Case 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, and 18-2724

United States Court of Appeals

for the Third Circuit

In re National Football League Players' Concussion Injury Litigation

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

JOINT OPENING BRIEF OF APPELLANTS AND OPENING BRIEF OF APPELLANT LOCKS LAW FIRM ADDRESSING THE COMMON BENEFIT FEE ALLOCATION ORDER

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STATEMENT OF JURISDICTION

The district court had original jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d). This brief addresses the May 24, 2018 order of the district court allocating common-benefit attorney fees. JA84; JA8971. That ruling constitutes a final order subject to immediate appeal over which this Court has jurisdiction pursuant to 28 U.S.C. § 1291. *See Interfaith Community Org. v. Honeywell Intern., Inc.*, 426 F.3d 694, 702–703 (3d Cir. 2005). Locks Law Firm filed a timely notice of appeal following the court's denial of its motion for reconsideration. JA42.

ISSUES PRESENTED

JOINT APPELLANTS:

Did the district court commit legal error and violate due process when it delegated responsibility for the allocation of common benefit fees in this multi-district litigation to Co-Lead Counsel Christopher Seeger of Seeger Weiss LLP, the most interested party in the allocation, and approved a unilateral process that lacked transparency and basic mechanisms of fairness and accountability?

LOCKS LAW FIRM:

Did the district court employ a legally erroneous standard, rely on clearly erroneous factual findings, and abuse its discretion when it approved Mr. Seeger's proposed award to Locks Law Firm (LLF), which improperly excluded common-

benefit time from the firm's lodestar and applied a lower multiplier to LLF than that applied to other firms in similar roles?

LLF objected to the fee allocation process and the fee award Mr. Seeger proposed, JA8052–JA8080, JA8082–JA8085, and renewed its objections after the allocation hearing, JA8964–JA8966. The court rejected these objections. JA84; JA8971. LLF filed a motion for reconsideration on its individual allocation after the court issued the fee award. JA9025–JA9031. The court denied the motion. JA117.

RELATED CASES AND PROCEEDINGS

This Court heard an appeal from the order of the district court certifying the class and approving the settlement in this action. The Court affirmed that order in a decision filed April 18, 2016, as amended May 2, 2016, and reported at 821 F.3d 410. The Court also rejected a prior appeal taken from the district court's preliminary approval of an earlier proposed class settlement, finding that action was not immediately appealable. The Court's decision was filed December 24, 2014 and reported at 775 F.3d 570.

As relevant to this consolidated appeal, the Alexander Objectors filed a notice of appeal from the district court's January 16, 2019 order granting a subsequent petition for common-benefit fees. JA118; JA671 (Doc. 10428). *See* Case No. 19-1385.

STATEMENT OF THE CASE

This consolidated appeal arises from rulings by the district court on a fee award for attorneys who performed common-benefit work in the National Football League concussion injury litigation, and also rulings concerning compensation of attorneys who represent former players through individual retainer agreements. This brief addresses the allocation of $112.5 million in common-benefit fees and costs, the district court's decision to delegate responsibility for that allocation to the largest recipient of those fees, Co-Lead Counsel Christopher Seeger, and the improper process that Mr. Seeger and the court employed.

The NFL Concussion Injury Litigation

Former football players have suffered grave harm from repeated head injuries while playing for the NFL. Many have experienced lifelong physical, mental and emotional disability and early death from a range of diseases and conditions that include amyotrophic lateral sclerosis (ALS or Lou Gehrig's disease), Alzheimer's disease, Parkinson's disease, chronic traumatic encephalopathy (CTE), and dementia that severely impact the basic activities of daily life. Starting in July 2011, hundreds of former players brought suit against the NFL in state and federal courts alleging that the NFL knew for decades that players were at serious risk from head injury and violated their duty of care by failing to take reasonable steps to ensure player safety, fraudulently minimizing risk, and

suppressing information. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 821 F.3d 410, 421–422 (3d Cir. 2016) ("*NFL Concussion Injury I*").

In January 2012, on motion from the NFL and with the endorsement of LLF and other leading attorneys for retired players, the Judicial Panel on Multidistrict Litigation consolidated these cases as an MDL and transferred the proceeding to Judge Anita Brody of the Eastern District of Pennsylvania. JA135 (Doc. 1). The district court then issued its first Case Management Order, instructing attorneys for retired players to confer on the formation of a plaintiff's management structure and submit applications for the position of lead counsel. JA693–JA696.

On April 26, 2012 the court appointed a Plaintiffs' Executive Committee consisting of two attorneys each from the firms Anapol Weiss, Girardi Keese, Hausfeld, Locks Law Firm, Podhurst Orseck, and Seeger Weiss, and also a Plaintiffs' Steering Committee with seven additional attorneys, later expanded by several more. The Executive Committee was tasked with coordinating and managing all pretrial proceedings and administrative duties, and the Steering Committee was charged with performing pretrial tasks. The court appointed Mr. Seeger as Co-Lead Counsel and instructed the Executive Committee to choose a Philadelphia-based lawyer as a second Co-Lead Counsel, later selected to be Sol Weiss of Anapol Weiss. The Executive Committee had proposed nominating three

attorneys from their ranks to serve as co-lead counsel, but the court informed them it wanted Mr. Seeger in that position. JA721–JA722.

From that point forward, the court dealt exclusively with Mr. Seeger in all matters relating to the management and progress of the litigation for plaintiffs. Mr. Weiss performed a significant amount of work in his capacity as Co-Lead Counsel as did other Executive and Steering Committee members, but the court empowered only Mr. Seeger to communicate directly with the court and exercise managerial authority over the case for plaintiffs.

The Early Phase of the Litigation

With the management structure of the MDL established, plaintiffs filed two superseding Master Complaints in summer 2012: a long-form complaint and a class action complaint. JA251 (Doc. 2642), JA143 (Doc. 84). The parties then briefed and argued a motion to dismiss in which the NFL asserted that collective bargaining agreements that bind many former players preempted the state-law tort claims. JA291–JA292 (Docs. 3589 & 3590).

In parallel with work relating to the pleadings, members of the Executive and Steering Committees created the infrastructure of this litigation. Multiple firms consulted extensively with medical and legal experts to develop the substantive expertise to conduct discovery and prepare for trial on the modalities of cognitive impairment resulting from traumatic brain injury, held public meetings with former

players, and developed a communications strategy to keep players informed about the proceedings and put pressure on the NFL. JA6725–JA6729, JA6757–JA6759, JA6786–JA6787.

The Class Action Settlement

After the motion to dismiss was submitted, the court appointed retired District Judge Layn Phillips to facilitate settlement negotiations between the NFL and plaintiffs. Co-Lead Counsel Sol Weiss, Executive Committee members Steve Marks and Gene Locks, and others participated in the negotiation process and performed supporting work, including valuation of claims, analysis of proposed term sheets, development of protocols for medical evaluation of former players, and claim-processing procedures. JA6726–JA6727, JA6760–JA6763. Throughout, the court gave Mr. Seeger responsibility for leading negotiations with the NFL and used him as its sole point of contact for plaintiffs.

These negotiations resulted in a proposed class settlement. The settlement established a Monetary Award Fund (MAF) enabling players diagnosed with certain neurological diseases to receive compensation without having to prove that the NFL's malfeasance caused their injuries, created a Baseline Assessment Program (BAP) that provided neurological evaluations to players at no cost, and set up an Education Fund to provide information about player safety and assistance under the Collective Bargaining Agreement. The MAF compensated players

according to the severity of their neurological disease by establishing six Qualifying Diagnoses: Level 1.5 and 2.0 Neurocognitive Impairment, Alzheimer's Disease, Parkinson's Disease, ALS, and CTE. Monetary awards would vary depending on a claimant's Qualifying Diagnosis, age, and number of eligible seasons played, and awards would be reduced for players with prior medically diagnosed stroke or traumatic brain injury. JA1035–JA1038.

Mr. Seeger agreed to cap the MAF at $675 million in this initial settlement, JA1078, meaning former players would seek compensation from a fund that might provide no remedy if the number and severity of claims exceeded projections. The settlement also provided that the NFL would not object to any request by plaintiffs' counsel for common-benefit fees and costs up to $112.5 million, an amount the NFL agreed to pay in addition to the MAF and other settlement benefits. JA1121.

When the parties presented this deal to the court and sought preliminary approval of a class settlement, the court rejected the request. It held the amount of the capped fund was inadequate and risked leaving former players with no remedy. JA1471. The court directed the parties to revisit their forecasts and negotiate toward a settlement with an uncapped fund. With the assistance of Special Master Perry Golkin, the parties agreed to a revised settlement that uncapped the MAF and modified some other terms. JA2135–JA2143 (describing revised settlement).

On July 7, 2014, the court issued an order granting preliminary approval to the revised settlement and directing that notice be provided to the class. The court appointed Mr. Seeger and Mr. Weiss as Co-Lead Class Counsel, Mr. Locks and Mr. Marks as Co-Class Counsel, and Arnold Levin and Dianne Nast as Subclass Counsel for future and currently injured players, respectively. JA2121. Following an unsuccessful attempt by objectors to take an immediate appeal, the court held a fairness hearing on November 19, 2014. JA4542. Class counsel and the NFL presented arguments in support of the settlement while objectors argued that it was inadequate. The court "proposed several changes to benefit class members" following the hearing, *NFL Concussion Injury I*, 821 F.3d at 423, and the parties submitted a revised settlement. JA5842. On April 22, 2015, the court certified the class and granted final approval to the settlement. JA6131. This Court affirmed. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2015), *aff'd*, *NFL Concussion Injury I*, 821 F.3d at 420.

The Common-Benefit Fee Petition

On February 13, 2017, while the work of implementing the settlement was still underway, Mr. Seeger petitioned the court to award the full amount of common-benefit fees and expenses that the NFL agreed not to oppose under the settlement: $112,500,000. JA6555. In fall 2016, in preparation for submitting the fee petition, Mr. Seeger instructed attorneys seeking common-benefit fees to

provide his firm with itemized time sheets for work they wanted compensated. Mr. Seeger made the sole determinations of what work performed by other Executive and Standing Committee members qualified for common-benefit compensation in his petition, in some cases excluding time without notifying attorneys in advance or providing an explanation. Neither Mr. Seeger nor the court used an independent auditor or special master for this task.

Although Mr. Seeger reviewed and adjusted time and expense records for all other firms applying for common-benefit fees, other firms had no access to his time and expense records. To this day, no Appellant has seen those records.

After Mr. Seeger made determinations about what time would be eligible for compensation, he instructed other firms to provide declarations describing their common-benefit work. The declarations were included as exhibits to the fee petition. JA474 (Doc. 7151). They included only top-line figures for total hours billed by attorneys and staff, along with narrative accounts of the work performed. For example, the supporting data for Mr. Seeger's nearly $7,000,000 personal lodestar figure consists of the following entry:

NAME	HOURS	HOURLY RATE	AMOUNT
Christopher A. Seeger	6,955.90	985	$6,851,561.50

JA6680.

On April 5, 2018, the court awarded the full amount of common-benefit fees and expenses requested in the petition: $106,817,220.62 in fees to be placed in a fund for subsequent allocation and $5,682,779,38 in expenses. JA49; JA8767. The court relied on the percentage-of-recovery method, using lodestar as a cross-check. JA53–JA63; JA8771–JA8781 The court indicated that it had requested and received from Mr. Seeger "the time records from these firms for *in camera* review." JA62; JA8780. These were the adjusted time records reflecting Mr. Seeger's decisions about what time would be compensated.

Mr. Seeger's Proposed Fee Allocation

On September 11, 2017, while the fee petition was still pending, the court issued a one-paragraph order delegating responsibility to Mr. Seeger to propose an allocation of common-benefit fees for himself and other firms. JA7920. Mr. Seeger used the lodestar method, basing his proposal on the time records he had collected and adjusted and instructing firms to submit any additional time they had logged since their initial declarations, which he again unilaterally adjusted. He also retained an expert, Professor Brian Fitzpatrick of Vanderbilt Law School, to write an opinion in support of his proposal. JA7967. Professor Fitzpatrick "conferred with [Mr. Seeger] and reviewed the declarations by the various firms that worked on this case" in preparing his opinion. JA7968.

On October 10, 2017, Mr. Seeger filed his proposed allocation with the court. Having served as the gatekeeper for what time would be included in lodestar figures, Mr. Seeger now decided the "relative value of the contributions made by each of the firms to bring the eventual benefits of the Settlement to the Settlement Class" and the lodestar multipliers they should receive. JA7948. Mr. Seeger did not negotiate these figures with other firms.

Mr. Seeger assigned the highest multiple to himself, proposing that his lodestar be enlarged by a factor of 3.885. Multipliers for other firms ranged from 2.5 for Mr. Levin to no multiplier or a downward adjustment of .75. The only proposed multiplier that approached Mr. Seeger's was for Professor Samuel Issacharoff at 3.55. Mr. Seeger's proposal recommended a total award to his firm of slightly over $70 million, about 65% of the total available common-benefit compensation. JA7956. The court gave other firms an opportunity to submit counter-declarations, and Mr. Seeger filed an omnibus reply. These submissions were completed by November 17, 2017. JA576 (Doc. 8900).

The Fee Allocation Hearing

The court held a hearing on May 15, 2018 concerning the allocation of common-benefit fees. The hearing began with Mr. Seeger presenting his proposal. Each firm then had ten minutes to make arguments, followed each time by ten minutes for Mr. Seeger to reply.

At several points in the hearing, the court emphasized its inability to make independent judgments on key aspects of the fee allocation petition, explaining that it felt the need to defer to Mr. Seeger:

- In a colloquy with Mr. Seeger following the presentation by LLF, the court described its "use of you [Mr. Seeger], who I think knows more about this case than I" and went on to acknowledge: "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 . . . 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 we had."

JA9117.

- When Steering Committee member Derriel McCorvey emphasized problems with the process underlying the allocation, the court explained why it had delegated unilateral authority to Mr. Seeger: "I have to take some responsibility on that [referring to the allocation process] because frankly, [Mr. Seeger] 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. . . . I probably – I will reevaluate but it think [sic] that they – I think I still believe, that he – but I will certainly reconsider it, whether or not he is in the best position to allocate."

JA9172.

- During the same argument, when Mr. McCorvey emphasized that Mr. Seeger had horded common-benefit work for himself and urged the court to take that fact into account when considering the multipliers Mr. Seeger was proposing, Mr. McCorvey said "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 –" and the court responded, "Well that I can't – that's something that's very hard – . . . – for me to adjudicate on."

JA9173.

Multiple Appellants objected to the process Mr. Seeger and the court employed in the allocation. Co-Lead Counsel Anapol Weiss urged the court to appoint a special master to conduct a fair assessment of the time and relative contributions of each firm. JA8020. LLF urged a committee process where applicants could engage in negotiations to arrive at consensus on most questions about the size and content of lodestar figures and the assignment of multipliers. JA9112–JA9114. The court rejected these recommendations.

In response to a request at the hearing by Mr. McCorvey that the court appoint a special master so that Mr. Seeger would not be deciding his own allocation, the court responded:

> 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.

JA9172. *See also* JA9177 (responding to the presentation of Steven Molo, the court insisted " -- and I think I'm the Special Master here").

The Fee Allocation Order

Nine days after the hearing, on May 24, 2018, the court issued its decision. JA84; JA8971. The court allocated $85,619,466.79 of the available fund for immediate payment of common-benefit fees and reserved $22,823,253.33 for future payment "as attorneys continue to work to implement this Settlement Agreement." JA108; JA8995. The court accepted Mr. Seeger's lodestar hours for all firms, making his changes to those figures the last word. The court adjusted the billing rate for some lodestars, taking the average rate among all those submitted in each category (partners, associates) and making reductions where a firm's overall rates exceeded those averages.

On the question of multipliers, the court provided a short summary of each firm's work, relying largely on descriptions contained in Mr. Seeger's proposal, and adopted his multipliers in most respects, making only a few minor adjustments described further below. The adjustment to billing rates and a slight decrease in multiplier from 3.885 to 3.5 together reduced Mr. Seeger's immediate award from $70,415,116.45 (about 66% of the total available fees) to $51,737,185.70 (about 60% of the total fees awarded by the court), a difference of $18,677,930.75. JA104; JA8991.

Mr. Seeger has since filed three additional petitions for payment from the remaining fund reserved for continued implementation of the Settlement. The court

granted the first petition on January 16, 2019, awarding $9,381,961.06 in fees and costs, of which Mr. Seeger received $8,270,349.01 (about 88%). JA126. The second, which remains pending, requests $3,195,634.43 in fees and costs, of which Mr. Seeger claims $2,701,569.41 (about 85%). JA9398. The third, which remains pending. requests $1,689,276.76 in fees and costs, all for Mr. Seeger. JA9441. Between granted and pending petitions, this is $12,661,195.18 more in fees and costs for Mr. Seeger so far. The initial reduction in his award was simply deferred compensation.

On May 24, 2019, the court terminated all appointments of co-lead counsel, class counsel, and the Executive and Standing Committees. In their place, the court reappointed Mr. Seeger as sole class counsel. JA9402–JA9403. It appears that further awards of common-benefit fees will be available only to Mr. Seeger.

SUMMARY OF ARGUMENT

The district court employed a process for the allocation of common-benefit fees that violated basic principles of fairness and due process.

1. The court delegated exclusive responsibility to the most interested party in the dispute, Mr. Seeger, who conducted a unilateral, opaque process with no mechanisms of consensus or accountability.
2. Mr. Seeger's time records were never available for adversarial scrutiny and never entered on the record, violating due process and frustrating appellate review.
3. The court acknowledged at the allocation hearing and again in its ruling that it had insufficient information to exercise independent scrutiny, had only dealt with Mr. Seeger, had to defer to Mr. Seeger, and was unable to evaluate key questions about hours billed and value added.
4. These inadequate procedures cannot be justified by practical constraints. In the related task of resolving disputes over competing claims for attorney fees in the representation of individual claimants, the court already employs a robust process exhibiting the fairness and transparency that were absent in the allocation of common-benefit fees.
5. The fee allocation violates this Court's requirements for fee awards based on lodestar analysis and is not supported by substantial record evidence.

STANDARD OF REVIEW

This Court "review[s] *de novo* the standards and procedures applied by the District Court in determining attorneys' fees, as it is a purely legal question." *Planned Parenthood of Cent. New Jersey v. Att'y Gen. of New Jersey*, 297 F.3d 253, 265 (2002). This Court reviews the fee allocation for abuse of discretion. *In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 538 (3d Cir. 2009). The Court reviews the evidentiary sufficiency of the fee allocation for clear error. *Interfaith Community Org. v. Honeywell Intern., Inc.*, 726 F.3d 403, 416 (3d Cir. 2013) [*Interfaith II*].

ARGUMENT OF JOINT APPELLANTS

The district court's May 24, 2018 order allocated common-benefit fees among lawyers who were, for purposes of that order, adverse parties making competing claims on a limited fund. Nonetheless, the court took the most interested party in that dispute, Mr. Seeger, and empowered him to exercise unilateral authority over the lodestar figures that other firms would submit, employing a process that lacked the transparency and accountability an independent auditor or special master would have offered. The court then empowered Mr. Seeger to assign multipliers to those lodestars, enabling him to reward himself and penalize rivals without any on-the-record scrutiny of his own time records. The court accepted Mr. Seeger's multipliers with only minor

adjustments, stating both at the hearing and in its order that it had insufficient information to make independent judgments about key aspects of his proposal.

There is no justification for this manifestly inadequate process. Precedents from other large MDLs and the district court's own approach to resolving competing claims on individual retainer agreements both demonstrate that practicable options were available for a fair and reliable allocation of common-benefit fees. The court's order rests on legal error, and the failure to make Mr. Seeger's time records available for adversarial scrutiny violates due process. This Court should vacate the allocation order and remand with instructions that the district court perform a new allocation using a fair process.

I. THE PROCEDURES THE DISTRICT COURT USED TO ALLOCATE COMMON-BENEFIT FEES LACKED FAIRNESS, TRANSPARENCY AND ADEQUATE SUPERVISION.

The most thorough analysis this Court has provided of the procedures district courts should employ in allocating common-benefit fees comes from the Diet Drugs litigation, presided over by U.S. District Judge Harvey Bartle. *See In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524 (3d Cir. 2009) [*Diet Drugs II*]; *see also* In re *Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143, 167–174 (3d Cir. 2005) [*Diet Drugs I*] (Ambro, J., concurring). In *Diet Drugs II*, this Court affirmed a fee allocation order in which the district court:

- appointed a neutral auditor to review and approve time records submitted by attorneys for inclusion in their lodestar;
- sought proposals from all interested attorneys on the most appropriate process to employ in arriving at an allocation of common-benefit fees;
- received a consensus allocation approved by all members of the Plaintiffs' Management Committee and nearly all attorneys claiming common-benefit fees; and
- permitted limited discovery by objecting applicants, allowing them to probe areas of disagreement in the underlying time records and the relative contributions of common-benefit attorneys.

See In re Diet Drugs Prods. Liab. Litig., 553 F. Supp. 2d 442, 458–463 (E.D. Pa. 2008), *aff'd*, *Diet Drugs II*, 582 F.3d 524 (3d Cir. 2009).

These fee allocation procedures were a gold standard, exhibiting transparency, reliability and basic fairness "more than adequate" to satisfy the "thorough judicial review" required of a common-benefit fee application in a federal class action or MDL. *Diet Drugs II*, 582 F.3d at 537–539, 547. *Diet Drugs* left open the question how far a district court can depart from these best practices before it commits legal error. *See also Diet Drugs I*, 401 F.3d at 167 (Ambro, J., concurring in part and dissenting in part) (noting the Third Circuit's "prior lack of exploration of the issues involved in such an allocation"). The present appeal

requires this Court to enforce a procedural baseline. The district court declined to employ any of the best practices used in *Diet Drugs*, instead delegating unilateral authority to the attorney who had the most at stake in the allocation. This was error, and the failure to make Mr. Seeger's time records available for scrutiny on the record is a violation of due process that alone requires reversal.

A. The District Court Authorized Mr. Seeger to Conduct a Unilateral, Non-Transparent Allocation Process Without Negotiation, Consensus, or an Auditor or Special Master.

By placing Mr. Seeger in sole control of the review of time records and the proposal of a final allocation of common-benefit fees, the district court maximized the problem of conflict of interest. Mr. Seeger was the most interested party in the fee allocation, and the power the court conferred on him to control the assignment of common-benefit work and serve as the court's sole point of contact throughout the litigation gave him a singular capacity to control information about the relative contributions of other firms. The court had options available that would have mitigated this conflict of interest: use of an auditor or special master to examine time records and the contributions of firms seeking compensation, or appointment of a committee to conduct negotiations and arrive at a consensus allocation. As this Court has explained, negotiation of a fee allocation among common-benefit counsel is an "accepted practice." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d

516, 533 n.15 (3d Cir. 2004). By refusing these options, the court intensified the structural conflict.

In his concurring opinion in *Diet Drugs I*, Judge Ambro warned of the potential for conflicts of interest in a fee allocation. That conflict is "inherent," he explained, where counsel "make recommendations on their own fees and thus have a financial interest in the outcome." *Diet Drugs I*, 401 F.3d at 173 (Ambro, J., concurring). When a court examines a proposed allocation or reviews a fee award, "How much deference is due the fox who recommends how to divvy up the chickens?" *Id.* Judge Ambro urged a "sliding scale approach to the standard of review" that would allow courts "to examine critically decisions of non-judicial bodies that may have a financial interest in the outcome of their decisions or recommendations" and explained, "when a conflict of interest is present, the reviewing court should consider on a fact-specific basis how much deference should be afforded to the views of a group potentially affected by self-dealing." *Id.*

In *Diet Drugs II*, Judge Ambro again emphasized the need for searching scrutiny where conflicts of interest threaten the allocation process. When "presented with a proposal that benefitted a group that was a party to the proposal . . . at the expense of group [sic] that was not a party to it," he explained, "the District Court [is] required to subject that proposal to extra scrutiny." *Diet Drugs II*, 582 F.3d at 557 (Ambro, J., concurring in part and dissenting in part). When the

court "adopt[s] [the proposing attorney's] flawed reasoning more or less in full," it "suggests . . . that such scrutiny was not applied." *Id.*

Diet Drugs addressed the conflict of interest problem by appointing an independent auditor to review time records, seeking input from interested counsel on the best way to approach the allocation, and receiving a negotiated proposal that had the consent of all members of the plaintiffs' leadership team and most other interested attorneys. In contrast, the district court here delegated authority to the most interested party, allowed him to exercise unilateral control over the review of time records, and approved an allocation that provoked sharp objections from the plaintiffs' leadership team including Co-Lead Counsel Anapol Weiss.

In the fee allocation hearing, Mr. Seeger responded to LLF's arguments about the advisability of a negotiated approach to the allocation by saying, "As far as the committee, I would have had no objection to it. Your Honor chose to ask me to make recommendations." JA9117. But nothing prevented Mr. Seeger from conducting a transparent and collaborative process. The court's order conferring authority on Mr. Seeger reads, in its entirety:

> AND NOW on this 11th day of September, 2017, to assist this Court in determining the proper allocation and division of class counsel attorneys' fees, it is ORDERED that Co-Lead Counsel, Christopher A. Seeger, submit a detailed submission as a proposal for the allocation of lawyers' fees among class counsel including the precise amounts to be awarded along with a justification of those amounts based on an analysis of the work performed.

JA7920. The opaque, unilateral process that followed was Mr. Seeger's invention, and the district court ratified it.

The *Vioxx* litigation provides another stark comparison to the inadequate process used here. To counteract the danger of monopoly and self-dealing in a fee allocation, the court in *Vioxx* took steps "from the very beginning of [that] MDL, and before the Settlement Agreement was contemplated or announced, . . . to create a fair and open environment for all interested attorneys to perform work for the common benefit of the [] plaintiffs and to create a transparent factual record for an eventual application for common benefit fees." *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 762 (E.D. La. 2011). That process included an independent auditor to review time and expense submissions, an eight-attorney committee to negotiate proposed common-benefit fee awards, and appointment of a special master "who had no financial interest in the awards" to "conduct[] discovery and mak[e] his own recommendation." *Id.* at 773–774. The committee and the special master made separate recommendations for the 102 firms seeking common-benefit fees, and the court issued decisions on each firm, sometimes accepting one of the competing recommendations and sometimes departing from both.

A district court in Ohio employed similar procedures in an MDL involving contaminated drinking water. *In re E.I. Du Pont de Nemours and Company C-8 Pers. Inj. Litig.*, No. 2-13-MD-2433, 2018 WL 4771524, *adopted and ordered,*

2018 WL 4810290 (S.D. Ohio Oct. 3, 2018). The court required submission of all common-benefit time in an open process, instructed a fee committee to make recommendations for an appropriate allocation, appointed a special master to oversee and participate in the work of the committee and directly review time submissions, and required the special master to make his own allocation proposal. *Id.* at *2–*4, *6. These "extensive mediation efforts" resolved "all objections to the fee and expense allocations" and produced a consensus fee award. *Id.* at *7.

The court below employed no such front-end procedures to ensure transparency, minimize conflict of interest, or promote consensus in the fee allocation. It departed too far from the gold standard approved by this Court in *Diet Drugs* and failed to safeguard the "basic principles of fairness" this Court requires. *Diet Drugs II*, 582 F.3d at 547.

B. Mr. Seeger's Time Records Were Not Subject to Adversarial Scrutiny, Not Disclosed to Any Other Firm, and Not Independently Reviewed.

1. The District Court's Failure to Make Time Records Available for Review On the Record Violates Due Process.

One element of the procedure below is a stand-alone violation of the Due Process Clause: the lack of on-the-record, adversarial scrutiny for the time that Mr. Seeger claims in the lodestar for his firm. Every other firm was required to submit time records to Mr. Seeger for review and unilateral adjustment, but Seeger Weiss never disclosed its hours for scrutiny by other firms. To this day, no Appellant has

seen Mr. Seeger's time records. Neither will this Court: those records were never made part of the record below. The court's failure to make Mr. Seeger's time available for scrutiny — when Mr. Seeger had access to the records of other firms and unilaterally adjusted them — is a violation of due process.

The Due Process Clause requires that the evidence supporting a court's resolution of a contested fee allocation be available for review and subject to adversarial scrutiny, and that all claimants have equal access to a fair process. As the First Circuit has explained, when a court imposes "a rigid limitation [on] one affected group's input into [a contested fee allocation] while giving members of the other affected group a much broader array of participatory rights," it fails to provide the disadvantaged group "a constitutionally adequate chance to be heard." *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 613 (1st Cir. 1992). In *Nineteen Appeals*, the district court had limited the ability of one group of fee applicants to participate in an evidentiary hearing or submit detailed objections while other firms were allowed to do both. *See id.* at 612–613. Here the issue is access to the information necessary to craft objections at all. The court below empowered Mr. Seeger to review and adjust the time records of adverse parties while giving those adverse parties no access to his own records. As a result, Appellants had no adequate opportunity to be heard on the validity of Mr. Seeger's lodestar. Due process gives courts many options in

determining what procedures to use in resolving a fee allocation, but "when a judge constructs a process for setting fees, . . . those procedures must apply in a fair and evenhanded manner to the parties in interest, without preferring one group of disputants over another." *Id.* at 614–615.

When the First Circuit heard a second appeal in the hotel fire case, it found that the district court had cured the due process problems that marred its first allocation because it employed procedures that "compelled exchange of documentation" and "ensured that the [adverse parties] had access to all the data reasonably necessary to formulate their objections, including all the PSC members' time-and-expense submissions, summaries thereof, detailed accounts of the procedures used by the PSC to gather, review, and audit time records, and the working papers, correspondence, and documentation generated by the PSC's accountants during the compilation process." *In re Thirteen Appeals Arising Out of San Juan Dupont Hotel Fire Litig.*, 56 F.3d 295, 303 (1st Cir. 1995). These are precisely the materials the court failed to make available to Appellants here. Firms objecting to Mr. Seeger's self-assigned lodestar have a right to probe whether his records are padded with inflated or redundant hours.

When a court uses lodestar amounts as the basis for a fee award, this Court has repeatedly held that time records underlying those lodestars must be available for adversarial scrutiny and the court itself must perform a detailed review. *See,*

e.g., *American Bd. of Intern. Med. v. Von Muller*, 540 Fed. App'x 103, 107 (3d Cir. 2013) (where district court "acknowledged expressly that the lodestar figure was the starting point for determining a reasonable award . . . it was obliged to 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") (quotation omitted). It is only where a court bases a fee award on the percentage-of-recovery method and uses the lodestar as a cross-check that it "may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Rite-Aid Corp. Securities Litig.*, 396 F.3d 294, 306–307 (3d Cir. 2005). *Accord In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341–342 (3d Cir. 1998).

Mr. Seeger used lodestar values as the foundation of his proposed allocation. Those lodestars were based on time records that only Mr. Seeger saw and adjusted. The court adopted Mr. Seeger's adjusted lodestars without changing a single entry, without seeing the original time records, without entering any time records on the docket, and without giving other firms access to Mr. Seeger's time. This process denied Appellants an "adequate opportunity to be heard" on the fee allocation. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 584 (3d Cir. 1984).

The impact of this infirm process is not limited to Appellants. Appellate courts must also have access to time records in order to review a lodestar ruling.

This Court "cannot affirm the disallowance of hours without adequate time record support unless the trial court identifies the entries in question. More specific findings are essential." *Fine Paper*, 751 F.2d at 596. Where challenged lodestar hours are approved or disapproved with no evidentiary record, "[t]he district court's failure to make an adequate record . . . precludes [the circuit court] from properly discharging [its] reviewing function." *Rode v. Dellarciprete*, 892 F.2d 1177, 1187 (3d Cir. 1990). In a dispute over a fee application in a bankruptcy proceeding, for example, this Court noted that "only a total hourly listing was supplied to the court" and held that "[n]either the District Court, nor this court in reviewing the record on appeal, can be expected to render an appropriate decision in the absence of adequate time records." *In re Imperial '400' Nat., Inc.*, 432 F.2d 232, 239 (3d Cir. 1970). A "total hourly listing" of attorney and paralegal time is the only account of Mr. Seeger's lodestar entered on the record below.

In its April 5, 2018 order awarding the total amount of common-benefit fees, the district court indicated that it had received from Mr. Seeger the "[adjusted] time records from these firms for *in camera* review." JA62; JA8780. Neither Appellants nor this Court have been given that privilege. "*Ex parte* proceedings are an exception to the rule in our judicial system and contrary to its adversarial nature." *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 231 (5th Cir. 2008). The role of "adverse parties . . . willing to review the [time]

records" in a contested fee application "and object to any excesses" is vital, *Komoroski v. Utility Service Partners Private Label, Inc.*, No. 4:16-CV-00294-DGK, 2017 WL 5195880, at *2 (W.D. Mo. Nov. 9, 2017), particularly where the court does not perform a thorough independent examination.

Attorney fee records are not "state secrets that will jeopardize national security if they are released to the public." *High Sulfur Content*, 517 F.3d at 230. The billing records are not subject to any privilege. *Cf. Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV, 2013 WL 5928586, at *3–*5 (S.D. Fla. Nov. 1, 2013) (rejecting attorney request to file billing rates under seal). There is no justification here for abridging the due process requirement that the evidence relied on by a district court in ruling on a contested fee allocation be subject to adversarial scrutiny on the record and available to this court for appellate review.

2. The District Court Committed Legal Error and Made an Unreliable Allocation by Giving Mr. Seeger Unilateral Control Over Time Records.

The distinctive features of this litigation cast the impropriety of these unilateral procedures in sharp relief. Mr. Seeger had a singular incentive to minimize the compensable time of other firms. Because the Settlement provided for a fixed amount in common benefit fees as the presumed total available to all firms, lodestar determinations had a zero-sum quality: an increase in one firm's lodestar would diminish the amount of compensation available to others. And

because Mr. Seeger's firm had by far the largest lodestar amount, Mr. Seeger had particular reason to be concerned about the size of other firms' awards: larger common-benefit fees awarded to other firms would effectively come out of Mr. Seeger's predominant share of the fund. Mr. Seeger acknowledged this fact at the fee allocation hearing. JA9137–JA9138 (argument of Mr. Hagen pointing out the zero-sum problem); JA9144 (response of Mr. Seeger acknowledging the point).

In addition, Mr. Seeger had few individual clients. In the entire course of the litigation, Mr. Seeger has represented approximately twenty individual players. In contrast, LLF has represented approximately 1,400 individual players, and other firms have represented many hundreds. This disparity created different incentives in the review of time records. When class members have valuable individual claims and are highly engaged as clients, lawyers must fulfill two roles, promoting the interests of the class through common-benefit work and serving their clients through individual representation. Drawing a distinction between these two types of work involves an exercise of judgment. For example, lawyers may devote large amounts of time to explaining the value of a proposed settlement and discussing the risk of litigation with clients who must decide whether to opt out. When the viability of the settlement depends on low opt-out rates, that work benefits the class (helping preserve the settlement's viability) and the individual class member (enabling him to make an informed decision).

Mr. Seeger decided when the work of other firms was compensable through common-benefit fees and when it would be excluded from the lodestar. Because he represented only a handful of players, adopting a conservative approach to compensation for time spent communicating with clients would have no material impact on his lodestar but could severely impact the lodestar of firms that represented large numbers of players and spent hundreds of hours explaining to their clients the benefit of staying in the settlement.

The impact of Mr. Seeger's unilateral process was also evident during the fee allocation hearing. When Attorney Craig Mitnick objected to the 0.75 multiplier that Mr. Seeger applied to his lodestar, Mr. Seeger responded in part by saying: "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." JA9149. Appellants take no joint position on the merits of this assertion, but it highlights a simple fact: Mr. Seeger's own records were never subject to adversarial scrutiny to determine whether he was guilty of "heavy billing." Likewise, the district court in *Du Pont* has emphasized the importance of scrutinizing submissions by "attorneys who spent their time passively involved in meetings, reviewing emails, telephone conferences, or attending hearings" and contributed less to the class than their time records would indicate. *Du Pont*, 2018 WL 4771524 at *4. Appellants had no opportunity to

review Mr. Seeger's time records to make arguments about the proportion of his firm's time that should be characterized as passive involvement.

There was no reason for the court to employ a procedure that was so unbalanced and lacking in transparency. The administration of this 65-year settlement is at an early stage and more work remains to be done as the NFL continues to resist key provisions of the settlement that affect the ability of class members to recover. When faced with a similar situation, the court in *Diet Drugs* issued an interim award of common-benefit fees, deferring the full award until the administration of the settlement was further along and the court could structure a fair allocation. *In re Diet Drugs Prods. Liab. Litig.*, 553 F. Supp. 2d 442, 458–459 (E.D. Pa. 2008), *aff'd*, *Diet Drugs II*, 582 F.3d 524 (3d Cir. 2009). LLF unsuccessfully urged that approach on the court below. JA9114; JA8965–JA8966.

The list of other courts appointing independent professionals to scrutinize time records is long and deep. *See, e.g.*, *Diet Drugs*, 553 F. Supp. 2d at 458 (auditor reviewed attorney time records); *Du Pont*, 2018 WL 4771524, at *3 (special master reviewed attorney time records "in substantial detail" over the course of several months); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 09-2047, 2018 WL 2095729, at *4 (E.D. La. May 7, 2018) (court appointed "a neutral certified public accountant to vet common benefit counsels' hours" for nine years and reviewed the CPA's work on a monthly basis); *In re*

Vioxx, 802 F. Supp. 2d at 762–769 (court appointed CPA and special master); *Komoroski*, 2017 WL 5195880, at *2 (emphasizing need to employ special master when "summary of time records and affidavits" is insufficient). The court here opted instead to authorize Mr. Seeger to exercise one-sided control of information.

This Court has long emphasized the importance of "the court's oversight function" in class proceedings to address "potential public misunderstandings . . . in regard to the interests of class counsel." *In re Gen. Motors Corp. Pick-Up Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995) (citations omitted). "Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *U.S. v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978). The district court failed to protect those values here. The resulting allocation lacks the "basic principles of fairness" this Court has demanded. *Diet Drugs II*, 582 F.3d at 547.

C. The District Court Has Already Adopted a Robust Procedure for Judicial Scrutiny of Attorney Lien Disputes.

There was no practical constraint preventing the district court from implementing a fair and transparent process to allocate common-benefit fees. The court has already implemented such a process for the related task of adjudicating disputes over individual attorney fees in the representation of former players. In contrast to the common-benefit fee allocation, the resolution of these attorney liens

exhibits transparency, even-handedness, and a careful examination of underlying time records and the relative contributions of competing attorneys.

Because awards in this case are large, many players have secured counsel through individual retainer agreements to advise them and help navigate the claims process. When former players discharge attorneys — because they believe an attorney performed inadequately, or new attorneys poach existing clients — former counsel often place a lien on the player's recovery to ensure payment based on their work to that point. On April 4, 2017, the court referred "all petitions for individual attorneys' liens" to U.S. Magistrate Judge David Strawbridge. JA7289. Pursuant to that order, the court adopted comprehensive rules for these lien adjudications. JA9248. The Magistrate provided additional guidance on "the legal constructs that apply generally to this lien litigation" in a January 7, 2019 opinion resolving three individual disputes. JA9293. In the same opinion, the Magistrate noted that 723 petitions for liens had been filed by attorneys with individual retainer agreements. JA9291. Many more have been filed since.

Under the rules adopted by the court, competing parties must first undertake good faith efforts to negotiate a consensus allocation of individual attorney fees. If consensus fails, each party may submit records indicating fees and costs incurred, "a chronology of the tasks performed by the attorney, the date each task was performed, and the time spent on each task," along with any exhibits. JA9256–

JA9257. Parties submit memoranda stating their position on the disputed issues and can request a hearing that may include live testimony and argument on the record. JA9256–JA9261. The Magistrate then issues a report and recommendation that becomes a final decision when adopted by the court. JA9262–JA9263.

In the January 7, 2019 opinion, the Magistrate explained that analysis of time records and competing accounts of the relative value added by attorneys would be guided by this Court's rulings in *McKenzie Constr. Inc. v. Maynard*, 758 F.2d 97 (3d Cir. 1985) [*McKenzie I*] and *McKenzie Constr. Inc. v. Maynard*, 823 F.2d 43 (3d Cir. 1987) [*McKenzie II*], employing a reasonableness standard that evaluates 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; JA9301. The Magistrate must make a contextual judgment that includes "the quality of the work performed" by the attorney and "whether the attorney's efforts substantially contributed to the result." *McKenzie II*, 823 F.2d at 45; JA9301–JA9315.

The Magistrate then examined the three individual lien disputes and conducted a detailed analysis of the records submitted by each attorney, the value of their efforts in light of the point in the litigation where those efforts were undertaken, and the diagnosis and prospects for recovery for each client. JA9315–JA9343 (Podhurst v. Turner); JA9343–JA9370 (Podhurst v. Smith); JA9370–

JA9381 (CMDA v. Johnson). This analysis drew distinctions between individual representation and common-benefit work, examining the relationship between time records submitted by Executive Committee firm Podhurst Orseck in the lien dispute and time the firm included in its lodestar for common-benefit fees. *See, e.g.*, JA9328–JA9330.

The careful scrutiny the Magistrate uses in attorney lien disputes parallels the role special masters have played in fee allocations in cases like *Vioxx* and *Du Pont*. As Appellants explain below, that scrutiny stands in contrast to the lack of robust independent review that the district court applied to the fee allocation here.

II. THE DISTRICT COURT DID NOT CONDUCT AN INDEPENDENT REVIEW SUFFICIENT TO CURE THE INFIRMITIES IN THE ALLOCATION PROCESS.

The court did not perform an independent review of the time records and the relative contributions of counsel in this case sufficient to counterbalance the infirmities of Mr. Seeger's fee allocation process. To the contrary, the court repeatedly acknowledged that it had insufficient information to assess the relative contributions of counsel, adopted Mr. Seeger's allocation and multiplier recommendations with only minor adjustments, and made no adjustments to any lodestar beyond standardizing hourly rates, giving no indication in its opinion or at the hearing that it had independently audited the underlying records.

The best indication of a robust independent review in a lodestar allocation is evidence that the court analyzed the records underlying the proposed fee awards and made its own determinations about what hours should be included in the lodestar and what relative value should be assigned to common-benefit work. *See, e.g.*, *Du Pont*, 2018 WL 4771524, at *2–*3; *In re Vioxx*, 802 F. Supp. 2d at 762, 763. The Magistrate regularly performs these tasks when adjudicating attorney lien disputes. The court performed no such analysis in the fee allocation.

As to lodestar amounts, the court accepted the figures submitted by Mr. Seeger without alteration. The only change the court made was to apply a cap on hourly rates that reduced some lodestar totals. That policy decision did not involve close scrutiny of the underlying records. As previously noted, the court never saw original time sheets from the firms themselves, only Mr. Seeger's adjustments, and the record contains no suggestion that the court conducted a detailed review of even the Seeger-adjusted records. In the April 5, 2018 order awarding total fees, the entirety of the court's treatment of the matter is a sentence that reads, "I determine that the hours submitted by Class Counsel are a fair and reasonable representation of the work performed." JA62; JA8780. In the fee allocation order, the court says nothing about specific objections to Mr. Seeger's unilateral exclusion of hours.

On the issue of multipliers and the relative value contributed by each firm, the court accepted Mr. Seeger's recommendations with few changes, making just two small adjustments upward and three downward. *Compare* JA7956 *with* JA8980 (Girard Gibbs, 1.25 becomes 1.2); JA8980–JA8981 (Girardi Keese, 1.0 becomes 1.2); JA8981 (Goldberg, Persky & White, 1.0 becomes 1.25); JA8983–JA8984 (Samuel Issacharoff, 3.55 becomes 3.25); JA8990–JA8991 (Seeger Weiss, 3.885 becomes 3.5). And on multiple occasions, the court admitted that it could not make any independent judgment about questions bearing on relative contributions. At the hearing, the court repeatedly indicated that it had to defer to Mr. Seeger, who "knows more about this case than I" and had been "the only one that faced the Court" and "the only person that I — that interacted with the Court." JA9117. Mr. Seeger "was the face that I saw for years," the court said, "he and Mr. – Professor Issacharoff are the people that I've seen for years and years and years." JA9172. When Mr. McCorvey raised the issue of Mr. Seeger hording work in the MDL and argued that behavior should affect the court's assessment of his multiplier recommendations, the court replied: "Well that I can't – that's something that's very hard – . . . – for me to adjudicate on." JA9173.

In the allocation order, the court deferred to Mr. Seeger in its review of LLF's fee award. Mr. Seeger justified the low multiplier he assigned LLF — augmenting the firm's lodestar by only 1.25 where other Executive Committee

members received multipliers of 2.25, 2.5, or Mr. Seeger's 3.5 — by asserting that LLF had not played an active role in crafting and advancing the Settlement and had provided an interview to a magazine that he said harmed negotiations. LLF contested both assertions. JA8065–JA8069. Rather than making independent findings, the court indicated it was "accept[ing]" Mr. Seeger's assessment about work relating to the settlement and had "to respect Co-Lead Counsel's concerns" about the interview "since Co-Lead Counsel led the negotiations with the NFL and is best positioned to advise me on this matter." JA98–JA99; JA8985–JA8986.

This Court warned in the prior appeal in this case that there was a heightened need for supervision of the fee process. Because the fee petition was delayed until after class certification and final approval of the settlement, "class members may have less incentive to object to the fee award at [that] later time because approval of the settlement will have already occurred." *NFL Concussion Injury I*, 821 F.3d at 446–447. And because the common-benefit fees were subject to a clear-sailing provision in the Settlement, "careful scrutiny" on fees was required with an extra obligation laid on the court to "review the process and substance of the settlement and satisfy itself that the agreement does not indicate collusion or otherwise pose a problem." *Id.* at 447. Those concerns also demanded careful scrutiny in the allocation of fees.

Instead, the court empowered Mr. Seeger to run the allocation process unilaterally, accepted without analysis his adjusted lodestar figures, and deferred to him on key questions relating to the relative value of attorney contributions and multipliers. This flawed process employed none of the safeguards used in *Diet Drugs*, *Du Pont*, *Chinese-Manufactured Drywall* or *Vioxx* and exhibited none of the close analysis used in attorney lien resolutions in this case. The minimal review conducted by the district court was inadequate to cure these flaws.

ARGUMENT OF LOCKS LAW FIRM

The district court assigned a multiplier of 2.25 or 2.5 to the lodestar of every other firm in this litigation that served a role comparable to LLF's, but it assigned LLF a multiplier of only 1.25. That decision was error for multiple reasons.

First, the court used a flawed standard in justifying the award. It purported to employ a lodestar methodology to allocate common-benefit fees, but it examined none of the factors this Court requires in lodestar analysis, and it improperly minimized the importance of the up-front risk assumed by firms like LLF that invested effort and capital when compensation was most uncertain while inflating the value of work done after settlement discussions began and compensation was more likely and eventually guaranteed. The only virtue of that standard was its benefit to Mr. Seeger. This Court should reject it.

Second, the court issued findings unsupported by substantial evidence. Mr. Seeger asserted that his primary reason for assigning a lower multiplier to LLF was a public interview Mr. Locks gave in a magazine. That interview was never made part of the record and Mr. Seeger's claims were never subject to scrutiny. The court simply deferred to Mr. Seeger's conclusory assertions and indicated it could not make an independent judgment. As to specific lodestar objections, the court made no ruling and developed no record at all. "Clear error exists . . . where factual findings are unsupported by substantial evidence [or] lack adequate evidentiary support in the record." *Interfaith II*, 726 F.3d at 416 (quotation omitted). There is clear error here.

I. THE COURT FAILED TO CONDUCT THE REQUIRED LODESTAR ANALYSIS AND EMPLOYED AN IMPROPER ALLOCATION STANDARD.

The objective of any fee allocation is to distribute an aggregate award among participating attorneys in accordance with the relative value of the services each contributed to the litigation. *In re Prudential*, 148 F.3d at 329 n.96 (describing "the difficult task of assessing counsels' relative contributions"). Here, the court purported to use the lodestar method for the allocation. In a lodestar analysis, "the court multiplies the number of hours that [petitioning] counsel reasonably worked by the reasonable hourly rate for that work to determine the counsel's lodestar, which may be multiplied by a factor intended to compensate the

attorneys for the risks they faced." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 (3rd Cir. 2005). This methodology requires a court to evaluate the lodestars of petitioning attorneys and then determine whether risk factors justify rewarding some attorneys with multipliers greater than those awarded to others in the litigation.

A *risk multiplier* has two components. First, it must compensate counsel for the delay incurred between the time they perform professional services in the litigation and the time they are paid. *Lindy Bros. Builders, Inc. of Phila. v. Am. Rad. & Std. Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976). Second, it must compensate counsel for the risk of receiving little or no payment when compensation for their services is contingent on uncertain success. *Id.* "[T]he risk of success [is] 'perhaps the foremost' factor to be considered in determining whether to award an enhancement [to the lodestar]." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 54 (2d Cir. 2000) (citation omitted). *Accord, e.g.*, *Matter of Continental Illinois Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992) (court failed to provide compensation that "reflect[ed] the risky character of the[] undertaking"). Many courts have ruled that the risk of non-payment "must be judged as it appeared to counsel at the outset of the case, when they committed their capital (human and otherwise)." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998). *Accord Hartman v. Lyphomed, Inc.*,

945 F.2d 969, 975–976 (7th Cir. 1991); *Diet Drugs*, 553 F. Supp. 2d at 478. This Court has not yet "addressed whether courts must reconsider the risk of nonpayment as the action evolves." *Diet Drugs II*, 582 F.3d at 543.

Unlike a risk multiplier, a multiplier based on *quality* is "appropriate only in rare cases." *Student Pub. Int. Research Grp. of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436, 1439 (3d Cir. 1988). That is because quality is typically reflected in the lodestar:

> [C]ounsel who possess or who are reputed to possess more experience, knowledge and legal talent generally command hourly rates superior to those who are less endowed. Thus, the quality of an attorney's work in general is a component of the reasonable hourly rate; this aspect of "quality" is reflected in the "lodestar" and should not be utilized to augment or diminish the basic award under the rubric of "the quality of an attorney's work".

Lindy, 540 F.2d at 117.

This Court has found quality multipliers to be appropriate in four exceptional circumstances. First, quality multipliers may be appropriate for the "complexity and novelty of the issues presented." *Fine Paper*, 751 F.2d at 589. Typically, this evaluation is performed with reference to quantitative measures of litigation burden: the number of documents obtained and analyzed in discovery, the number of depositions taken and defended, the volume and difficulty of motion practice, the competence and vigor of the attorneys opposing class counsel. *See, e.g.*, *Rite-Aid*, 396 F.3d at 305 (discussing complexity factors).

Second, "[a] quality multiplier might well be appropriate, even for a modest result, if the court were to conclude that it had been achieved with unusual efficiency, and with little expenditure of attorney time and expense." *Fine Paper,* 751 F.2d at 589.

Third, a quality multiplier might be justified for an "extraordinary" result:

> In settled cases, the [quality] factor ... is reflected largely in the benefit produced. It permits the court to recognize and reward achievements of a particularly resourceful attorney who secures a substantial benefit for his clients with a minimum of time invested, or to reduce the objectively determined fee where the benefit produced does not warrant awarding the full value of the time expended."

Lindy, 540 F.2d at 112 (citation omitted).

Finally, a quality multiplier is warranted where the attorney at issue has performed "exceptional services" and "has discharged the professional burden undertaken with a degree of skill above . . . that expected for lawyers of the caliber reflected in the hourly rates." *Id.* at 118.

Although the court purported to allocate the fee award using a lodestar methodology, it did not consider much less apply most of the factors this Court has required for determining appropriate multipliers. Instead, the court actually penalized firms with large numbers of clients, minimizing the value of the up-front work that made this MDL viable and holding that the "great risk" required to mount a large number of lawsuits and present a credible threat to the NFL "must be paid by [the] individuals" in those lawsuits, not taken into account in a risk

multiplier. JA89; JA8976. This is nonsense. The lodestar method begins by distinguishing between common-benefit time and work that benefits only individual clients. By definition, a multiplier compensates firms for the risk of work that a court has already determined benefits the class as a whole. The court's erroneous risk standard prejudiced LLF severely. The firm spearheaded the effort to mount a strong litigation threat against the NFL, filing four state class actions and more individual actions than any other firm. JA8069, JA8082–JA8085.

A proper risk standard would not reward Mr. Seeger any more than other participating firms. If risk is determined at the outset of litigation, then every attorney entitled to common-benefit fees was exposed to the same risk of non-compensation and is entitled to the same multiplier. If instead risk must be evaluated on an ongoing basis, this factor cuts against Mr. Seeger. Other leaders in this case performed substantial work prior to and immediately after the MDL transfer, before the NFL initiated settlement discussions. They interviewed hundreds of players, filed individual and class lawsuits, and in the case of LLF took preservation depositions. JA8067, JA8069, JA8082–JA8085. They marshaled experts to articulate the trauma players endured, identified the risk that claims would be preempted by the collective bargaining agreement, and hired a preeminent appellate lawyer to respond to the anticipated motion to dismiss. JA6726–JA6728; JA8023–JA8029. Mr. Seeger, in contrast, only started

performing substantial work after the NFL signaled its desire to settle and the risk of non-recovery was reduced. JA6641–JA6647.

The court compounded this error by categorically refusing to include time expended before the MDL transfer when calculating petitioning attorneys' lodestars. JA88–JA89; JA950–JA951; JA8975–JA8976. This pre-MDL work created pressure for the NFL to settle early and clearly benefitted the class. JA8069, JA8082–JA8085.

Quality factors also cannot justify multiplying Mr. Seeger's lodestar out of proportion to other firms. First, as to complexity, prior to the start of settlement negotiations, Mr. Seeger did not obtain or analyze any documents in discovery, did not conduct any depositions, did not brief any motions, retained no experts, and argued no appeals. *Compare In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 741 (3d Cir. 2001) (identifying "factors which increase the complexity of class litigation" as "complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel"). Even after a settlement deal was struck with the substantial assistance of the court and the Executive Committee, Professor Issacharoff presented the argument to secure judicial approval of the Settlement and defend that result on appeal, not Mr. Seeger. Mr. Seeger's outsized multiplier cannot be justified on the basis of litigation complexity.

Second, considerations of efficiency do not support special enhancement of Mr. Seeger's lodestar. Seeger Weiss submitted over 19,000 attorney hours in the allocation process (and many more since) in a case with no discovery and only one dispositive motion prior to settlement. JA6680. Mr. Seeger can hardly claim that he was undercompensated because the settlement was "achieved with unusual efficiency, and with little expenditure of attorney time and expense." *Fine Paper,* 751 F.2d at 589.

Third, whether or not the result here can be characterized as "extraordinary," that outcome is the same for all firms whose common-benefit work contributed to the result and is thus a neutral factor in allocating the fee award.

Finally, there is no basis to conclude that services rendered by Mr. Seeger were performed with a degree of skill so exceptional as to justify a lodestar enhancement 2.8 times greater than LLF's and 1.4 to 4.67 times greater than other counsel. Many of the attorneys in leadership positions had substantial experience litigating and settling personal injury class actions. Mr. Locks, Mr. Weiss, Mr. Levin and Ms. Nast all served as Class or Sub-Class counsel in *Diet Drugs*, *see Diet Drugs*, 553 F. Supp. 2d at 449–450 nn. 4 & 7, the case that created the template for resolving personal injury class actions after the Supreme Court's decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). But when Mr. Seeger was put in charge of the negotiating effort, he agreed to a cap on player

recovery that led the court to reject the first proposed settlement. JA1471. It was the court, not Mr. Seeger, that pressured the NFL to negotiate an uncapped fund, and the resulting Settlement was approved only after the court required further changes. *NFL Concussion Injury I*, 821 F.3d at 423. The record does not support a finding that Mr. Seeger demonstrated extraordinary skill entitling him to a greater multiplier than LLF and other Executive Committee members who made vital contributions to the settlement effort.

The district court chose to employ a lodestar methodology to allocate common-benefit fees but failed to perform the analysis this Court requires for lodestar-based awards. Instead, the court upended this Court's standard for determining risk multipliers and awarded Mr. Seeger a quality multiplier that is not supported by substantial evidence. This was error, resulting in a bonanza for Seeger Weiss and under-compensation for LLF and other firms.

II. THE FINDINGS AGAINST LLF ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Lower Multiplier Applied to LLF is Clear Error.

The district court and Mr. Seeger both identified an interview that Mr. Locks gave to *Businessweek* for a feature story the magazine published on the litigation as a primary reason LLF received a low multiplier. *See* Paul M. Barrett, *Will Brain Injury Doom the NFL?*, BLOOMBERG BUSINESSWEEK, Feb. 21, 2013, *available at* https://www.bloomberg.com/news/articles/2013-01-31/will-brain-injury-lawsuits-

doom-or-save-the-nfl. The court's finding on this issue is unsupported by substantial evidence.

In his initial proposed allocation, Mr. Seeger made no mention of the *Businessweek* interview. Indeed, his statement about LLF in the proposal contained no explanation at all for the low multiplier he assigned the firm. On the settlement process, Mr. Seeger said only that "LLF made contributions toward the negotiation of the Settlement." JA7952. Rather, LLF introduced the issue in its description of its work during the settlement negotiations when responding to Mr. Seeger's proposal:

> To the NFL's consternation and anger, the undersigned was featured and interviewed for a *Businessweek* publication in Nov–Dec, 2012 [sic] which was published a few months after settlement negotiations began. That interview infuriated the NFL and spurred it to negotiate earnestly since it was plain to the NFL that the risk of not settling the matter was very high. This was, from the beginning, a very dangerous public-relations case for the NFL. It still is. When LLF and others exposed the NFL for denying the existence of insidious brain injury in football, the NFL risked losing its fan-base and revenue. It still does, and it has never faced an existential crisis of this magnitude. When *Businessweek* made clear to the public that the seriousness of this matter could well run into an uncapped liability to the NFL of multiple billions of dollars, the leverage of that publicity at the same time the Court ordered the parties to negotiate and work out a deal was substantial. The result was an uncapped settlement created in large measure by this Court, not Seeger, which proved that the statements in *Businessweek* were true. The result of the claims process, still not yet certain, may also prove these statements to be true.

JA8067–JA8068.

Only then did Mr. Seeger seize on the interview as a reason for penalizing LLF, writing in his reply, "It is important to note that, during confidential settlement negotiations, Mr. Locks gave an interview to *Businessweek*, which jeopardized settlement negotiations and caused him to be removed from the negotiating team." JA8257 n.23. At the allocation hearing, Mr. Seeger then offered this interview as his primary reason for penalizing LLF:

> 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.

JA9116. Notwithstanding the reference to the interview being "in our papers," the materials quoted above constitute the entirety of the record Mr. Seeger made on this issue: one sentence in his reply declaration, five sentences at the hearing.

Here is the entirety of the district court's factual finding on the matter: "I also have to respect Co-Lead Class Counsel's concerns about the impact of Mr. Locks' interview with *Businessweek*, since Co-Lead Class Counsel led the negotiations with the NFL and is best positioned to advise me on this matter." JA98–JA99; JA8985–JA8986. The *Businessweek* story was never made a part of the record. There is no indication that the court read it.

On its face, this account is not credible. Mr. Locks sat for the interview with *Businessweek* in fall 2012, well before negotiations began with the NFL. JA8067–JA8068. The story was *published* in February 2013, shortly after negotiations started. The interview disclosed no details of those negotiations (which had not even begun at the time), and Mr. Seeger offered no evidence that the story harmed the plaintiffs' negotiating position. To the contrary, Mr. Seeger said at the hearing that when the NFL demanded Mr. Locks be excluded from direct involvement with settlement talks "because they believed he would be a source of leaking information" Mr. Seeger was "not agreeing with them at all." JA9116. LLF had no opportunity to question Mr. Seeger and interrogate his account.

This record does not constitute substantial evidence that Mr. Locks' interview justifies the penalty that Mr. Seeger and the court imposed. In a fee award based on lodestar analysis, the court "has a positive and affirmative function in the fee fixing analysis, not merely a passive role." *Interfaith II*, 726 F.3d at 416 (quotation omitted). When a court simply "credit[s] [Appellees'] arguments as to the reasonableness of the legal . . . fees, expenses and hours charged" and says it "will not second guess" those arguments, that "perfunctory statement does not allow for meaningful appellate court review." *Id.* at 417 (citation omitted). That is exactly what happened here. Mr. Seeger justified LLF's lower multiplier with a conclusory statement at the fee hearing about a one-sentence post-hoc justification

that was not contained in his initial allocation proposal, and the court simply deferred to him on the issue. JA98–JA99; JA8985–JA8986. This was plain error.

Subsequent events in the record provide an obvious alternative explanation for these events that reinforces Mr. Locks' account of pressure applied to the NFL. After Mr. Locks was excluded from direct participation in settlement negotiations, Mr. Seeger agreed to cap the Monetary Award Fund for players at $675 million. Mr. Seeger presented that limit on recovery to the rest of the Executive Committee as a *fait accompli*, putting counsel and their clients to a Hobson's choice: agree to a cap that threatened to leave many players without compensation, or abandon the settlement framework entirely. It took the intercession of the court to avoid this trap, reject the proposal as inadequate, and push the NFL to negotiate an uncapped fund. JA1471. And the NFL did exactly that, agreeing to a fund with no limit on total payouts. JA2121. Small wonder the NFL demanded Mr. Locks' removal from the negotiating team when the *Businessweek* story was published: his interview created public pressure for a larger fund — *see* Barrett, *Will Brain Injury Doom the NFL?* at 4, 10–11 — at a time when Mr. Seeger was agreeing to an inadequate cap on the NFL's liability.

B. The Court Created No Record and Issued No Specific Ruling on LLF's Objections to Exclusion of Time from its Lodestar.

LLF and other firms also made specific objections to Mr. Seeger's unilateral adjustments to their lodestar on which the court made no record and no specific

ruling. For example, early in the litigation LLF spent many paralegal hours creating a Retired Player Database to strengthen the case for the NFL's liability exposure. In his petition seeking the award of total fees, Mr. Seeger emphasized this database as "vitally important to the entire negotiation process because it enabled Plaintiffs' Counsel to appropriately characterize disease and symptom occurrence" and "served as a useful cross-check" on epidemiological data. JA6650–JA6651. When LLF sought to include this "vitally important" work in its lodestar, Seeger Weiss refused, saying paralegal time would not be reimbursed. But Mr. Seeger went on to include $382,804 in paralegal time in his lodestar. JA6680. When increased by his 3.5 multiplier, this meant over $1.3 million in compensation for Mr. Seeger. Mr. Levin also received compensation for paralegal time. JA6723-11.

LLF raised this issue at the hearing. JA9111–JA9112. Mr. Seeger responded as follows: "When you're talking about a database, our view was that many of that [sic] was client-specific." JA9115. The same database that Mr. Seeger trumpeted to the court as "vitally important to the entire [settlement] negotiation process" when he was petitioning for the award of common-benefit fees, JA6650, he dismissed as unworthy of compensation when allocating those fees between himself and other firms. The statement quoted above is the entirety of the record Mr. Seeger made on the matter. The court issued no finding of fact.

LLF's attorney hours also included substantial time communicating with clients about the Settlement. That time served a vital function. The Settlement involves trade-offs, and players required expert assistance when deciding whether to participate. In the end, only a tiny handful of LLF's clients opted out, preserving the Settlement's viability. Nonetheless, Mr. Seeger disallowed much of that time. JA8068–JA8069. LLF had the largest number of clients of any firm, so it suffered the most from Mr. Seeger's skewed incentive on the treatment of client-contact time. Because Mr. Seeger made these decisions unilaterally, there is no record of the exclusions on the docket. Again, the court issued no finding of fact.

In a fee award based on lodestar values, where "an objecting party has challenged specific types of work and states why it is contended that the hours claimed are excessive" — or here, improperly excluded — "the reviewing court must support its findings with a sufficient articulation of its rationale to allow for meaningful appellate review." *Interfaith II*, 726 F.3d at 416. If instead "the opinion of the District Court is so terse, vague, or conclusory that [there is] no basis to review it, [the Court] must vacate the fee-award order and remand for further proceedings." *Id.* at 417 (quotation omitted). The court below created no record on myriad objections to the exclusion of billed hours from the lodestars of LLF and other firms. Instead, it deferred to Mr. Seeger's decisions. The resulting allocation is unsupported by substantial evidence and must be vacated.

CONCLUSION

The district court empowered Mr. Seeger uniquely among all the experienced firms that filed suit on behalf of former players in this proceeding. The court had contact only with Mr. Seeger, placed him in control of settlement negotiations with the NFL, and made him the gatekeeper for all filings and petitions on behalf of the class. Using that authority, Mr. Seeger assigned the lion's share of common-benefit work to himself.

When a court empowers one attorney as its sole agent and grants him authority over other firms that contribute common-benefit work in an MDL, that decision imposes additional responsibilities. The court must ensure its agent employs even-handed procedures, and it must exercise meaningful supervision to ensure that its agent does not exploit his position. The district court failed to satisfy those responsibilities in the allocation of common-benefit fees, enabling Mr. Seeger to sacrifice transparency for one-sided control of information and abandon negotiation for self-enrichment. It then blessed the results without adequate independent scrutiny. The resulting award offends the "basic principles of fairness" that this Court has demanded in fee allocations. *Diet Drugs II*, 582 F.3d at 547.

Appellants respectfully request that this Court vacate the district court's order allocating common-benefit fees and remand with instructions that the court

and the parties craft a process for a new allocation that will accord with due process and satisfy the values of transparency, reliability and basic fairness.

Dated: August 9, 2019

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1(e), I hereby certify that I was admitted to the Bar of the U.S. Court of Appeals for the Third Circuit on September 25, 2018 and remain a member in good standing.

Dated: August 9, 2019

/s/ Tobias Barrington Wolff

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and this Court's June 11, 2019 briefing and scheduling order as it contains 12,999 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

Undersigned counsel also certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2011.

Undersigned counsel further certifies pursuant to Local Appellate Rule 31.0(c) that the text of the electronic version of this brief is identical to the text of the paper copies, and a virus check was performed on the .pdf file of this brief using McAfee VirusScan version 8.8 and no virus was detected.

Dated: August 9, 2019

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AFFIDAVIT OF SERVICE

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case 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, and 18-2724

In re National Football League Players' Concussion Injury Litigation

COUNTY OF PHILADELPHIA

I, Frederick W. Wright, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Tobias Barrington Wolff, Esq., Attorney for Appellant, Locks Law Firm, that on this 9th day of August 2019, the Brief and Appendix Volumes I-XIII have been served by ECF.

Filing to the Court has been perfected on the same date as above.

/s/Frederick W. Wright

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