manuals that are being used by each of the Administrators to train the physicians and providers on the medical aspects of the Settlement. Similarly, Co-Lead Class Counsel continually monitors and reviews these networks to make certain that Retired NFL Football Players are receiving the care and services to which they are entitled under the Settlement.

BAP Examinations and Supplemental Benefits: Maintenance of the BAP network of Providers was only one aspect of ensuring delivery of the full range of BAP benefits for eligible Retired NFL Football Players. Seeger Weiss is monitoring the implementation of the BAP so that examinations are scheduled with increased efficiency and all appropriate medical standards are followed. Moreover, in coordination with the BAP Administrator, Co-Lead Class Counsel worked toward the implementation of BAP Supplemental Benefits for those Retired NFL Football Players whose BAP examinations yield a diagnosis of Level 1 Neurocognitive Impairment. As of November 30, 2018, 50 players had received Level 1 diagnoses and were either in the process of selecting their BAP Provider who will be overseeing their treatment and benefits, or were already receiving their Supplemental Benefits. These benefits include a range of therapeutics, pharmaceuticals, and diagnostic and imaging services, and required additional contracting with BAP Providers as well as with those entities outside of the BAP network of Providers who will provide many of the services. Working with the BAP Administrator, the Claims Administrator, the NFL Parties, and its own experts, Seeger Weiss developed the services agreement that each physician and supplemental provider will need to sign to serve as Supplemental Providers.

In addition, since the First Post-Effective Date Petition, several visually-impaired Retired NFL Football Players sought to participate in the BAP. Because many of the tests that make up the BAP test battery require that the test subject be able to see, Co-Lead Class Counsel, with the support and assistance of its expert, undertook to negotiate an amended battery of neuropsychological tests that would accommodate visually-impaired Retired NFL Football Players.

Appointment of Additional Appeals Advisory Panel Members: As the Court is aware, Appeals Advisory Panel ("AAP") members and AAP Consultants serve several functions in the Settlement, including review of many pre-Effective Date diagnoses, re-review of claims that were subject to appeal but remanded by the Special Masters for further consideration in light of new documentation submitted on appeal, resolution (in some instances) of disputes between BAP Providers as to the existence (or not) of a Qualifying Diagnosis, and consultation with the Special Masters as issues relating to medicine arise in the course of their duties.

Toward the middle of 2018, it became apparent that the volume of claims and the related need for AAP claims review and consultation by the Special Masters and the Claims Administrator exceeded projections (driven largely by the unexpectedly high number of registrations that were received and approved). Accordingly, the decision was made to add two additional members to the AAP. As with each of the prior candidates, the Settling Parties identified and interviewed potential candidates until the Settling Parties agreed on the recommendations to be made to the Court for appointment to the AAP. On September 5, 2018, the Court approved the appointment of two new AAP members (ECF No. 10248).

Fielding Calls from, and Supporting, Class Members and Counsel Representing Class Members: In addition to all of the above, Seeger Weiss has responded to hundreds of telephone calls each month from Class Members and attorneys representing Class Members. The calls involve virtually every conceivable issue concerning the Settlement, including the Claims Process, matters relating to post-Effective Date examinations through the BAP and MAF, liens, and appeals. Seeger Weiss handled every call and was able to assist numerous Class Members in successfully navigating the Claims Process and, when appropriate, assisted unrepresented Class Members in gathering

necessary documents, including medical records, and completing their claims packages so that their claims can be promptly reviewed and, where meritorious, approved. Seeger Weiss was similarly engaged with counsel representing Class Members, answering questions they had about the Claims Process, the Settlement Website's Frequently Asked Questions (which guide the Claims Process), and otherwise offering support to ensure that meritorious claims are properly submitted and paid.

Efforts to Protect Class Members from Third-Party Profiteers: Co-Lead Class Counsel has continued to stand up for Class Members whom litigation funders lured into putative assignments of their prospective Monetary Awards.[4] It completed the Third Circuit briefing of the appeals taken by several third-party funders who are challenging the Court's declaration that their putative assignment agreements were void. *See* ECF Nos. 9558, 9755, 9794, 10027, 10141 (notices of appeal filed by various funders). Related to these appeals was Co-Lead Class Counsel's successful briefing of sundry district court and Third Circuit motions (for stay pending appeal, imposition of bond, or expedition of appeal) that the funders filed. *E.g.*, ECF No. 9812 (denying RD Legal entities' motion for stay pending appeal; also denied by the Third Circuit on Apr. 10, 2018), ECF No. 10232 (denying Thrivest's motion for imposition of bond; also denied by the Third Circuit on Nov. 6, 2018). The Third Circuit has tentatively calendared the oral argument for these appeals (which were briefed separately but consolidated for purposes of disposition) for January 23, 2019.

[4] As the Court is already well aware from the briefing of the assignment issues, these putative purchases of Class Members' prospective awards at steep discounts (usually exceeding 50%) were cleverly packaged as what are, in effect, advances against the awards at usurious rates of interest. *See* ECF No. 8434 at 7 & n.2.

On May 7, 2018, the Court directly instructed Class Counsel Gene Locks to attempt to negotiate a global resolution with all funders that entered into assignments with Class Members as a potential alternative to the rescission remedy that the Court afforded Class Members in its December 8, 2017 Explanation and Order (ECF No. 9517). Mr. Locks and his partner David Langfitt worked over many months with more than 25 funders, the Special Masters, and the Claims Administrator to ensure that a separate resolution protocol will be and is being implemented case by case in a manner that is fair to all Class Members. Mr. Locks gave regular status reports to Special Master Verrier and worked directly with the Claims Administrator as he negotiated with these funders to develop a draft protocol to resolve disputes over the agreements. He also directly reported to the Court on multiple occasions. *See*, *e.g.*, ECF Nos. 10212, 10233. The protocol is now in place as part of the Settlement Program and offers an alternative means for Class Members to protect their rights under the Settlement Agreement. A vast majority of funders have cooperated and agreed to the protocol rather than engage in further litigation.[5]

Continuing to press for discovery following the filing of a motion for sanctions against certain funders – namely, the so-called Cambridge Entities and attorney Tim Howard (who was also one of their principals), who had encouraged Class Members to "invest" their retirement monies in that funder's investment portfolio – Seeger Weiss obtained an accounting showing that the monies had been used to pay cash advances to those entering into void assignment agreements with that funder. *See* ECF Nos. 10186, 10210. Co-Lead Class Counsel's related motion for

[5] One such funder, Walker Preston Capital Holdings LLC, availed itself of the Third-Party Funding Resolution Protocol and voluntarily dismissed the Third Circuit appeal that it had filed. ECF No. 10317; *see* ECF No. 10174.

sanctions (ECF No. 9974) remains pending. Meanwhile, governmental entities are believed to be actively investigating the Cambridge Entities' activities.

Education Fund and Medical Research Library: Co-Lead Class Counsel and the NFL Parties began exploring organizations that support safety and injury protection in football and may be appropriate recipients of proceeds from the $10 million Education Fund that was established as part of the Settlement. *See* ECF No. 6481-1 at 68 (Settlement Agreement, art. XII). The Settling Parties are considering organizations that benefit youth who are just now starting to participate in tackle football as well as those that are focused on the players who have made it further along the path to professional play and retirement from professional play.

Similarly, the Settlement Agreement contemplated that the medical records and information that would be generated through the free BAP examinations provided to consenting and eligible Retired NFL Football Players would be made available for medical research.[6] *Id.* at 33 (Settlement Agreement § 5.10(a)). During the late summer of 2018, Seeger Weiss commenced efforts with Columbia University, the BAP Administrator, the Claims Administrator, its own expert, and the NFL Parties to establish a medical research library that will gather, systematically organize, and maintain the medical information that the BAP Administrator is collecting from the BAP Examinations.

KEYSTONE ACCOMPLISHMENTS ON BEHALF OF CLASS MEMBERS

Although the importance and benefit to the Class of the tasks discussed above are self-evident, a few of the key successes along the way illustrate the value of the work performed by

[6] As further provided in the Settlement Agreement, player confidentiality will be maintained.

Seeger Weiss and other Class Counsel for the common benefit of the Class. These keystone successes include:

- **Special Masters' Use of AAP on Appeals** – In response to a number of Special Masters' denials of its appeals of monetary awards in claims involving diagnoses rendered by MAF Physicians and BAP Providers, the NFL submitted a letter-brief to the Special Masters, asserting that they should overturn the denials of its appeals because they had not consulted with the AAP in reaching their decisions. The NFL took the position that the Special Masters are required to consult with the AAP in all appeals involving medical issues. Co-Lead Class Counsel submitted an opposing letter-brief, pointing out that although the Settlement Agreement *permits* the Special Masters to consult with the AAP on appeals, it does not mandate it but, rather, leaves such consultation solely to the discretion of the Special Masters. The Locks Firm also submitted a coordinated response on behalf of all the individual counsel representing the Players' who were subject to the appeal. The Special Masters rejected the NFL's position, and the NFL has now appealed. Co-Lead Class Counsel and the Locks Law Firm filed responding briefs. That appeal is pending.

- **"Generally Consistent" Appeal** – The NFL initially appealed a number of Monetary Awards in which the diagnoses were rendered by MAF Physicians, contending that the players' test results did not satisfy the BAP diagnostic criteria. Co-Lead Class Counsel filed statements in support of a number of the players who were the subject of the NFL's appeals, arguing that the Settlement Agreement's "generally consistent" standard, applicable to all diagnoses rendered outside of the BAP, expressly does not require the player to satisfy the BAP diagnostic criteria. The Special Masters denied all of the NFL's appeals and the NFL filed objections to the Special Masters' decisions. Co-Lead Class Counsel filed a brief in opposition to the NFL's objections.

The Special Masters denied the NFL's objections. The NFL then appealed the Special Masters' ruling to this Court and Co-Lead Class Counsel filed additional briefing in opposition to the NFL's appeal. *See* ECF No. 10361 (notice of Jan. 10, 2019 hearing, appending parties' submissions). The Court had scheduled oral argument on that matter for January 10, 2019 (the date of filing of the instant petition), ECF No 10361, but cancelled the hearing following the NFL's withdrawal of its appeal. ECF No. 10370.

- **Appointment of a Special Investigator** – On May 30, 2018, the Court heard argument on the NFL's motion for appointment of a Special Investigator. ECF Nos. 10029-30, 10146; *see* ECF No. 9880. Acknowledging that such an appointment could further the efficient functioning of the Settlement Program by serving as a valuable source of information for the Special Masters and the Claims Administrator in rendering the determinations for which they are responsible, and by freeing up valuable resources so that claims can be more efficiently reviewed on their merits, Co-Lead Class Counsel did not object to the appointment of a Special Investigator. At the same time, however, it argued for a clearly-delineated scope of authority and accountability were the Court to make such an appointment, asserting that the Special Investigator's role be purely investigatory and that he or she not be permitted to render any adjudication, determination, or formal findings concerning Monetary Award claims. Co-Lead Class Counsel also noted that the Settlement's audit and anti-fraud provisions were already working effectively to weed out dubious claims. ECF No. 9917 at 1-3. Initially, the Court deferred decision on the motion unless and until the Special Masters or the Claims Administrator "alert the Court . . . that a Special Investigator is needed to faithfully implement the Settlement Agreement." ECF No. 10114.

Once the Special Masters formally requested such an appointment (ECF No. 10253) and the Court granted the NFL's Motion (ECF No. 10255), Co-Lead Class Counsel advocated for an order

of appointment that would protect the interests of Class Members with meritorious claims. The Court's Order appointing Judge Stengel as Special Investigator reflects its mindfulness of the concerns that Co-Lead Class Counsel expressed. *See* ECF No. 10355 (Order Appointing Special Investigator, carefully delineating his authority out of concern that the appointment not chill participation in the Claims Process). Thus, although it did not spur the appointment of a Special Investigator – which was opposed outright by two Class Counsel out of genuine concerns for Class Members (ECF Nos. 9916, 9919) – Co-Lead Class Counsel acted to balance the interests of, on the one hand, guarding the integrity of the Claims Process by ferreting out suspect claims while, on the other hand, protecting the Class by ensuring that the appointment of such an official does not compromise the efficient and timely payment of meritorious Monetary Award claims.

- **Resolution of Putative Assignments Taken by Numerous Third-Party Funders –** As discussed at pages 10-11 above, the successful negotiation of a Third-Party Funding Resolution Protocol affords an alternative remedy to that of rescission provided in the Court's December 8, 2017 Explanation and Order. Although not all third-party funders have agreed to the protocol and the aforementioned Third Circuit appeals of certain funders remain to be adjudicated, the negotiation of the protocol provides a fair, reasonable, and mutually satisfactory resolution to Class Members and the funders, thereby affording relief to the many Class Members who entered into such putative assignments of their prospective Monetary Awards and limiting, if not avoiding altogether, the need for further judicial intervention. As the Court is already well aware, third-party funder issues have commanded a substantial amount of its attention.

SUMMARY OF HOURS & LODESTAR AND EXPENSES INCURRED

Seeger Weiss collected and reviewed common benefit time and expenses submitted from other Class Counsel. It reviewed all of the time entries and expenses submitted, and re-reviewed its own, in order to exercise billing judgment as to both the reasonableness of the submissions and whether the work performed and expenses incurred genuinely relate to the Settlement's implementation. Based on its thorough review, and in light of the work that this time represents, Co-Lead Class Counsel requests a fee award of $2,895,044.17 based on the blended rates established by the Court, and $300,590.26 for reimbursement of expenses, to be allocated as follows[7]:

Firm	Total Hours	Blended Rate Lodestar[8]	Expenses	Total Award Requested
Levin Sedran & Berman	19.1	$14,102.56	$55.00	$14,157.56
Locks Law Firm	545.6	$413,755.76		$413,755.76
Podhurst Orseck	62.2	$45,973.33	$2,887.99	$48,861.32
Prof. Samuel Issacharoff	22.8	$17,290.38		$17,290.38
Seeger Weiss	3,728	$2,403,922.14	$297,647.27[9]	$2,701,569.41

[7] As with the common benefit fee petition filed in February 2017 (ECF No. 7151; *see* ECF No. 9860, at 15) and the First Post-Effective Date Petition filed on July 10, 2018 (ECF No. 10128), Co-Lead Class Counsel and Class Counsel stand ready to submit their supporting time records to the Court for *in camera* review.

[8] As directed by the Court, the lodestar billed employs the blended rates that the Court prescribed in its May 24, 2018 allocation order. Accordingly, the billing rate for partners is $758.35; the rate for "counsel" or "of counsel" attorneys is $692.50; the rate for associates is $486.67; the rate for contract attorneys is $537.50; and the rate for paralegals is $260.00. *See* ECF No. 10019 at 7 n.4. Attached hereto as Exhibit "A" is a chart setting forth the above totals and breaking down each firm's common benefit hours by professional rank.

[9] The bulk of these expenses are $285,612.52 in professional fees, including the fees of Co-Lead Class Counsel's consulting experts.

CONCLUSION

WHEREFORE, the undersigned, as Co-Lead Class Counsel, respectfully requests that the Court approve this Second Post-Effective Date Fee Petition for Post-Effective Date Attorneys' Fees and Costs and award $3,195,634.43, which reflects $2,895,044.17 in attorneys' fees based on the blended rates established by the Court, and $300,590.26 for reimbursement of expenses, to be paid from the Attorneys' Fees Qualified Settlement Fund, and allocated as set forth in the above table.

Date: January 10, 2019

Respectfully submitted,

/s/ Christopher A. Seeger
Christopher A. Seeger
SEEGER WEISS LLP
55 Challenger Road, 6th Floor
Ridgefield Park, NJ 07660
cseeger@seegerweiss.com
Telephone: (212) 584-0700

CO-LEAD CLASS COUNSEL

VERIFICATION

CHRISTOPHER A. SEEGER declares, under penalty of perjury under the laws of the United States of America and pursuant to 28 U.S.C. § 1746, that he is the Petitioner in this matter, has read the foregoing Second Verified Petition of Co-Lead Class Counsel Christopher A. Seeger for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs, and knows the contents thereof, and that the same are true to his personal knowledge, information, and belief.

Executed this 10th day of January, 2019.

/s/ Christopher A. Seeger
CHRISTOPHER A. SEEGER

CERTIFICATE OF SERVICE

I, Christopher A. Seeger, hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the date below upon all counsel of record in this matter.

Dated: January 10, 2019

Respectfully submitted,

/s/ Christopher A. Seeger
Christopher A. Seeger

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
THIS DOCUMENT RELATES TO: ALL ACTIONS	**Hon. Anita B. Brody**

ORDER

I recognize the outstanding result Class Counsel have achieved in securing an uncapped settlement agreement lasting sixty-five years that benefits qualifying Class Members with substantial awards. Class Counsel did an excellent job in shepherding the Agreement through the stages of final approval and appeal. What remains, of course, is for each lawyer to assist individual clients in the claims process.[1] Additionally, there is a need to conserve the common benefit fund.

AND NOW, this 24th day of May, 2019, it is **ORDERED** that:

- The appointments of Class Counsel, Co-Lead Class Counsel, and Subclass Counsel, made pursuant to Rule 23(g) in the Final Approval Order (ECF No. 6510), are terminated;

[1] Many Class Counsel currently represent a substantial number of Settlement Class Members. For example, one lawyer represents over a thousand individual Class Members. *See* ECF 9786 at 3.

- All counsel appointments in the Court's Case Management Orders (*See* ECF No. 64, ECF No. 72) are terminated; and
- Christopher A. Seeger is reappointed as Class Counsel.[2]

ANITA B. BRODY, J.

Copies VIA ECF

[2] Nothing in this Order precludes any attorney who represents an individual class member from filing a submission to the Court advocating for his or her client's position.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
Kevin Turner and Shawn Wooden, on behalf of themselves and others similarly situated, Plaintiffs, v. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	
THIS DOCUMENT RELATES TO: Podhurst Orseck P.A. v. Tim McKyer Attorney Lien Dispute (Doc. No. 10327)	

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE June 20 , 2019

I. INTRODUCTION

Presently before the Court for a Report and Recommendation in the National Football League Player's Concussion Injury Litigation is the assertion of an Attorney Lien by Podhurst Orseck P.A. ("Podhurst") against the Award granted to their former client, Settlement Class Member ("SCM") Tim McKyer ("McKyer"), in the litigation that became this class action, *In re: National Football League Players' Concussion Injury Litigation*, No. 12-md-2323 (E.D. Pa.). The firm seeks payment of attorneys' fees of 22%[1] of the Award issued to McKyer pursuant to the

[1] As we describe below, on April 5, 2018, the District Court determined that presumptively no

contingency fee agreement ("CFA") that he entered into with them on January 12, 2012. McKyer, now proceeding *pro se*, challenges the lien. He contends that "it was not [his] understanding" that he had retained Podhurst to represent him individually, "nor was it ever [his] intent" that the firm "be [his] personal lawyer against the NFL." SCM Statement at 1. He contends that the fact that he made arrangements for appointments with doctors demonstrates that he never intended to hire Podhurst to act on his behalf. *Id.* He asks that the funds withheld for counsel fees to Podhurst be released to him.

As we set out in a Report and Recommendation ("R&R") filed on January 7, 2019,[2] our evaluation of these positions involves a consideration of the CFA between McKyer and his former counsel and an assessment of the reasonableness of the requested fees in light of the five factors enumerated by the Third Circuit in *McKenzie*. *See* Doc. No. 10368 at 11-26 (discussing *McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97, 100 (3d Cir. 1985) ("*McKenzie I*") and *McKenzie Constr., Inc. v. Maynard*, 823 F.2d 43, 45 (3d Cir. 1987) ("*McKenzie II*")). This approach will require us to scrutinize the reasonableness of the CFA at the time of the signing of the contracts and then determine if the circumstances compel a different evaluation of the CFA at the time Podhurst, as lienholder, seeks to enforce it. We will then examine the results obtained, the quality of the representation provided by Podhurst, and whether the efforts of Podhurst substantially contributed to the result. *See McKenzie I*, 750 F.2d at 101; *McKenzie II*, 823 F. 2d at 45 n.1. We conclude

---

Individually Retained Plaintiff's Attorneys ("IRPAs") should receive more than 22% of a Monetary Award in fees. ("Fee Cap"). (Doc. No. 9863). *See* Doc. No. 10368 at 10-11 (discussing the District Court's decision relating to the presumptive Fee Cap).

[2] The District Court referred to us all "all petitions for individual attorneys' liens." (Doc. No. 7446). On January 7, 2019, we issued an R&R pertaining to three separate cases. (Doc. No. 10368). In that R&R we set out the legal principles that would guide our analysis in these cases. We have since issued opinions resolving similar disputes in which the parties consented for the magistrate judge to resolve the lien dispute. *See* Doc. Nos. 10383 (Owens) & 10514 (McElroy).

that McKyer's fee agreement with Podhurst must be honored. We ultimately value Podhurst's reasonable fee for the firm's work on behalf of McKyer at 20% of the monetary award.

II. FACTS AND PROCEDURAL HISTORY

On January 12, 2012, McKyer signed a document entitled "Authority to Represent," which reflected that he "retain[ed] and employ[ed] the firm of PODHURST ORSECK, P.A. and THE LEVINE LAW FIRM, P.C., as [his] attorneys to represent [him] in [his] claim for damages" against the NFL or any other entity liable for the injuries he sustained while playing in the NFL. (Lienholder Stmt., Ex. A at 1.)[3] Under the terms of the agreement, if recovery were made, McKyer would pay 40% of the net recovery as the legal fee, with an additional 5% fee due if the recovery was made only after institution of an appeal or if post-judgment relief or action was required for recovery on the judgment.[4] *Id.* McKyer also signed an appended "Statement of Client's Rights" document that advised him of his rights as a prospective client entering into a contingent fee relationship. *Id*. at 3-4. McKyer's signature on the "Authority to Represent" document indicated in typed language that it was "[d]ated at Miami, Florida," with the handwritten date of January 12, 2012. Both documents were signed by attorneys Stephen F. Rosenthal of Podhurst and David I. Levine of the Levine Firm, with Attorney Rosenthal dating his signatures January 13, 2012.[5]

---

[3] The document provided for the division of responsibilities, as well as fees, between the two firms. The Levine firm was to "be responsible and available to the client for consultation, will participate and assist in preparation of the case, and will bear full responsibility to the client, for its processing, up to final conclusion," together with Podhurst, which was described as "the lead trial and appellate counsel." (Lienholder Stmt., Ex. A, at 1.) The Levine firm is not a party to this lien dispute.

[4] On January 5, 2017, Podhurst advised its clients via e-mail that it would not seek an individual contingency fee of more than 25%. (Lienholder Resp. at Ex. 1.)

[5] Podhurst has represented that McKyer sent his signed agreement to the Podhurst office in Miami, where Attorney Rosenthal then signed it. (Lienholder Stmt. of Disp. at 1.)

At the time of the execution of this contract, Podhurst already had filed a complaint against the NFL on behalf of retired players asserting concussion injuries. When the firm amended its complaint on January 20, 2012, it included McKyer as a plaintiff, and it filed an individual short form complaint on McKyer's behalf after the MDL was formed. (Lienholder Stmt., Exs. D, E.) After the class action settlement was reached, approved by the District Court, and upheld on appeal, Podhurst registered McKyer in the claims portal on February 12, 2017. It obtained documentation of a qualifying diagnosis for McKyer on June 24, 2018 and within a matter of days submitted McKyer's claim. The Claims Administrator gave Notice on August 13, 2018 of McKyer's Monetary Award Claim Determination. This determination was based upon the qualifying diagnosis of a Level 1.5 Neurocognitive Impairment as of June 24, 2018. (Dispute Rec. Doc. 1.)

The Notice of Award also reflected the Claims Administrator's understanding that McKyer was represented by Podhurst. On October 22, 2018, after the appeal period had passed as to the monetary award, Podhurst provided to McKyer via e-mail a "Closing Statement" to reflect the disbursements it would make from his Monetary Award for attorney's fees, direct costs, and medical liens paid. (Lienholder Stmt., Ex. C.) At that point, McKyer expressed an objection to Podhurst about paying any fee from his award. The parties attempted to resolve this dispute in several telephone calls but were unsuccessful, prompting McKyer to advise the Claims Administrator that Podhurst was no longer his representative. Podhurst filed a Notice of Lien on the MDL docket on November 9, 2018. (ECF No. 10327.)

The Claims Administrator gave McKyer notice of Podhurst's lien on November 12, 2018. (Dispute Rec. Doc. 2.) McKyer filed his timely dispute of the lien by e-mail on November 13, 2018. In light of the unresolved lien based upon the contingency fee agreement, the Claims

Administrator withheld from McKyer's award funds for payment of attorneys fees in an amount equal to 22% of his Award, which reflects the presumptive cap on attorney's fees imposed by the Court's April 5, 2018 Opinion and Order (Doc. Nos. 9862, 9863), plus costs – $4,450 – allegedly incurred by Podhurst as asserted in their Notice of Lien. Of that attorney fee withholding, a portion reflecting 5% of McKyer's Award was separately deposited into the Attorneys' Fees Qualified Settlement Fund pursuant to the Court's June 27, 2018 Order Regarding Withholdings for Common Benefit Fund counsel. (Doc. No. 10104.) Those funds may be distributed at a later date upon further order(s) of Judge Brody. This leaves the Court to determine the appropriate distribution for the attorneys fees currently available for disbursement (representing 17% of McKyer's Award) and the allocation of those funds that are currently held in the Attorneys' Fees Qualified Settlement Fund (representing 5% of McKyer's Award), if those funds, or a portion thereof, are distributed by the Court at a future date.

Pursuant to a briefing schedule issued by the Court and in accordance with the Lien Rules, the parties submitted simultaneous Statements of Dispute concerning Podhurst's entitlement to a fee. (Dispute Rec. Doc. Nos. 7 & 8.) Each also submitted a Response to the other's Statement of Dispute. (Dispute Rec. Docs. 9 & 10.) Neither party requested that the Court hold an evidentiary hearing. Pursuant to Lien Rule 17, the Record of Dispute was then transferred to the Court. After convening a telephone conference with the parties, I determined that it was not necessary to hold an evidentiary hearing before evaluating this dispute and making a recommendation for its disposition.[6] The matter is ripe for review.

[6] During a preliminary telephone conference, Podhurst recommended that I assist the parties by overseeing settlement discussions. McKyer joined in this request. Accordingly, I spoke with each side individually in an initial effort to reach a resolution. I then enlisted the assistance of my colleague, the Honorable Timothy R. Rice, United States Magistrate Judge. Unfortunately, those efforts were unsuccessful.

III. THE VALIDITY OF THE CONTRACT

To begin, we address the implicit challenge raised by McKyer about the enforceability of the CFA. That document, entitled "**AUTHORITY TO REPRESENT**," provides:

> I, the undersigned client, do hereby retain and employ the firm of PODHURST ORSECK, P.A. and THE LEVINE LAW FIRM, P.C., as my attorneys to represent me in my claim for damages against THE NATIONAL FOOTBALL LEAGUE, or any other person, firm or corporation liable, resulting from injuries sustained while a player in the NFL.
>
> I hereby agree to pay from any recovered amount, the cost of investigation including reasonable charges for in-house charges for services and, should it be necessary to institute suit, the court costs including the actual amount charged by third party providers of services to the attorney. As compensation for their services, I agree to pay my said attorneys, from the proceeds of any gross recovery, including any awarded attorneys' fees, the following fees:
>
> a. 40% of any recovery; plus
>
> b. An additional 5% of any recovery after institution of any appellate proceeding is filed or post-judgment relief or action is required for recovery on the judgment.

(Lienholder Stmt. of Dispute, Ex. A) (Dispute Rec. Doc. 7).

In response to the Claims Administrator's notification that funds were being deducted from his Monetary Award for Podhurst's fee (albeit capped at 22% of his award), McKyer asserted that he "NEVER thought [he] 'hired' them as [his] personal attorney in the case." (SCM Resp. to Notice of Lien, Nov. 13, 2018) (Dispute Rec. Doc. 3). He contended that the firm lawyers "grossly misrepresented themselves by leading [him] to believe they [were] the main attorneys in the case against the NFL and the league was going to pay them." (*Id.*) He contends that he "do[es] not recall ever being told that [he] hired them at 40%" and that he would not have agreed to such a term. (*Id.*) He re-asserted this contention in his Statement of Dispute as this lien dispute reached the briefing stage, explaining that it was never his "intent to hire Steven Marks or Podhurst Orseck

PA" to be his "personal lawyer against the NFL," adding that according to Marks, "they were already 'Hired'" and McKyer "was adding [his] name as a litigant," which he believes he "did not have to do as [he is] a protected class member." (SCM Stmt. of Dispute, Jan. 15, 2019) (Dispute Rec. Doc. 7). He contends that he "honestly [does not] remember actually signing this 'contact' with Mr. Marks," whom he says he never met and spoke with on only a few occasions. (*Id.*)

McKyer contends that the fact that he and his friend who assisted him throughout coordinated appointments with doctors and paid for the flights and accommodations reflects that he was "acting on the understanding that [he] was not represented by Podhurst Orseck or Steven Marks." (SCM Resp. to Stmt. of Dispute) (Dispute Rec. Doc. 9). *See also id.* (arguing that his actions "prove we were not on the 'same page' about the extent of the relationship").

We find that the records before us of the communications between McKyer and Podhurst belie his contentions. McKyer provided, or caused to be provided, to Podhurst several hundreds of pages of medical and other records from his NFL career. *See* Lienholder Stmt. of Disp., Ex. F. These records would have been important had the individual lawsuit against the NFL proceeded with discovery and in the absence of the large-scale resolution of the class-wide settlement. In addition, when the proposed revised settlement agreement was pending approval in the district court in early 2015, Podhurst personnel made inquiries on McKyer's behalf for an advance on his future recovery. *See id.*, Ex. G (March 4, 2015 email from Roy K. Altman, Esquire of Podhurst to McKyer, copied to paralegal Gina Palacio). These communications, particularly about an advance or loan, were clearly made in the context of an individual attorney-client relationship.

Podhurst has also represented that McKyer was included in "all client" e-mail alerts and bulletins, including one sent on January 5, 2017, as the class-wide settlement approached its effective date, that clarified the difference between common benefit fees for class counsel and

individual contingency fees. *See* Lienholder Resp. to SCM Stmt. of Dispute, Ex. 1. *See also id.* (describing the work for which individual contingency fees are paid). The firm explained that it would "not seek an individual contingency fee under your contract of more than 25%." *Id.* There is no record of any response by McKyer to this e-mail communication that would dispute the notion that he entered into a contract with Podhurst for individual representation, which at that point, as the e-mail message explained, would include "gathering medical records, preparing updates, registration for settlement benefits, scheduling baseline examinations (if needed), compiling, preparing, submitting, and following up with the claims package and representing individual clients through any appeals within the claims process, should that be necessary." (*Id.*)

Finally, the dispute record demonstrates that Podhurst personnel, usually paralegal Gina C. Palacio,[7] did help with many of the tasks of individual representation described in the firm-wide e-mail, such as scheduling (and re-scheduling) McKyer's evaluation by Dr. Brooks. *Id.*, Ex. J (e-mails of Feb. 2018). Ms. Palacio also demonstrated in her e-mail communications with McKyer that she obtained from Dr. Books his neuropsychological report, which she shared with him, and that she "provided it to Dr. Nieto's office so he can finalize his MAF Report and Certification." *Id.* (e-mail of Mar. 27, 2018). She also explained to McKyer that Dr. Nieto required that a close family member fill out a particular questionnaire, which she attached to her message and which she asked to be returned to her for transmission to Dr. Nieto. (*Id.*) McKyer's friend complied with Ms. Palacio's request, as the record shows that Ms. Palacio had the completed questionnaire on hand less than two weeks later and forwarded it to Dr. Nieto's office staff to facilitate his MAF Report and MAF Certification. *Id.* (e-mail of April 9, 2018).

[7] Ms. Palacio's e-mail signature identifies her as "Sr. Paralegal to Steven C. Marks, Esq." at Podhurst Orseck, P.A. *See* Lienholder Stmt. of Dispute, Ex. J.

The record thus demonstrates that Podhurst personnel conducted themselves in a manner we accept as consistent with the obligations they undertook in the contingency fee agreement and that McKyer engaged with them in those efforts, even if there were other arrangements that he made on his own. *See, e.g.,* Report of Lisa Cicetti, Psy. D., Dec. 16, 2016 (reflecting McKyer's self-referral). (Lienholder Stmt. of Dispute, Ex. H.) McKyer did not produce any evidence that he made any objection to the efforts of Ms. Palacio or any other Podhurst personnel that are described here and which reflect activity on his behalf over a span of several years. Moreover, his alternative account – that Attorney Steven Marks told him that he was merely adding his name to a lawsuit but that he did not have to do so because he was "a protected class member" – reflects a garbled understanding or recollection of events, as no class had been certified when McKyer signed the CFA on January 12, 2012. To be sure, the MDL had not even been formed.[8] As neither Steven Marks nor the Podhurst firm was yet designated as class counsel or members of plaintiffs' steering committees, it is difficult for us to accept that Attorney Marks would have assured McKyer on or before January 12, 2012 that, notwithstanding the clear language of the CFA, he "would be paid by the NFL." *See* SCM Stmt. of Dispute at 1. (Dispute Rec. Doc. 7.)

We conclude that the only reasonable interpretation of the record is that McKyer entered into this contract because he agreed to and intended to be bound by all of the terms set forth in the contract. We proceed to consider the validity of Podhurst's attorney lien on that basis.

[8] The NFL parties filed a motion with the United States Judicial Panel on Multidistrict Litigation on November 15, 2011 requesting consolidated pretrial proceedings. Although we could assume that Podhurst expected that an MDL would be created and that its attorneys would play a significant role in the litigation, the motion was not granted until January 31, 2012, after Podhurst and McKyer entered into this CFA.

IV. DISCUSSION

Third Circuit authority makes it clear that attorneys carry the burden of proof to demonstrate that a fee sought pursuant to a contract "is reasonable under the circumstances." *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1111-12 (3d Cir. 1979) (discussing deference to fee contracts, but cautioning that attorneys always bear the burden of demonstrating the reasonableness of their contracts). The District Court's prior opinions in this class action settlement in no way relieved attorneys of this obligation. Indeed, the Court explained that all attorneys seeking fees – whether those fee requests are submitted through a Lien or otherwise – are obligated to ensure that their fees are "reasonable" under the standards set out in *McKenzie*. *See* Doc. No. 9862 at 8-9 (noting the requirement and indicating the attorney's burden of showing reasonableness by a preponderance of the evidence). Even when the lienholder presents a presumptively valid fee contract, we are required to assess if the payment of the fee would "result[] in such an enrichment at the expense of the client that it offends a court's sense of fundamental fairness and equity." *McKenzie I*, 758 F.2d at 101.

Pursuant to the *McKenzie* five-part reasonableness analysis, we evaluate the "performance of the attorney's contractual obligations [with consideration of] the circumstances surrounding the engagement of the attorney." *McKenzie I*, 758 F.2d at 101. Our inquiry begins "by scrutinizing the reasonableness of the contingent fee arrangement" at the time of the contract's signing and comparing it to the circumstances at the time of enforcement. *McKenzie II*, 823 F.2d at 45 n.1. Recognizing that the District Court has already adjusted fee agreements through the Fee Cap to account for the changed circumstances that occurred over the course of this litigation, we must determine if there were other factors specific to this individual case that should be considered in our assessment of the reasonableness of the fee at the time of the enforcement of each contract

upon which a lien is based. We will then review: (1) the result in the case, (2) the quality of the work performed by counsel, and (3) the substantiality of that contribution to the overall result.

As we outline below, circumstances changed significantly from the time of McKyer's initial contracting with Podhurst to the time that Podhurst sought to enforce its contract. Based upon our evaluation of the remaining three prongs of the *McKenzie* test, however, we are satisfied that Podhurst provided quality representation and made substantial contributions to the ultimate Award received in this case, notwithstanding McKyer's contention that he himself is solely responsible for the award he secured such that Podhurst should not receive any fee. We will therefore recommend that the Court approve Podhurst's fee request.

A. The CFAs at the time of contracting and enforcement – impact of changed circumstances

As we assess the reasonableness of the contingent fee arrangement at the time of the contract's signing by McKyer and Podhurst, there are two primary factors that we must examine: (1) the legal challenges in the plaintiff's pursuit of a monetary award and (2) the time-intensive nature of the litigation. We then compare the landscape at the time of contracting with the circumstances at the time the attorney-client relationship terminated.

Podhurst agreed to represent McKyer in his dispute with the NFL on January 13, 2012, after the first lawsuits were brought by former players against the NFL in a California state court but before individual cases had been consolidated for pretrial purposes into this MDL. The NFL's motion for consolidated pretrial proceedings, however, was pending at this time, and was granted soon after, on January 31, 2012. This is what Professor Rubenstein[9] characterized as "Phase 1" of

[9] The District Court appointed Professor William B. Rubenstein of Harvard Law School as an expert witness on attorneys' fees to aid the Court. After considering the recommendations of

the litigation. As has been noted in prior opinions in this MDL, at that time the plaintiffs faced stiff challenges surmounting the issue of preemption. Establishing causation also would have been similarly challenging, since the claims involved complex scientific and medical issues that had not yet been studied comprehensively and where the settlement class members would certainly also have suffered trauma in their college and high school careers.

Risk as it related to overall workload also varied over time in this litigation. When law firms undertake large-scale litigation, they are obligated to decline to take on other litigation. The cost to law firms in deciding to participate and thus forego alternative matters must be recognized. In this first phase of the litigation, the law firms that undertook representation of players individually, without the benefit of the efficiencies contained within an MDL, faced monumental challenges and risked having to pursue the entire case themselves, perhaps even through trial. Fee arrangements reflecting those large contingencies "would have been expected and appropriate." (Doc. No. 9526 at 25-26).

Once the individual cases were consolidated into an MDL at the end of January 2012, the risk related to the *volume* of work to be undertaken by a law firm representing a retired player changed dramatically. Once an MDL was formed, "lawyers contracting to represent clients were well aware that the costs of doing so had been greatly reduced: pre-trial proceedings would now be consolidated and undertaken once and the likelihood that any case would be remanded for trial declined significantly." (Doc. No. 9526 at 26). The formation of an MDL also resulted in the formation of the Plaintiffs' Executive Committee ("PEC"), a Plaintiffs' Steering Committee

---

Professor Rubenstein and the viewpoints of interested parties, the District Court adopted Professor Rubenstein's conclusions and presumptively capped IRPAs' fees at 22% plus reasonable costs. (Doc. No. 9862 at 2).

("PSC"), and other committees that took over the primary work in the case. *See* Case Management Order Number 5 (Doc. No. 3710 at 3) (detailing types of work shifted from IRPAs to Plaintiffs' Committees, which would be compensated through a common benefit fund).[10] The risks as to the *legal* challenges faced by the plaintiffs at this phase in the litigation, however, remained substantial. This case remained a "high-risk, long-odds litigation." (Doc. No. 9860 at 10).

McKyer remained in a contractual relationship with Podhurst from January 13, 2012 until after he received his award on August 13, 2018. During this time, of course, substantial progress had been made in moving the cases forward, collectively and individually. The NFL's motions to dismiss and to sever were argued in April 2013, but in July 2013, without yet ruling on these motions, Judge Brody ordered the parties to mediation, and by the end of August 2013 a term sheet had been signed. This led to class counsel's motion for preliminary approval filed on January 6, 2014, which was further amended and finally approved on April 22, 2015. On April 18, 2016, the Third Circuit Court of Appeals affirmed the District Court's approval of the Settlement Agreement, and the United States Supreme Court later denied *certiorari*. The risk inherent in the litigation was then decreased significantly, thanks to the efforts of Class Counsel and those other lawyers who served on various MDL committees and performed work for the common benefit. This does not alter the fact, however, that Podhurst undertook the representation at a time of great risk.

McKyer and Podhurst remained in a contractual relationship through the period in which the claims administration opened. Podhurst registered McKyer with the Claims Administrator on February 12, 2017 and assisted in obtaining the necessary diagnosis and documentation from

[10] We have laid out specifics of this benefit in our initial attorney lien dispute Report and Recommendation. *See* Doc. No. 10368 at 13-18.

appropriate providers and followed up as necessary. Podhurst submitted McKyer's claim on June 28, 2018 and it was approved on August 13, 2018.

There were thus several key changes in the circumstances during the time between when Podhurst agreed to represent McKyer and when it sought to enforce the contract upon the approval of McKyer's monetary award by the settlement Claims Administrator. While the evidence-gathering tasks and case development relating to damages were much the same, Podhurst had only to adhere to an administrative process in order to secure the award and did not have to defend against legal challenges from the NFL Parties.

B. The results obtained

We next look to the results obtained, the quality of the work performed and the substantiality of the firm's efforts in bringing about the result. We observe that on August 13, 2018, McKyer qualified for the full Monetary Award grid amount based on his number of eligible seasons played and his Level 1.5 Neurocognitive Impairment diagnosis at the age of 54. (McKyer, Notice of Monetary Award Claim Determination).

C. The quality of the work performed

Podhurst contends that it provided quality work to assist McKyer in securing this award. It lays out this work at pages 7-10 of its Statement of Dispute. McKyer responds that Podhurst "did NOTHING" for him. (SCM Stmt. of Dispute at 1.) (Dispute Rec. Doc. 3.) He contends that he found doctors and made appointments himself, and that he made his own travel arrangements. This is acknowledged by Podhurst and confirmed by the dispute record, where a medical report from 2016 is addressed to McKyer and indicates that he was a "self-referral." Nonetheless, it does not appear that this arose from Podhurst failing to represent him adequately. To be sure, when

McKyer needed to be evaluated by a different (board-certified) psychologist, Podhurst helped to shepherd him through the process with Dr. Brooks and ensured that the neuropsychologist received all of the necessary information from Dr. Brooks and others to render a diagnosis consistent with the MAF protocols. Podhurst's involvement in this important work is also reflected in the costs it incurred. *See* Lienholder Stmt. of Dispute, Ex. C (reflecting expenses advance in 2017 and 2018 for reports and supplemental reports of Drs. Nieto and Brooks).[11]

As is demonstrated in our discussion below, we find that Podhurst provided quality work on behalf of McKyer and in accordance with the demands of the litigation and settlement administration.

D. The substantiality of the work performed

Perhaps the more important question is to consider Podhurst's contribution to the work necessary to obtain the Monetary Award that McKyer received in this case. In cases where more than one firm represented a settlement class member leading up to the receipt of the Notice of Award, we have looked to the contributions of each firm, comparing the value each added in advancing legal theories and in the work it performed individually for the client, with the effect on the ultimate outcome of the client's award. We typically lay out the efforts undertaken by the firms in the various aspects of their representation to aid in our evaluation of this critical and final factor in the *McKenzie* analysis.

Here, only one firm has represented McKyer – Podhurst – and that firm was still of record

[11] We observe here that this is not the first case in which we have been faced with a settlement class member or representative who claims that counsel's fee request should be rejected or reduced because he or she made appointments with doctors independent of the law firm. *See* ECF No. 10383 (*Locks Law Firm v. Burtaniel Owens*), Mem. Opin., Jan. 18, 2019. There we concluded that the lienholder was entitled to the 20% fee percentage set forth in the parties' CFA as amended.

when the award was made, at which point there was no more to be done. There is no other attorney competing for the funds available for counsel fees. Rather, McKyer contends that no IRPA fee is payable to Podhurst at all because he never intended to oblige himself to an individual contract representation. He also contends that "they did NOTHING for me," as he did not require advances and he and his friend did all of the "leg work." (SCM Resp. at 3.)

Although the construct is somewhat different here, we will evaluate Podhurst's (and McKyer's) contributions here in accordance with Circuit case law and our prior decisions. As we have described there, we look to as many as seven non-exclusive categories of work undertaken by IRPAs who have supported their clients in this litigation:

> (1) review of medical records and necessary actions taken to ensure medical conditions were identified and diagnosed at the earliest possible date;
>
> (2) support of their individual clients to ensure their lawsuit would have evidentiary support should the matter proceed to trial;
>
> (3) review of other litigation that was related to ensure claims in this litigation would not be negatively impacted;
>
> (4) support of their individual clients in understanding the ongoing settlement negotiations and risks, and in ultimately making the determination of whether to opt out of the class,
>
> (5) shepherding the individual client through a claims process from registration to receipt of a Monetary Award,
>
> (6) support of clients who were seeking loans and were exposed to predatory lending practices; and
>
> (7) providing necessary support in other personal matters collaterally related to this litigation.

In no way is it expected that an IRPA's work will cover each of these categories. We will, however, use these categories as checkpoints as we consider the substantiality of Podhurst's efforts as an IRPA and the role Podhurst played in the maximizing McKyer's award.

(1) The review of medical records and necessary actions taken to ensure medical conditions were identified and diagnosed at the earliest possible date

Podhurst contends that it worked with McKyer to schedule a medical evaluation with a qualified MAF physician because a psychologist with whom McKyer previously consulted on his own in 2016 did not ultimately meet the criteria set for the MAF program. Podhurst facilitated the transmission of a third-party report to the neuropsychologist to review for his qualifying diagnosis. It is uncontested, however, that McKyer himself also arranged and paid for medical appointments and obtained recommendations and referrals for evaluators for this litigation. *See* Lienholder Stmt. of Dispute at 9-10.

(2) Support of their individual clients to ensure their lawsuit would have evidentiary support should the matter proceed to trial

We accept Podhurst's assertion that it performed significant work with respect to reviewing and collecting medical reports and scheduling appointments for neuropsychological testing with Dr. Brooks and follow up diagnoses with board certified neurologist Dr. Nieto. The firm gathered NFL player history file materials (largely obtained by McKyer) that would pertain to the number of McKyer's eligible seasons, which would directly impact the size of his Monetary Award. These materials may also have been necessary had Podhurst been required to litigate the case individually and face causation challenges. In the course of the work it did after the settlement was reached and the MAF criteria established, Podhurst advanced $4,450 in costs in 2017 and 2018 for testing and reports by Drs. Brooks and Nieto.

(3) Review of other litigation that was related to ensure claims in this litigation would not be negatively impacted

This factor is not applicable to this dispute.

(4) Support of their individual clients in understanding the on-

going settlement negotiations and risks, and in ultimately making the determination of whether to opt out of the class

Podhurst obviously counseled McKyer to join the multi-plaintiff lawsuit that was being filed in the Southern District of Florida on January 20, 2012. Podhurst has represented that it had periodic communications with McKyer concerning the status of settlement discussions and the future of the litigation. *See, e.g.*, Lienholder Resp., Ex. 1 (e-mail from Steven C. Marks dated Jan. 5, 2017 re: implementation of settlement). Podhurst appears to have done as much for McKyer as the circumstances of the case would allow while the agreement was negotiated, pending approval, and on appeal.

(5) Shepherding the individual client through a claims process from registration to receipt of a Monetary Award

Podhurst exclusively performed this work for McKyer. It registered him on February 12, 2017 and submitted the claim form on June 28, 2018. This work was certainly a necessary step for McKyer to receive the award that he did.

(6) Support of clients who were seeking loans and were exposed to predatory lending practices

Podhurst worked with McKyer when he wanted to obtain a loan, although the loan application was ultimately not approved. *See* Lienholder Stmt., Ex. G (e-mail dated Mar. 4, 2015 from Roy K. Altman, Esq. of Podhurst to McKyer, copied to Gina Palacio of Podhurst).

(7) Providing necessary support in other personal matters collaterally related to this litigation

This factor does not appear to apply to McKyer's relationship with Podhurst.

* * *

In this attorney lien process, we are called upon to synthesize this information to apportion fees for the quality representation provided to the retired player that yielded the positive outcome

of a Monetary Award. We are cognizant that, here, three entities contributed to the work necessary to obtain that Award: Podhurst acting for McKyer individually; Class Counsel and law firms such as Podhurst that acted for the common benefit in negotiating and defending the Settlement Agreement; and McKyer himself, who sought out treatment providers and obtained evaluations at his own expense.

The substantiality of Podhurst's work as an IRPA in securing McKyer's Monetary Award is necessarily reduced by the work of Class Counsel and the attorneys working with them for the common benefit for much of the same time period in which Podhurst represented him. The Court has already observed that class counsel's efforts clearly "reduced the amount of work required of IRPAs." (Doc. No. 9862 at 4.) Its establishment of a 22% presumptive fee cap for IRPAs reflects this, taking into account: (1) the value of the work provided by Class Counsel in their negotiation of a Settlement Agreement; (2) the benefits of Class Counsel's work as the legal team in filing pleadings, framing the Settlement Agreement, and handling the complex appellate process that followed; and (3) the efficiencies provided when the case was resolved without formal discovery, with limited motion practice, and with no bellwether trials. Podhurst was at McKyer's side prior to the formation of the MDL, during the period in which the settlement was negotiated, while protocols were finalized and qualifying diagnoses could be secured, and for claim submission and award receipt. It was only after the claim culminated in the Award that McKyer discharged Podhurst.

Our task is to determine the reasonableness of the fee sought by Podhurst. We conclude that Podhurst's work warrants a reasonable fee. We acknowledge McKyer's expression of confusion about the nature of the agreement that was signed in January 2012. *See* SCM Stmt. of Dispute ("I honest[ly] do no[t] remember actually signing that 'contract' with Mr. Marks"). While

he argues that his course of conduct in setting up his own appointments reflected his understanding about his responsibility to manage his own case, there is no evidence that McKyer ever communicated to Podhurst that he desired any change to their CFA. Nor is there any evidence that he questioned or objected to the individualized assistance, reflected in the record, from Attorney Altman (concerning a possible advance) and paralegal Gina Palacio (concerning the advance as well as compilation of the medical record and claim submission), nor the firm's interactions with the Claims Administrator regarding registration and claim form submissions. The record contains no evidence of any complaints by McKyer that Podhurst was not providing the services described in the CFA. Rather, Podhurst was available to him and assisted as necessary throughout. We cannot accept the proposition he advances that the award was solely the result of his own effort, albeit with some sort of "free" assistance of Ms. Palacio, the paralegal to Podhurst partner Mr. Marks.

At the same time, McKyer did have direct involvement in obtaining his player records and in securing and making many of the arrangements to see the doctors who would ultimately provide the necessary testing and qualified diagnosis. He thus relieved Podhurst of some of the tasks ordinarily undertaken by IRPAs. We also note that there did not appear to have been any difficulty in the processing or approval of McKyer's claim that required any additional or unanticipated work by Podhurst. In these circumstances, we are hard pressed to conclude that the firm's efforts support the presumptive maximum fee of 22% for its IRPA work on McKyer's behalf. We are comfortable, however, in approving a fee of 20%.

E. Costs

Podhurst has declared that it does not seek reimbursement of the $4,450.00 incurred in costs arising from its representation of McKyer. (Lienholder Stmt. of Dispute at 13.) Therefore, these withheld funds will be available for release to McKyer.

V. CONCLUSION

The evidence recounted here should result in an approval of a fee to Podhurst equal to 20% of McKyer's monetary award. We are convinced that McKyer's assertions, predicated upon his own "understanding" of the relationship he had with Podhurst and its personnel, does not invalidate the clear terms of the CFA signed in January 2012. We find that Podhurst's IRPA contribution to McKyer's Award is sufficient to support a fee of 20%, although this amount must be reduced by the Common Benefit Fee deduction currently applicable to all Awards. Accordingly, we recommend that the Claims Administrator be ordered to:

1) Disburse from the currently withheld funds, representing 17% of McKyer's monetary award and $4,450.00 withheld for reimbursement of costs:
    a. To Podhurst: an amount equal to 15% of McKyer's monetary award; and
    b. To McKyer: an amount equal to 2% of the monetary award, plus $4,450.00;
2) At such time as the Court rules upon the 5% holdback request, disburse from those currently set aside funds:
    a. To Podhurst: 91% (20/22nds) of the funds released for payment to IRPAs; and
    b. To McKyer: 9% (2/22nds) of the funds released.

BY THE COURT:

/s/ David R. Strawbridge, USMJ
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 12-md-2323 (AB) MDL No. 2323
THIS DOCUMENT RELATES TO: Plaintiff's Master Administrative Long-Form Complaint and: Plaintiff Vontrell Jamison	**PETITION TO ESTABLISH ATTORNEY'S LIEN**

Comes now Petitioners, David Buckley, Attorney David Buckley, PLLC, Mokaram Law Firm and Stern Law Group, pursuant to an executed Agreement for Legal Services come now and states as follows:

1. Petitioners are attorneys at law admitted to practice before the courts of Texas, and file this Petition to establish a lien for attorney's fees as set forth hereinafter.
2. On or about May 9, 2015, Petitioners, David Buckley, Attorney David Buckley, PLLC, Mokaram Law Firm and Stern Law Group, were retained and employed by the Plaintiff, Vontrell Jamison, pursuant to an agreement for legal services, to pursue a claim for injuries and damages allegedly caused by the National Football League's conduct associated with football-related concussions, head, and brain injuries.
3. The specifics of the agreement for legal services are as follows: If no recovery (by settlement or trial) is obtained, client will not owe a legal fee. If David Buckley, Attorney

David Buckley, PLLC, Mokaram Law Firm and Stern Law Group obtain a settlement or judgment for Client, Client will pay to the Petitioners thirty three and one third percent (33.33%) of the gross recovery plus reimbursement of expenses.

4. When Petitioners entered into contract with Plaintiff, Petitioners entered into the risk and expense of the litigation.
5. From the date the Petitioner was authorized to proceed on behalf of the Plaintiff, the Petitioner has actively and diligently investigated, prepared, and pursued Plaintiff's claims, and has taken all steps necessary to prosecute those claims, including, but not limited to, correspondence and communications with the client, preparation and review of client's factual and legal circumstances, providing client updates, analyzing Plaintiff's medical status and need for medical testing, etc.
6. The Plaintiff has discharged the Petitioners as his attorney in this matter, and it is expected that a new attorney will be pursuing representation of the Plaintiff in this action.
7. Petitioners were not terminated due to any malfeasance or other improper action.
8. The Petitioners claim the right to have a lien for attorney's fees and expenses established and enforced upon any sums to be derived from any settlement or judgment obtained or to be obtained by Plaintiff in this action.

WHEREFORE, the Petitioners pray:

1. That an attorney's lien be established;
2. That the amount of the lien be determined;
3. That the Court order that Petitioner be entitled to enforce an attorney's lien against the proceeds to be derived from any settlement or judgment in this action;
4. That the Defendant or the Defendant's insurer be prohibited from paying to the Plaintiff any sums of money until said lien has been satisfied; and

5. For such other further relief as this Court deems just.

Dated: July 18, 2019.

Respectfully submitted,

ATTORNEY DAVID BUCKLEY, PLLC

By: */s/ David Buckley*
David Buckley
State Bar No. 24078281
FED ID No. 1465981
1811 Bering Drive Ste. 300
Houston, TX 77057
Tel. (713) 719-9312
Fax. (713) 719-9307
david@thebuckleylawgroup.com

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Petition to Establish Attorney's Lien to be served via the Electronic Case Filing (ECF) system in the United States District Court for the Eastern District of Pennsylvania, on all parties registered for CM/ECF in the litigation.

Dated: July 18, 2019.

/s/ David Buckley
David Buckley

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323 **Hon. Anita B. Brody**
Kevin Turner and Shawn Wooden, *on behalf of themselves and others similarly situated*, Plaintiffs, v. National Football League and NFL Properties LLC, successor-in-interest to NFL Properties, Inc., Defendants.	Civ. Action No. 14-00029-AB
THIS DOCUMENT RELATES TO: ALL ACTIONS	

THIRD VERIFIED PETITION OF CLASS COUNSEL CHRISTOPHER A. SEEGER FOR AN AWARD OF POST-EFFECTIVE DATE COMMON BENEFIT ATTORNEYS' FEES AND COSTS

Pursuant to this Court's May 24, 2018 Explanation and Order (ECF No. 10019), and subsequent to the Second Verified Petition for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs (ECF No. 10374) ("Second Post-Effective Date Petition"), Class Counsel Christopher A. Seeger ("Class Counsel" or "Seeger Weiss") respectfully submits this Third Verified Petition for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs.

Based on the work undertaken from December 1, 2018, the first date after the close of the time period covered by the Second Post-Effective Date Petition,[1] to May 31, 2019, Seeger Weiss has undertaken work for the common benefit of the Settlement Class and dedicated over 2,100 hours, resulting in a lodestar (calculated using the blended rates set by the Court; *see* ECF No. 10019 at 7 n.4) of $1,445,488.66, and has incurred $243,788.10 in expenses.

SUMMARY OF WORK COMPLETED – DECEMBER 1, 2018 TO MAY 31, 2019

As was discussed in the Second Post-Effective Date Petition, the work of implementation of the Settlement continued alongside the on-going monitoring and oversight that the Settlement will continue to demand over the remainder of its term. Although the foundational work necessary to establish this 65-year settlement was largely completed by the time of the Second Post-Effective Date Petition, several substantive matters above and beyond the monitoring and oversight of the Settlement continued to demand the attention and resources of Class Counsel. Additionally, monitoring the Settlement Program to ensure that it continues to deliver the promised benefits to the Settlement Class has continued to require sundry efforts.

Among these efforts were revisions to the MAF and BAP policies and documentation, monitoring and oversight of the medical professionals in the network of Qualified MAF Physicians and BAP Providers, support of Class Members through the Claims Process, including on appeals, ongoing support of unrepresented Class Members and individual counsel, and work concerning the Education Fund (specifically, in determining appropriate programs and research resources contemplated for the Fund). During the time period covered by the instant Petition, two significant

[1] The Second Post-Effective Date Petition covered the period from May 25, 2018 to November 30, 2018. *See* ECF No. 10374 at 1.

deadlines in the Settlement took place or were imminent. Class Counsel coordinated with the Claims Administrator to ensure that players and their families with pre-Effective Date Diagnoses had no issue with the February 6, 2019 deadline for the filing of Monetary Award[2]. To that end, Class Counsel directly assisted unrepresented Settlement Class Members in meeting this deadline. Similarly, Class Counsel worked with the BAP Administrator to ensure that all players eligible for the BAP and who faced the June 6, 2019 deadline for their examinations[3] timely requested the BAP examinations to which they were entitled. As to both deadlines, Class Counsel sent reminder letters to all unrepresented Retired Players and all private counsel representing Retired Players regarding the February 6, 2019 deadline to file Pre-Effective Date claims, and also sent letters to all BAP-eligible Retired Players born on or before June 6, 1974, and their counsel, reminding them about the June 6, 2019 deadline to take their BAP exams.

Additionally, as with the Second Post-Effective Date Petition, Class Counsel continued to engage in certain significant work that was unanticipated, but which was essential to ensure the integrity of the Settlement Program and the benefits negotiated for the Retired NFL Football Players and their families. Most notably, this work included securing an Order of the Court that affirmed that the Special Masters are not required but, rather, have the unfettered discretion to consult with members of the AAP when deciding appeals (*see* ECF No. 10528), shoring up an inclusive definition of "generally consistent" for diagnoses made outside of the BAP, and

[2] For the sake of simplicity and brevity, "Monetary Awards" refers to both Monetary Awards and Derivative Claimant Awards under, respectively, Articles VI and VII of the Settlement Agreement.

[3] Under the Settlement Agreement, BAP-eligible players born on or before June 6, 1974 had until June 6, 2019 to have their BAP exams. Settlement Agreement § 5.3. To accommodate the practicalities of the BAP scheduling and appointment process, Class Counsel worked with the BAP Administrator to allow initial efforts by a player to schedule examinations to satisfy the deadline. The NFL consented to this accommodation.

providing that players on the practice squad received credit toward half an Eligible Season for bye weeks.

As of May 28, 2019, over 20,500 Settlement Class Members had registered for the Settlement Program, over 2790 Claim Packages had been submitted, 863 Notices of Monetary Awards had been issued, worth over $657 million; and over 10,230 BAP examinations had been scheduled for 5,870 players and over 9,281 appointments had been attended. [4] *See* www.nflconcussionsettlement.com/Reports_Statistics.aspx (last accessed July 18, 2019). These successes are not mere happenstance. Seeger Weiss has worked tirelessly in coordination with the Administrators, the Special Masters, and the Court—and both cooperatively with and, as circumstances have warranted, against the NFL—to facilitate and oversee the Settlement. The bi-weekly call that Seeger Weiss hosts with the NFL Parties, the Claims Administrator, the BAP Administrator, and the Lien Resolution Administrator, where ongoing issues and progress in resolving them are hashed out, has been a central component of these efforts. Approximately 129 of these bi-weekly calls had taken place by the May 31, 2019 closing date of this petition. Work on the Settlement has been a daily matter, requiring the dedication of several Seeger Weiss attorneys and paraprofessionals, and has focused around certain key areas that are summarized in the sections that follow.

[4] Historic statistics related to the MAF are available on the Settlement Website. *See* www.nflconcussionsettlement.com/Reports_Statistics.aspx (last accessed July 18, 2019). Historic BAP statistics are not maintained on the Settlement Website. The BAP Administrator, however, filed his Second Quarter Report on May 31, 3019 (ECF No. 10653).

Oversight of the Claims Process and Monetary Award Determinations.

Seeger Weiss devoted significant time to actively monitoring and supporting the Claims Process to ensure that Class Members are receiving the benefits that were negotiated on their behalf. This oversight included ongoing reporting and requests for information from the Claims Administrator and reviewing each claim determination by a member of the AAP or the Claims Administrator to ensure that they are correctly following the terms of the Settlement Agreement. Class Counsel's continuing engagement with Settlement Class Members and their counsel provided further bases and guidance on the needs of the Claims Process. This type of "hands on" support was particularly needed in the lead-up to the February 6, 2019 deadline for the filing of pre-Effective Date claims, and the June 6, 2019 BAP deadline for those BAP-eligible players born on or before June 6, 1974.

Moreover, Class Counsel continues to support the petitions of Representative Claimants for Retired NFL Football Players who were diagnosed with a Qualifying Diagnosis but who died before January 1, 2006. Pursuant to the Settlement Agreement, before these claims can proceed to review on the merits, the Court needs to determine whether they are timely under the applicable state's law. *See* ECF No. 6481-1 at 35 (Settlement Agreement § 6.2(b)). Since the Second Post-Effective Date Fee Petition, Cass Counsel has submitted several additional Statements in support of the Representative Claimants' submissions that such claims are timely under the Settlement Agreement.

Furthermore, just as it had worked to ensure inclusion of protections for the interests of Class Members in the audit rules and procedures, Class Counsel has remained engaged in supporting Class Members with ongoing audits of claims. In particular, Class Counsel has submitted Statements regarding the Claims Administrator's referrals to the Special Masters and

replies in those referral accepted by the Special Masters, to make certain that meritorious claims are not unduly caught up in the audit process and to ensure that the focus of any inquiry be on only those parties (e.g., medical and legal professionals) that may have engaged in behavior not permitted under the terms of the Settlement. More generally, Seeger Weiss monitors the progress of audit investigations and provides formal input at each juncture.

As in the prior implementation periods, Class Counsel has worked to protect the interests of Class Members (and will continue to do so) by monitoring the wider operation of the Settlement Program and addressing with the Claims Administrator all manner of issues as they arise.

Appeals of Claims Determinations.

Seeger Weiss has continued to monitor all Monetary Award determinations to provide guidance to Class Members. In those cases where an appeal from a determination is taken, either by a Class Member or the NFL Parties, Class Counsel also determines whether to file a Statement in support of the player's position. Through this active engagement, Seeger Weiss' goal is to make sure that Class Members' entitlement to benefits is not restricted or foreclosed outright by improper interpretations of the Settlement Agreement or by meritless appeals taken by the NFL. Whether through submitting Statements in support of a Class Member's appeal or through direct support of unrepresented Class Members and individual counsel, Class Counsel pursued, among other things: a determination, based on the NFL's Collective Bargaining Agreement, that players on the practice squad will earn credit toward half an Eligible Season for "bye" weeks; the application of the correct injury definition for Alzheimer's disease for deceased players, which differs from the injury definition for living players; and the proper use of screening tests, such as MMSE and MoCA, which are not designed to be used to rule out a Qualifying Diagnosis of Level 1.5 or 2 Neurocognitive Impairment. Regarding the "bye" week success, the player whose appeal

raised the issue had his monetary award increased by approximately $150,000 while 37 other players received an additional half of an Eligible Season and eight of these players became newly eligible for the BAP.

Maintenance of the Networks of Qualified BAP Providers and Qualified MAF Physicians.

The process of identifying and vetting BAP Providers and Qualified MAF Physicians is on-going as the BAP and MAF networks continue to require qualified neurologists and neuropsychologists (BAP only) in new regions, to add medical professionals in existing regions and to replace those providers no longer in the program. That process involves a detailed review of each provider's curriculum vitae and application, as well as an investigation concerning such candidates' qualifications. Seeger Weiss has continually been engaged in this effort.

BAP Examinations and Supplemental Benefits.

Beyond its role in helping to maintain the BAP network of Providers, Seeger Weiss continues to monitor the BAP to ensure that examinations are scheduled efficiently and appropriate standards are followed. Moreover, in coordination with the BAP Administrator, Class Counsel has continued to roll out BAP Supplemental Benefits for those Retired NFL Football Players whose BAP examinations yield a diagnosis of Level 1 Neurocognitive Impairment. These efforts include monitoring initial orientation of such eligible players, first consultations, and the expansion of covered services to allow each player to receive the care most appropriate to his condition. As of the BAP Administrator's last Status Report, 85 players had received Level 1 diagnoses and were either in the process of selecting the BAP Provider who will be overseeing their treatment and benefits, or were already receiving their Supplemental Benefits. These benefits include a range of therapeutics, pharmaceuticals, and diagnostic and imaging services, and require additional contracting with BAP Providers as well as with those entities outside of the BAP network of

Providers who will provide many of the services. Class Counsel has also monitored these retention efforts by the BAP Administrator. Finally, in anticipation of the June 6, 2019 deadline for BAP exams, and in coordination with the BAP Administrator, Class Counsel negotiated a compromise with the NFL that offered the players subject to the deadline an extension so long as they request an appointment by the deadline (as opposed to completing the examinations).

Fielding Communications from, and Supporting, Class Members and Individual Counsel.

Seeger Weiss continues to receive (and address) hundreds of telephone calls and emails each month from Class Members and attorneys representing Class Members. The inquiries involve all manner of issues concerning the Settlement, including the claims process, matters relating to post-Effective Date examinations through the BAP and MAF, liens, and appeals. Seeger Weiss handles every inquiry and has assisted numerous Class Members in successfully navigating the claims process. Class Counsel has further assisted unrepresented Class Members in gathering necessary documents, including medical records, and completing their claims packages so that their claims can be promptly reviewed and, where qualifying, approved. Class Counsel also frequently speaks and corresponds with counsel representing Class Members concerning, *inter alia*, questions they have about the claims process, the Settlement's Frequently Asked Questions (which guide the claims process), and otherwise offering support to ensure that qualifying claims are properly presented and paid. Given the deadline to file pre-Effective Date claims and the deadline for certain players to take BAP exams fell within the time period covered by this Petition (along with Class Counsel's reminder letters), Class Counsel received a very high number of calls and correspondence during this period.

Efforts to Protect Class Members from Third-Party Profiteers.

Class Counsel has continued its efforts to protect Class Members whom litigation funders lured into putative assignments of their prospective Monetary Awards.[5] Professor Issacharoff presented oral argument in the Third Circuit in the appeals taken by several third-party funders who challenged the Court's declaration that their putative assignment agreements were void. *See* ECF Nos. 9558, 9755, 9794, 10027, 10141 (notices of appeal filed by various funders). In a victory for the players, the Third Circuit affirmed the authority of this Court to protect the *res* along with the players from prohibited assignments. *See Nat'l Football League Players' Concussion Injury Litig.* 923 F.3d 96, 107-10 (3d Cir. 2019).

Education Fund and Medical Research Data.

Class Counsel and the NFL Parties continued exploring organizations that support safety and injury protection in football and may be appropriate recipients of proceeds from the $10 million Education Fund that was established as part of the Settlement. *See* ECF No. 6481-1 at 68 (Settlement Agreement, art. XII). In that regard, the Parties are in advanced discussions with an initial candidate organization.

Similarly, the Settlement Agreement contemplated that the medical records and information that would be generated through the free BAP examinations provided to consenting and eligible Retired NFL Football Players would be made available for medical research.[6] *Id.* at 33 (Settlement Agreement § 5.10(a)). Class Counsel continued efforts with the BAP

[5] As the Court is already well aware from the copious briefing of the assignment issues, these putative purchases of Class Members' prospective Monetary Awards at steep discounts (often exceeding 50%) were cleverly packaged as what are, in effect, advances against the awards at usurious rates of interest. *See* ECF No. 8434 at 7 & n.2.

[6] As further provided in the Settlement Agreement, player confidentiality will be maintained.

Administrator, the Claims Administrator, its own expert, a potential university partner, and the NFL Parties to establish a medical research database that will gather, systematically organize, and maintain the medical information that the BAP Administrator is collecting from the BAP Examinations.

Class Counsel anticipates presenting a formal motion to the Court for approval of the organizations that will be engaged in both initiatives and for and initial release of some portion of the Education Fund to commence both programs.

INITIAL ASSESSENT OF ON-GOING WORK NECESSARY TO OVERSEE AND MAINTAIN THE SETTLEMENT PROGRAM

As is evident from the foregoing, Class Counsel's efforts to ensure that the Settlement Program is implemented in accordance with the Settlement Agreement has borne substantial fruit for the players and their families. Unlike prior fee petitions, this Third Fee Petition marks the first period where the majority of Class Counsel's efforts have been dedicated to the oversight and maintenance of the Settlement Program, as opposed to the development and implementation of the program. These daily oversight and maintenance tasks, however, are themselves demanding and will continue to require commitments by Class Counsel as the submission of Claims Packages to the Claims Administrator and the BAP process continue. With the deadline for filing Claims based on pre-Effective Date Qualifying Diagnoses recently passed, Class Counsel anticipates that the volume of all claims-related activity will remain high for several more months as these Claims, as well as any related deficiencies and appeals, are processed.

Three key areas illustrate the kinds of responsibilities Class Counsel undertakes and will continue to undertake as part of its on-going monitoring and oversight of the Settlement.[7] Looking forward, Class Counsel anticipates that the following areas will comprise its primary monitoring and oversight obligations.

Daily Communications with Unrepresented Players and Lawyers

In the period since the last Petition, Class Counsel received hundreds of calls and emails each week in advance of key milestones (e.g., the pre-Effective Date Claims deadline). Currently, Seeger Weiss receives approximately one hundred calls and emails each month. Calls are initially received by a dedicated paralegal, who often can address the caller's needs. Those calls that present a more complex issue or problem and require investigation and engagement with the Claims Administrator and/or the BAP Administrator, are escalated to an attorney. Some calls

[7] In its April 5, 2018 Memorandum addressing the aggregate award of common benefit fees and expenses, the Court noted that it hoped to address the question of the nature and amount of on-going work to determine the funds that will be appropriate for the duration of the Settlement program, including the potential need for the imposition of a holdback from Monetary Awards, for the purposes of compensating the on-going monitoring and oversight of the Settlement. *See* ECF No. 9860 at 2, 17-18 & n. 1. Although Class Counsel is unable to provide a sum certain at this juncture, Class Counsel makes this proffer to lay the foundation for an estimate of the nature and amount of work that the Settlement program will demand on a long-term basis. With respect to the amount of work anticipated, Class Counsel notes that, consistent with previous representation that once the "start-up" efforts were substantially concluded, future implementation-related petitions would likely be for smaller attorneys' fees awards, the hours submitted with this Petition are substantially fewer (only 60%) than those submitted in the Second Post-Effective Date Fee Petition. The deadline for pre-Effective Date claims has passed, with a subsequent, marked increase in claims to be processed. In the month leading up to the pre-Effective Date claim deadline, over 500 Claims were submitted, 170 of which were submitted by unrepresented Settlement Class Members (who may require particular attention from Class Counsel). As these claims are processed and the number of new MAF/BAP claims reaches a new baseline, Class Counsel will be in a better position to frame both the scope and volume of the expected ongoing work.

result in long-term assistance, including help with obtaining and reviewing medical records, assistance with Claim forms, or appeals (or in some case all three).

Review and Responses to Daily MAF Notices – Claims Determinations through Appeals

Since the launch of the Settlement, 863 Notices of Monetary Awards have been issued, and that number increases with each passing day. Class Counsel reviews each Notice for accuracy and possible issues that may impact the amount of award to which a Settlement Class Member is entitled (e.g., age at diagnosis, wrong diagnosis date, Eligible Seasons). Through its investigation and work with the Claims Administrator, Class Counsel's vigilance and engagement has resulted in increases to Monetary Awards for several players.

Relatedly, since the launch of the Settlement, 648 Notices of Denial of Monetary Awards have been issued, and that number similarly increases with each passing day. As with the Notices of Monetary Awards, Class Counsel reviews each of these denial notices for accuracy and possible issues that may have led to an imprudent denial. Class Counsel contacts every unrepresented Settlement Class Member to explain the decision and discuss possible next steps. Alongside these efforts, Class Counsel investigates any issues that may exist, seeks expert medical and scientific guidance (as may be required), and works with the Settlement Class Member (or their counsel) to reach the best resolution.

In addition, since the launch of the Settlement, 351 appeals from claims determinations have been taken by Settlement Class Members or the NFL, and several appeals have led to post-appeal briefing. Throughout the administrative appeals process, Class Counsel reviews all filings by the Settlement Class Members and the NFL, both to determine whether a Statement from Class Counsel is warranted and to provide all appropriate support to unrepresented Settlement Class Members or their individual counsel. As the Special Master issues decisions on Appeals, Class

Counsel tracks each determination for potential precedential value, monitors objections that may be submitted to the determinations and, as with the initial appeals process, provides support to Settlement Class Members and may submit Statements in their support.

Finally, over 800 audit notices have posted since the launch of the Settlement. Class Counsel reviews each audit notice to determine the basis of the audit and the position that Class Counsel will be taking, raising any initial issues with the Claims Administrator that may lead to a quicker resolution of the audit. For those audits that lead to a formal proceeding, Class Counsel seeks to protect the interests of the affected Settlement Class Members, including possible referral to the Special Masters and/or decision by the Special Masters when referral is taken.

Ongoing Settlement Coordination and Communication with Administrators

Beyond the engagement with the daily MAF Notices, Class Counsel addresses a wide range of ongoing issues that arise in the course of the Settlement Program. In addition to internal coordination within Seeger Weiss, including regularly scheduled team calls, Class Counsel is in regular communication with the Claims Administrator, the BAP Administrator, and the Lien Resolution Administrator to discuss current "action" issues. These communications take place at what is now a biweekly call, which includes the NFL, as well as throughout the week via email or calls with particular personnel at the Claims Administrator and BAP Administrator to identify and move toward resolution of issues as they arise.

SUMMARY OF HOURS & LODESTAR AND EXPENSES INCURRED

Throughout the time period covered by this Petition, Class Counsel dedicated 2,180.1 hours, for a lodestar of $1,445,488.66. This calculation is based on the blended rates established by the Court,[8] and reflects the following[9]:

Professional Rank	**Total Hours**
Partners[10]	1327.1
Counsel	352.7
Associates	285.7
Paralegals	214.6
TOTAL	2,180.1

Seeger Weiss also incurred $243,788.10 in expenses.

[8] As directed by the Court, the lodestar billed employs the blended rates that the Court prescribed in its May 24, 2018 allocation order. Accordingly, the billing rate for partners is $758.35; the rate for "counsel" or "of counsel" attorneys is $692.50; the rate for associates is $486.67; the rate for contract attorneys is $537.50; and the rate for paralegals is $260.00. *See* ECF No. 10019 at 7 n.4.

[9] Class Counsel stand ready to submit supporting time records and supporting backup for expenses to the Court for *in camera* review.

[10] This includes 50.3 hours for Prof. Issacharoff's time dedicated to his work before the Third Circuit, particularly that relating to oral argument in opposition to the appeals of third-party funders.

CONCLUSION

WHEREFORE, the undersigned, as Class Counsel, respectfully requests that the Court approve this Third Post-Effective Date Fee Petition for Post-Effective Date Attorneys' Fees and Costs and award $1,689,276.76, which reflects $1,445,488.66 in attorneys' fees based on the blended rates established by the Court, and $243,788.10 for reimbursement of expenses, to be paid from the Attorneys' Fees Qualified Settlement Fund.

Date: July 25, 2019

Respectfully submitted,

/s/ Christopher A. Seeger
Christopher A. Seeger
SEEGER WEISS LLP
55 Challenger Road, 6th Floor
Ridgefield Park, NJ 07660
cseeger@seegerweiss.com
Telephone: (212) 584-0700

CLASS COUNSEL

VERIFICATION

CHRISTOPHER A. SEEGER declares, under penalty of perjury under the laws of the United States of America and pursuant to 28 U.S.C. § 1746, that he is the Petitioner in this matter, has read the foregoing Third Verified Petition of Class Counsel Christopher A. Seeger for an Award of Post-Effective Date Common Benefit Attorneys' Fees and Costs, and knows the contents thereof, and that the same are true to his personal knowledge, information, and belief.

Executed this 25th day of July, 2019.

/s/ Christopher A. Seeger
CHRISTOPHER A. SEEGER

CERTIFICATE OF SERVICE

I, Christopher A. Seeger, hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the date below upon all counsel of record in this matter.

Dated: July 25, 2019

/s/ Christopher A. Seeger
CHRISTOPHER A. SEEGER