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August 20, 2019

VIA ECF

Hon. Patricia S. Dodszuweit
Clerk of the Court
United States Court of Appeals
for the Third Circuit
James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106

Re: ***In re National Football League Players' Concussion Injury Litigation*, No. 19-2753**

Dear Ms. Dodszuweit:

As Class Counsel for the Plaintiff Settlement Class, I respectfully submit this letter pursuant to the Court's Order dated August 6, 2019 (Doc. No. 003113312669). That Order directed the parties to address the Court's authority to review the District Court's July 2, 2019 Settlement Implementation Determination overruling the Appellant class member's objections to the Special Master's determination that he is not entitled to a Monetary Award under the Settlement (ECF No. 10712).

Section 9.8 of the Class Action Settlement Agreement approved by the District Court and upheld by this Court provides that, as to the District Court's review of Monetary and Derivative Claimant Award determinations, "[t]he decision of the [District] Court will be final and binding." ECF No. 6481-1 at 52. The use of "final and binding" language in the Settlement Agreement is not, however, by itself sufficient to preclude appellate review. In *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, 200 F. App'x 95 (3d Cir. 2006) (unpublished), this Court rejected the argument that a similar provision in the settlement agreement in that case, providing that orders of the district court affirming arbitration

awards were "final and binding," precluded this Court's review of such orders. *Id.* at 101; *accord Andersen Corp. v. Pella Corp.*, 422 F. App'x 882, 884 (Fed. Cir. 2011) (unpublished) ("We agree with Pella that the agreement's language indicating that the magistrate's determination would be 'final' and 'binding' did not indicate that it was waiving its right to appeal to this court."). If anything, the Court noted, its jurisdiction under 28 U.S.C. § 1291 "is typically contingent on orders of the District Court being 'final.'" *In re Diet Drugs*, 200 F. App'x at 101. As such the terms of the Settlement Agreement do not necessarily foreclose the instant appeal.

That, however, does not end the inquiry concerning the Court's appellate jurisdiction. The district court's order here is not a final decision that terminated litigation. As such, appellate jurisdiction would lie only under the collateral order exception to the final judgment rule.

In its recent decision addressing the district court's December 8, 2017 decision voiding assignments of Monetary Awards under the Settlement, this Court addressed the collateral order exception in the context of this very litigation, noting that it has jurisdiction to review "certain decisions that do not terminate the litigation . . . as final decisions of the district courts if they are (1) conclusive, (2) resolve important questions completely separate from the merits, and (3) would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *In re Nat'l Football League Players' Concussion Injury Litig.*, 923 F.3d 96, 106 (3d Cir. 2019) (citing *Russell v. Richardson*, 905 F.3d 239, 253 (3d Cir. 2018)) (internal quotation marks omitted).

Here, as to the Appellant class member's claim for a Monetary Award under the Settlement, the district court's award determination is final and conclusive. Unlike the district court's class-wide determination invalidating assignments of Monetary Awards that was the subject of this Court's April 26, 2019 decision in this litigation, however, *see* 923 F.3d at 103, 106, the order here does not resolve any important question separate and apart from the merits of the *NFL Players' Concussion Litigation*, let alone render any important question effectively unreviewable on appeal from final judgment.

This Court has "'consistently construed the collateral order exception narrowly lest the exception swallow up the salutary general rule that only final orders be appealed[,] . . . consistent with the longstanding congressional policy against piecemeal appeals that underlies the final

judgment rule.'" *United States v. Mitchell*, 652 F.3d 387, 393 (3d Cir. 2011) (quoting *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 324-25 (3d Cir. 1999)).

Given the foregoing, it is questionable whether appellate jurisdiction lies pursuant to the collateral order exception in this particular appeal.

Respectfully,

/s/ Christopher A. Seeger
Christopher A. Seeger
Class Counsel for Class Plaintiffs

cc: Counsel of record (by ECF)