No. 19-2753

In the United States Court of Appeals for the Third Circuit

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(CIV. NO. 2-12-MD-02323) (THE HONORABLE ANITA B. BRODY, J.)

RESPONSE FILED BY NFL PARTIES
TO THE ORDER OF THE CLERK OF COURT

BRAD S. KARP
LYNN B. BAYARD
BRUCE BIRENBOIM
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Attorneys for the National Football League and NFL Properties LLC, successor in interest to NFL Properties, Inc.

INTRODUCTION

On October 26, 2018, pursuant to the District Court's 2016 order that it would review *de novo* objections to conclusions of law of the Special Master appointed to hear claim appeals in the NFL Concussion Litigation Settlement Program (while his findings of fact are final and binding), Appellant filed an objection in the District Court to a claim appeal ruling. Specifically, the Special Master had found that Appellant's diagnosis of early dementia (Level 1.5 Neurocognitive Impairment) rendered before the Effective Date of the Settlement Agreement did not meet the diagnostic criteria required by the Agreement to merit a monetary award. In his objection, Appellant argued that the Special Master erred by holding that the evaluation and evidence for Appellant's diagnosis must be "generally consistent" with the diagnostic criteria used in the Settlement Program's Baseline Assessment Program after the Effective Date of the Settlement.

On July 2, 2019, the District Court rejected Appellant's objection, holding that the terms of the Settlement Agreement plainly state that the "generally consistent" standard applies to all pre-Effective Date diagnoses, including Appellant's diagnosis. The Court further stated that the "decision of the Court will be final and binding" pursuant to § 9.8 of the Settlement Agreement.

On July 29, 2019, Appellant filed a Notice of Appeal to this Court. In response, the Clerk of this Court issued an August 6, 2019 Order stating that all parties must file, within fourteen (14) days, written responses addressing this Court's authority to review the District Court's July 2, 2019 Order. This Memorandum responds to that Order.

ARGUMENT

The NFL Parties respectfully submit that there is no jurisdiction for this Court to review the District Court's decision rejecting Appellant's misguided interpretation of the Settlement Agreement.

As a general matter, notwithstanding Section 9.8 of the Settlement Agreement, which states that for claim appeal determinations the "decision of the Court will be final and binding," this Court has authority to review a district court's conclusion of law, including on an issue of interpretation of a settlement agreement's terms in a settlement program such as this, under the collateral order doctrine (28 U.S.C. § 1292(a)(1)).

Under the collateral order doctrine, an appeal is proper if the district court order: (1) "conclusively determines the disputed question"; (2) "resolves an important issue that is completely separate from the merits of the dispute"; and (3) "is effectively unreviewable on appeal from a final judgment." *In re Diet Drugs (Phentermmine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 418 F.3d 372, 376 (3d Cir. 2005) (quoting *In re Ford Motor*

Co., 110 F.3d 954, 958 (3d Cir. 1997)); *see In re Deepwater Horizon*, 793 F.3d 479, 484 (5th Cir. 2015) (stating "'[i]mportance' has sometimes been characterized as a discrete fourth requirement and other times been wrapped up in an analysis of both the second and third requirements"). In the *Deepwater Horizon* Settlement Program, for example, the Fifth Circuit exercised jurisdiction under the collateral order doctrine to hear appeals when settlement interpretation disputes involved an accounting methodology that potentially affected "thousands of claimants" and "hundreds of millions of dollars" in recovery framework (732 F.3d 326, 332 n.3, 345 (5th Cir. 2013)), final rules governing discretionary review of internal appeal determinations that had substantial, settlement-wide ramifications as governing all future reviews by the district court (785 F.3d 986, 989 (5th Cir. 2015)), and when the interpretive issue concerned whether donations and grants qualified as revenue for nonprofit organizations for purposes of calculating loss (785 F.3d 1003, 1006 (5th Cir. 2015)).

Here, although theoretically the legal issue of whether the "generally consistent" standard applies to pre-Effective Date claims could be an important issue affecting operation of the Settlement Program, that "interpretive" issue, in fact, is a non-issue manufactured by one Claimant – Appellant – through a strained reading of the Settlement Agreement that lacks any basis in its language. As the District Court explained, the Settlement

Agreement "plainly state[s]" that the "generally consistent" standard applies to pre-Effective Date claims. *See* July 2, 2019 Order at 2. There is no colorable argument to the contrary, as the District Court found three separate bases in the Settlement Agreement that each alone, and certainly together, makes any alternative reading of the Agreement wholly without merit. *Id.* at 3. Tellingly, while over 1,900 claimants have asserted pre-Effective Date diagnoses,[1] and scores of these claims have been, as required, subject to the generally consistent standard and denied, Appellant is the only claimant to have filed an objection in the District Court and appealed to this Court on that basis.

Accordingly, far from presenting an "important" interpretive dispute for this Court's review, this appeal presents a frivolous one that falls far short of the collateral order doctrine's stringent requirements. *See In re Deepwater Horizon*, 793 F.3d at 487 (summarizing that the Fifth Circuit exercised the doctrine only when the issue involved "the right to an interpretation of the Settlement Agreement on an issue with a serious impact on the effective and fair administration of the settlement"); *see also Sec'y U.S. Dep't of Labor* v. *Koresko*, 646 F. App'x 230, 248 (3d Cir. 2016) ("The collateral order doctrine allows appeals from district court orders that meet a 'strin-

[1] *See* August 12, 2019 NFL Settlement Program Summary Report, Section 5, https://www.nflconcussionsettlement.com/Docs/8_12_19_report.pdf.

gent' standard."). Should this appeal nevertheless proceed, the NFL Parties reserve all rights to demand costs and damages. *See* Fed. R. App. P. 38 (permitting a Court of Appeals to "award just damages and single or double costs to the appellee" for frivolous appeals); *see also Rouse* v. *II-VI Inc.*, 658 Fed. Appx. 21, 24 (3d Cir. 2016) (explaining that "an appeal is frivolous when, viewed objectively, it is wholly without merit, i.e. when there is no 'colorable argument' in support of the appeal"); *Nagle* v. *Alspach*, 8 F.3d 141, 145 (3d Cir. 1993) (awarding Rule 38 damages where "there was no possibility of success").

Finally, to the extent Appellant seeks to challenge the Special Master's underlying findings of fact in his claim appeal denial – as adopted by the District Court – those findings are non-reviewable as final and binding pursuant to the District Court's July 13, 2016 order appointing the Special Master to hear claim appeals. *See* District Court Order (July 13, 2016), Doc. No. 6871. As that Order states, the parties stipulated that, if an appeal is referred to the Special Master, pursuant to Fed. R. Civ. P. 53(f)(3)(B), "the factual determinations of the Master(s) will be final and binding." *See* Fed. R. Civ. Proc. Rule 53(f)(3)(B) (stating that the court "must decide de novo all objections to findings of fact made or recommended by a master, *unless the parties, with the court's approval, stipulate that . . . the findings of a master . . . will be final*") (emphasis added); *In re Bayside Prison Litig.*, 419 F.

App'x 301, 303 (3d Cir. 2011) ("As the parties specifically agreed to be bound by the Special Master's findings of fact . . . those findings are unreviewable by this court or by the district court."); *see also* Settlement Agreement § 9.8 (for individual claim appeal determinations, "[t]he decision of the [District] Court will be final and binding"). For this reason, Appellant did not – and he could not – contest the Special Master's fact determinations when objecting to the District Court. Nor may he do so here, as those factual findings are final and binding.

CONCLUSION

For the reasons above, the NFL Parties respectfully submit that this Court lacks jurisdiction over this appeal.

Respectfully submitted,

s/ Brad S. Karp

BRAD S. KARP
LYNN B. BAYARD
BRUCE BIRENBOIM
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

AUGUST 20, 2019

CERTIFICATE OF BAR MEMBERSHIP

I, Brad S. Karp, counsel for the NFL Parties, hereby certify pursuant to Third Circuit Rule 28.3(d) that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

s/ Brad S. Karp
BRAD S. KARP

AUGUST 20, 2019

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1623 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f);

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font;

3. The electronic copy of this brief is filed using this Court's CM/ECF system; and

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s/ Brad S. Karp
BRAD S. KARP

AUGUST 20, 2019

CERTIFICATE OF SERVICE

I, Brad S. Karp, counsel for the NFL Parties and a member of the Bar of this Court, certify that, on August 20, 2019, an electronic copy of this Memorandum was filed with the Clerk of Court using the CM/ECF system. I further certify that all parties required to be served have been served.

s/ Brad S. Karp
BRAD S. KARP