Ringing the Bell for the Last Time: How the NFL's Settlement Agreement Overwhelmingly Disfavors NFL Players Living with Chronic Traumatic Encephalopathy (CTE)

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I. INTRODUCTION

The routine tackle, sack, and block in the National Football League ("NFL") are typically accompanied by violent blows to the players' heads.¹ Players often ignore the resulting injuries in an attempt to both maintain their respective starting positions.

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According to Harry Carson, former linebacker for the New York Giants:

And so I have to meet force with force. All of my power is coming from my big rear end and my big thighs into my forearm and I hit him in the face. I have to stun him, get my hands on him, throw him off when I see where the ball is going and when I hit him in the face, his head is going back, he’s going forward but all of a sudden his head is going back and his brain is hitting up against the inside of his skull.

According to Neuropsychologist, Robert Stern, Ph.D.:

In football, one has to expect that almost every play of every game and every practice they’re going to be hitting their heads against each other. That’s the nature of the game; those things seem to happen around 1,000 to 1,500 times a year. Each time that happens it’s around 20g or more. That’s the equivalent to driving a car at 35 mph into a brick wall - 1,000 to 1,500 times per year.
and to avoid the shame associated with admitting weakness. Fans of the game see the players line up on the field, week after week, without much regard for their well-being or safety, until it affects their ability to score a touchdown or block a pass. By not reporting head injuries, players place their starting positions and respect among their peers above their long-term mental and physical health.

Certain life-altering cognitive diseases follow as a direct result of head injuries. These diseases include Amyotrophic Lateral Sclerosis ("ALS"), Parkinson's disease, Alzheimer's disease, dementia, and Chronic Traumatic Encephalopathy ("CTE"). In a recent settlement agreement, the NFL agreed to compensate former players with a

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2 Richard Robeson & Nancy M. P. King, Loss of Possession: Concussions, Informed Consent, and Autonomy, 42 J.L. MED. & ETHICS 334, 336 (2014). The culture of the NFL encourages self-sacrificing for the sake of the game and ignorance pertaining to any real or substantial pain incurred by a hard tackle during a game often leading to the downplaying of any real injury. Id. Consequently, players not only risk losing their starting position, but also risk losing respect among other players if they report their injuries. Id. See also Kevin Kaduk, NFL Rookie Retires at age 24 Due to Concussion Fears, YAHOO (Mar. 18, 2015, 10:04 AM), https://au.sports.yahoo.com/a/26700135/nfl-rookie-retires-at-age-24-due-to-concussion-fears/ (noting NFL player retiring at young age due to concussion related fears).


4 See Robeson & King, supra note 2, at 336-37 (discussing the sacrifices players make with respect to themselves and their peers by not reporting injuries).

5 Id. "Kevin Guskiewicz, Director of the Center for the Study of Retired Athletes, began in the early 2000s to identify associations between repeated concussions, or recurrent mild traumatic brain injury (MTBI), and brain disorders such as Parkinson's disease, Alzheimer's disease, and clinical depression." Id. at 336.

qualifying diagnosis of any of the above-mentioned diseases. Of these five diseases, CTE is the only disease that cannot be diagnosed while a person is alive, preventing NFL players from being compensated for the disease during their lifetime. CTE is also one of the more common debilitating cognitive diseases caused by severe head trauma, which typically occurs as a result of a concussion.

Provisions for fair compensation for CTE in the Settlement Agreement were a central issue in the Settlement Agreement as well as in the initial lawsuits filed by former NFL players against the NFL. The players alleged that the NFL concealed

7 Id. at 194. The Settlement Agreement was by and between two former football players, Kevin Turner and Shawn Wooden, on behalf of themselves and others similarly situated, and the National Football League and NFL Properties, LLC. Id. Judge Brody’s opinion was skeptical of the $675 million cap over a 65-year lifespan, regardless of “how well [the $675 million cap is] supported by the parties’ actuarial analyses... [which] entailed some degree of uncertainty of payment over the 65-year term.” Id. at 198. Maximum monetary awards for the qualifying diagnoses include the following: Level 1.5 Neurocognitive Impairment (early dementia), $1.5 million; Level 2 Neurocognitive Impairment (moderate dementia), $3 million; Alzheimer’s Disease, $3.5 million; Parkinson’s Disease, $3.5 million; Amyotrophic Lateral Sclerosis (ALS), $5 million; and death with CTE, $4 million subject to limitations. Id. at 196.

8 Id. CTE can only be diagnosed through autopsy and therefore, a qualifying diagnosis cannot be rendered until the individual has died. Natl Football League Players’ Concussion Injury Litig., 301 F.R.D. at 196. See also Joseph M. Hanna, Former NFL Players Object to CTE Benefits Cutoff Date for Incentivizing Suicide, SPORTS & ENT. LAW INSIDER (Mar. 2, 2015), http://sportslawinsider.com/former-nfl-players-object-to-cte-benefits-cutoff-date-for-incentivizing-suicide/. On Feb. 13, 2015, amendments were made to the draft NFL Settlement Agreement which extended the cutoff date for CTE diagnoses up until the settlement’s final approval date. Id. See also Maryclaire Dale, Federal Judge Wants Changes Made to NFL Concussion Settlement, CLAIMS J. (Feb. 4, 2015), http://www.claimsjournal.com/news/national/2015/02/04/261277.htm (discussing the change to the Settlement proposed by Federal Judge, to benefit living players).

9 See infra note 33 (describing medical consequences of CTE). Repeated head trauma causes progressive degeneration of brain tissue, including the buildup of abnormal protein called ‘tau.’ What is CTE?, BU CTE CENTER, http://www.bu.edu/cte/about/what-is-cte/ (last visited Nov. 5, 2015) (describing medical consequences of CTE). Brain degeneration is accompanied by “memory loss, confusion, impaired judgment, impulse control problems, aggression, depression, and, eventually, progressive dementia.” Id. See also Kelly A. Heard, The Impact of Preemption In The NFL Concussion Litigation, 68 U. MIAMI L. REV. 221, 222 (2013). CTE is a progressive degenerative disease that causes depression, confusion, and ultimately dementia or some other long term cognitive impairment. Id. See also infra note 15 (noting destruction of Webster’s life due to his CTE: symptoms exhibited through his “erratic” behavior).

information discovered by an NFL-sanctioned committee about the close connection between severe head trauma and CTE. CTE was still a contested issue at the final February 2, 2015, hearing, and many players were still reluctant to accept the final Settlement Agreement because of the continued inadequate compensation for retired NFL players diagnosed post mortem with CTE.

Dave Duerson’s complaint alleged that the NFL acted negligently by failing to educate players on the risks of sustaining concussions while playing in the NFL, the dangers in continuing to play after sustaining such concussions, the dangers in failing to diagnose and treat those injuries, and for failing to implement policies to prevent Duerson from returning to play with his injuries. Id. at *1. See also Complaint, at 8, Easterling v. Nat’l Football League, No. 11CV05209, 2011 WL 3627055 (E.D.Pa. Aug. 17, 2011) (detailing the first lawsuit brought against the NFL for negligence and head trauma related injuries). Easterling, along with seven other former NFL players, filed their lawsuit against the NFL on Aug. 17, 2011 seeking “medical monitoring, compensation and financial recovery for the long-term/chronic injuries, financial losses, expenses and intangible losses suffered by the Plaintiffs as a result of the defendant’s carelessness, negligence, intentional misconduct, and concealment of information directly related to each plaintiffs’ injuries and losses.” Id. See also In re Nat’l Football League Players’ Concussion Injury Litig., 842 F. Supp. 2d 1378, 1379-1380 (J.P.M.L. 2012) (noting transfer and consolidation of Pear’s Complaint to current multi-district lawsuit); First Amended Complaint For Damages, Pear v. Nat’l Football League, No. 2:11-cv-08395-R (C.D. Cal. Dec. 9, 2011), available at http://nflconcussionlitigation.com/wp-content/uploads/2012/02/download-66.pdf (detailing lawsuit brought by 36 NFL players against NFL and other corporations for negligence and relief sought).

11 See Duerson, 2012 WL 1658353, at *1 (discussing how the NFL fraudulently concealed the long term effects of concussion from its players). The NFL’s MTBI Committee concealed the risks of head injuries to players and that of players returning to the field before recovering from their injuries. See First Amended Complaint for Damages, supra note 10, at 63. Through public statements, published articles and concussion pamphlets issued to players, the NFL’s MTBI Committee misled and downplayed the long-term risk of concussions to NFL players. Id. The NFL withheld information regarding the risk of concussions from players in order to avoid negative publicity. Id.

12 See NFL Players Concussion Injury Litig., 301 F.R.D. at 196 (discussing proposed settlement of the multidistrict legislation and defining adequate compensation for the injured players). The class action lawsuit filed in July 2011 acted as the catalyst for the Settlement Agreement and alleged that the NFL failed to warn players about the risks of brain damage caused by repeated head injuries. Id. at 195. The fairness hearing was held on November 19, 2014. Id. at 206. Judge Brody met with both parties on July 7, 2014, to discuss and preliminarily approve the Settlement Agreement as well as to certify the settlement class and subclasses for settlement purposes. Id. at 207. The July 7, 2014, draft Settlement Agreement restricted the eligibility of players with CTE by precluding players who died before January 1, 2006, and after July 7, 2014, from participating in the Settlement Agreement. See Hanna, supra note 8. But see Federal Judge Approves NFL Concussion Settlement, ASSOCIATED PRESS (Jul. 7, 2014, 5:04 PM), available at http://www.nfl.com/news/story/Oap200000363672/article/federal-judge-approves-nfl-concussion-settlement (highlighting Judge Brody inquiring about available funding for all current
This note explores both the supporting and opposing views of the NFL’s April 22, 2015 Settlement Agreement regarding the concealment of research linking concussions with cognitive impairments. This note argues that the NFL should focus on reviewing its concussion guidelines in order to preclude players from returning to professional football after receiving a life-threatening concussion. It further emphasizes that the Settlement Agreement does not do enough for players currently living with CTE, since it precludes living players from receiving any monetary award because it is only possible to diagnose CTE post-mortem. Finally, this note ultimately concludes that the NFL should add a provision to the Settlement Agreement in order to compensate players currently living with CTE-like symptoms during their lifetime.

II. HISTORY

In 1928, Doctor Harrison Martland, a Pathologist from New Jersey, first coined the term “dementia pugilistica” or “punch drunk” syndrome to describe the symptoms of CTE. In 2005, Dr. Bennett Omalu, a Nigerian Neuropathologist, diagnosed the first case of CTE in former NFL player, Mike Webster, via an autopsy. In 2005, Dr. Bennett Omalu, a Nigerian Neuropathologist, diagnosed the first case of CTE in former NFL player, Mike Webster, via an autopsy. During his

and future claims). See also infra note 72 (noting extension of Settlement Agreement to Apr. 22, 2015).

13 See Robeson & King, supra note 2, at 335-37 (noting a major article written in 1928 on brain injuries resulting from professional boxing). See also Ann C. McKee et al., The Spectrum of Disease in Chronic Traumatic Encephalopathy, 136 BRAIN J. OF NEUROLOGY 43, 59 (2013) (describing statistical CTE data in 35 former professional football players). CTE was first reported by Harrison Maitland in 1928 when he observed boxers after repeated head trauma. See Robeson & King, supra note 2, at 336. Progressive neurological deterioration was observed and coined “dementia pugilistica,” or simply, “punch drunk.” See Benjamin Wedro & Melissa Conrad St6ppler, Chronic Traumac Encphalopaty, MEDICINE.NET.COM (Dec. 12, 2014), http://www.medicinenet.com/script/main/art.asp?articlekey=157953 (expressing the realization that brain injuries in boxing athletes could be present in football players). The term “CTE” was later widely recognized to encompass sports beyond just boxing. Id.

14 See Fainaru & Fainaru-Wada, CTE Found In Living Ex-NFL Players, ESPN (Jan. 22, 2013, 4:19 PM), http://espn.go.com/espn/odl/story/_/id/8867972/ucla-study-finds-signs-cte-living-former-nfl-players-first-time (discussing results of traumatic brain injury in a study performed on five living NFL players). Mike Webster’s autopsy showed, among other things, multiple herniated discs, a separated shoulder, broken vertebrae, torn rotator cuff, enlarged heart, and
lifetime, Webster suffered from multiple symptoms associated with CTE, including angry bouts of rage, abnormal outbursts, low physical stamina, decreased patience, increased forgetfulness, and confusion.15 Unfortunately, Webster died in 2002, eleven years after retiring from the NFL.16 Since that time, several autopsies have been performed on former NFL players who were subsequently diagnosed with CTE.17
Junior Seau, Adrian Robinson, Jovan Belcher, and Dave Duerson are just a few of the former NFL players that have been diagnosed with CTE. Tragically, all four players died from self-inflicted gun shot wounds. Dave Duerson, a former defensive back for the Chicago Bears, intentionally shot himself in the chest in an attempt to preserve his brain so that it could be donated to CTE research. CTE has since been found in the brains of former hockey players, wrestlers, and football players.

Wada, supra note 14. As of Sept. 30, 2014, researchers at the Department of Veteran's Affairs brain repository in Bedford, Massachusetts had performed 128 autopsies on former NFL players. See Jason M. Breslow, Frontline: 76 of 79 Deceased Players Found to Have Brain Disease, PBS (Sep. 30, 2014, 2:57 PM), http://www.pbs.org/wgbh/pages/frontline/sports/concussion-watch/76-of-79-deceased-nfl-players-found-to-have-brain-disease. Of the 128 brains studied, 101 players tested positive for CTE. Id. See Breslow, supra note 17 (noting how Seau, Webster, Belcher, and Duerson all diagnosed with CTE post-mortem). The New Bedford, Massachusetts brain repository is one of the nations largest brain banks focused on traumatic brain injuries. Id. This brain bank used to be the "preferred" brain bank of the NFL. Id. In 2014, researchers associated with this brain bank found that the number of cases of CTE had more than doubled. Id. See also Nadia Kounang & Stephanie Smith, Doctor: NFL Player Who Killed Girlfriend, Self Likely Had CTE, CNN (Sept. 30, 2014, 3:54 PM), http://www.cnn.com/2014/09/29/health/jovan-belcher-cte/ (discussing Jovan Belcher pathology reports and subsequent CTE findings). On Dec. 1, 2012, Jovan Belcher committed suicide in front of his coaches shortly after fatally shooting his girlfriend. Id. The doctors confirmed CTE after an autopsy was performed on Belcher's brain, showing tangles of tau found in seven sections of the hippocampus structure, a crucial portion of the brain supporting memory. Id. See Frank Schwab, Former NFL player Who Committed Suicide Diagnosed with CTE, YAHOO (October 14, 2015), http://sports.yahoo.com/blogs/nfl-shutdown-corner/former-nfl-player-who-committed-suicide-diagnosed-with-cte-213154757.html (discussing suicide of Adrian Robinson). Robinson was a linebacker with the Pittsburgh Steelers, Denver Broncos, San Diego Chargers, and Washington Redskins over the 2012-2013 seasons. Id. He was 25 years old when he committed suicide in May 2015. Id. After an autopsy was completed, Robinson was diagnosed with CTE. Id.


See supra note 19 (discussing Duerson's death). Duerson committed suicide in 2011 by shooting himself in the chest reportedly to preserve his brain for research. Mihoces, supra note 19. An autopsy was later performed on Duerson which definitively diagnosed Duerson with CTE. Id. See also Breslow, supra note 17 (referencing how after his death, Duerson’s brain was tested and diagnosed with CTE). Following Webster’s retirement from the NFL, friends and family observed erratic behavior such as uncharacteristic outbursts of rage, confusion and forgetfulness, which increased as time went on. Id. Webster was unable to finish his sentences or participate in interviews because he was “unable to get his thoughts together” and when he
Diagnosing CTE is a difficult process and a definitive diagnosis can be made only with a brain scan after the individual has died.22 During the autopsy, a brain scan is performed wherein the medical examiner looks for the abnormal buildup of a protein called tau, which is formed by the “spilling out” of cells.23 The buildup of tau protein cuts off blood flow and essentially strangles blood vessels in the brain, thus killing nerve did, “he couldn’t keep his thoughts in order.” Id. Webster and his wife, Pam, ultimately divorced after 27 years of marriage. Id. Webster spent many years living out of a pick-up truck and in poverty because he was unable to carry on basic day-to-day tasks. Id. 21 See Brain Disease CTE Hits Athletes Differently, Brain and Behavior Study Suggests, THE HOCKEY NEWS (Aug. 21, 2013, 5:25 PM), http://www.thehockeynews.com/articles/53089-Brain-disease-CTE-hits-athletes-differently-brain-and-behaviour-study-suggests.html (detailing connection between athlete concussions and memory and behavior impairment). A study published in the Journal of Neurology found that a significant number of former football players and hockey players who had suffered from repeated concussions had exhibited symptoms suggestive of CTE and/or had committed suicide. Id. See also Barbara Brotman, Late Steve Montador, a Former Blackhawks Player, had CTE Brain Damage, CHI. TRIB., May 12, 2015, http://www.chicagotribune.com/sports/hockey/blackhawks/ct-steve-montador-brain-disease-20150512-story.html (noting former hockey player diagnosed with CTE); Joe Burgett, Report: Another Pro-Wrestler Had Serious Brain Condition, Same as Chris Benoit, BLEACHER REP. (Dec. 9, 2009), http://bleacherreport.com/articles/305657-report-another-pro-wrestler-had-brain-damage-similar-to-chris-benoit (detailing significant number of boxers, football players, and wrestlers diagnosed with CTE). Former wrestlers Chris Benoit and Andrew “Test” Martin were both diagnosed with CTE. Id. See also Heard, supra note 9, at 222 (referencing CTE symptoms, commonalities). 22 See supra note 13 (providing general background on CTE). A CT scan of the individual’s brain while the individual is alive cannot produce definitive results showing tau protein causing CTE is present. Wedro & Stöpppler supra note 13, at 2. CTE appears to have Parkinson's and dementia-like symptoms and many times is confused with this disease. See Rebecca J. Stahl, Chronic Traumatic Encephalopathy, WESTERN NEW YORK UROLOGY ASSOCIATES, LLC, http://www.wnyurology.com/content.aspx?chunkid=744866 (last visited Nov. 2, 2015) (describing indicators of CTE that doctors look for). Doctors can suggest what may appear to be CTE in living individuals by obtaining the individual’s medical history, including traumatic head injuries as well as a detailed documentation of any changes in the individual’s behavior or personality. Id. See also infra note 24 (discussing how definitive diagnosis of CTE can only be made post mortem); infra note 26 (discussing symptoms and complications). 23 See Wedro and Stöpppler, supra note 13. Abnormal nerve fibers and cell tangles, inconsistent with the make up of brain tissue associated with Alzheimer’s disease, are also present in brains diagnosed with CTE. Id. These cell tangles and abnormal nerve fibers are diagnosed and confirmed through autopsy and dissection of the individual’s brain. Id. Protein, consistent with that of CTE, built up within seven sections of the hippocampus structure in his brain. Id. Belcher was 25. Id.
cells. Repeated blows to the head or severe head trauma primarily cause CTE. As such, CTE causes the progressive deterioration of brain function, which typically leads to severe mental and physical disabilities, with the most severe symptoms often resulting in an early death. However, the specific number of blows to the head or full-grade concussions causing the formation of tau protein is unknown.

Dr. Ann McKee, neuropathologist and director of the nation's largest brain

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24 See Fainaru & Fainaru-Wada, supra note 19 (explaining medical details and role of tau in CTE). Tangles of tau proteins caused by repeated head trauma surround the brain's blood vessels eventually interrupting normal brain functions. Id.

25 See Burgett, supra note 21. "After repeated blows to the head, at some point the brain loses the ability to heal itself. The tau impairs normal brain function and kills brain cells. The delicate balance of the neurotransmitters, which control moods and drives and maintains satiety, can be destroyed." Id. (quoting Dr. Bennet Omalu). See also Heard supra note 9, at 222-23 (noting repeated head trauma causes tau protein to develop in the brain causing CTE).

26 See Heard, supra note 9, at 223 (noting progressive degeneration of brain function caused by tau build up resulting in CTE). See also Stahl, supra note 22 (describing CTE disease progression). Symptoms of CTE include depression, suicidal thoughts, paranoia, aggression, apathy, irritability, agitation, impulsiveness, poor concentration, memory loss, confusion, poor judgment, tremors and muscle twitching. Id. See also infra notes 32-33 and accompanying text (describing suicidal symptoms in a living individual caused by CTE). See Kounang, supra note 18 (describing ex-NFL player, Jovan Belcher's suicide and violent killing of his girlfriend). Jovan Belcher, a Kansas City Chief's linebacker, played in 59 games from 2009 to 2012. Id. On December 1, 2012, Belcher shot his girlfriend and himself. Id. Tangles of tau were later found in seven sections of the hippocampus structure, a crucial portion of the brain supporting memory, in his brain. Id. Tau affects other sections of the brain controlling memory, judgment and fear among many other symptoms. Id. See also Wedro and Stöppler, supra note 13. The most typical and prominent symptoms come immediately after the head injury is sustained, usually in the form of concussion like symptoms and fade soon after. Id. However, some concussions causing CTE do not produce symptoms. Id. Sometime later, new symptoms occur typically in the form of memory loss, disorientation, headaches and confusion. Id. Individuals diagnosed posthumously with CTE many times succumb to an early death typically due to suicide or alcohol and/or drug overdose. But see Ben McGrath, The Talk of the Town, Beleaguered League, THE NEW YORKER (Sept. 29, 2014), available at http://www.newyorker.com/magazine/2014/09/29/beleaguered-league (describing the role of time in CTE disease progression). "[A]ccording to the National Institute For Occupational Safety and Health, N.F.L. veterans still live longer, on average, than the general population.” Id. Factors such as level of income, exercise, and overall level of health are considered. Id. See also Richard Weinmeyer, Concussion-Related Litigation Against The National Football League, 16 AMA J. OF ETHICS 552, 554 (Jul. 2014), available at http://journalofethics.ama-assn.org/2014/07/hlawl-1407.html (noting significant hardships on player and his family).

27 See Heard, supra note 9, at 222-23 (noting that researchers are unaware of any specific number of sustained concussions to trigger CTE). See also Ann C. McKee et al., The Spectrum of Disease in Chronic Traumatic Encephalopathy, 136 BRAIN: J. OF NEUROLOGY 43, 59 (2013), available at http://brain.oxfordjournals.org/content/brain/136/1/43.full.pdf (noting no specific number of concussions determines whether individual has CTE).
bank in Bedford, Massachusetts, stated that the most important factor to note when
determining the likelihood of a player to develop CTE is the number of years in which
the person played professional football.\textsuperscript{28} A study performed by Dr. McKee showed a
clear link between repeated blows to the head causing severe head trauma and CTE.\textsuperscript{29}
The Center for Study of Traumatic Encephalopathy at Boston University examined
eighty-five posthumous brains and categorized them into four stages of CTE after
reviewing the donor's head trauma history and brain scan.\textsuperscript{30} Seven brains were
categorized as stage one, with symptoms ranging from no symptoms to depression and
explosive aggression.\textsuperscript{31} Fourteen brains were categorized as stage two, with symptoms

\textsuperscript{28} See Burgett \textit{supra} note 25 (discussing dangers of repeated blows to the head for individuals who
play professional contact sports). \textit{See also} Breslow, \textit{supra} note 17 (describing the statistics
associated between NFL Players and CTE). According to Dr. Ann McKee, director of the
nation's largest brain bank located in Bedford, MA, "the higher the level you play football and
the longer you play football, the higher your risk [to develop CTE]." \textit{Id.} The link between
playing football (specifically in the NFL where severe head trauma has a greater likelihood) and
head trauma is not a coincidence. \textit{Id.} \textit{See also} McKee et al., \textit{supra} note 27, at 59 (noting specific
positions more susceptible to concussions than others). Players in certain positions were more
susceptible to receiving a concussion. \textit{Id.}

\textsuperscript{29} See McKee et al., \textit{supra} note 27, at 48-49 (describing the procedures used in gathering head
trauma date). The study examined eighty-five brains of former athletes, military veterans, and
individuals who reported a history of repeated head trauma. \textit{Id.} Of the 34 former professional
American football players and one Canadian football player, all but one was absent of the
presence of a cognitive disease. \textit{Id.} at 17. Of these subjects, 31 of the 34 American football
players had some form of CTE or CTE plus another type of disease. \textit{Id.} Sixteen of these players
had pure CTE and 94\% of these 16 players were symptomatic. \textit{Id.} at 17. McKee studied the
brains of these donors as well as gathered a history of their behavior while alive. \textit{Id.} at 3.

\textsuperscript{30} McKee et al., \textit{supra} note 27, at 43-44. Dr. McKee's study noted that the distinctive
neuropathological changes of CTE are easily distinguished from other cognitive diseases such as
Alzheimer's disease. \textit{Id.} at 44. Dr. McKee noted neuropathological features of CTE include
"generalized atrophy of the cerebral cortex, medial temporal lobe, diencephalon and mammillary
bodies with enlarged ventricles; cavum septum pellucidum, often with fenestrations; extensive p-
tau-immunoreactive neurofibrillary tangles and astrocytic tangles in the frontal and temporal
cortices, particularly around small cerebral vessels and at the depths of cerebral sulci; extensive p-
tau-immunoreactive neurofibrillary tangles in limbic regions, diencephalon and brainstem nuclei;
extensive degeneration of axons and white matter fibre bundles; TAR DNA-binding protein 43
(TDP-43) immunoactive intraneuronal and intraglial inclusions and neurites in most cases and a
relative absence of amyloid-\textit{\beta} peptide deposits." \textit{Id.}

\textsuperscript{31} \textit{Id.} Some features of stage I CTE include, minimal tau protein present which were more
restricted in certain areas of the brain. \textit{Id.} Stage I CTE preliminary symptoms reported in this
study ranged from no symptoms at all to "loss of attention and concentration...short term
including depression, mood swings, suicidal tendencies or thoughts, and language
difficulties.\textsuperscript{32} Fifteen brains were categorized as stage three, with symptoms ranging
from cognitive impairment to suicidal thoughts.\textsuperscript{33} Fifteen brains were categorized as
stage four, with symptoms ranging from executive dysfunction to suicide.\textsuperscript{34}

In 1994, the NFL established its own Mild Traumatic Brain Injury Committee
(\textquotedblleft MTBI Committee\textquotedblright) after more questions and concerns arose regarding head injuries
in professional football.\textsuperscript{35} The NFL named Dr. Elliot Pellman, a physician for the New

\begin{itemize}
  \item memory difficulties, aggressive tendencies and depression… executive dysfunction and
  explosivity… post-traumatic stress disorder.\textsuperscript{32}\textsuperscript{36} McKee et al., \textit{supra} note 27, at 52, 55. Some features of stage II CTE include the presence of
  multiple tau protein with no evidence of cerebral atrophy. \textit{Id.} at 52. Stage II CTE common
  symptoms include depression or mood swings, headaches and short term memory loss. \textit{Id.} at
  55. Less common symptoms included MND (motor neuron disease), depression or mood
  liability, explosivity, loss of attention and concentration, short term memory loss and headache.
  \textit{Id.} Less common symptoms included executive dysfunction, impulsivity, suicidality and language
difficulties." \textit{Id.} at 55.

  \item See McKee et al., \textit{supra} note 27, at 55-56. Some features of stage III CTE include, widespread
  tau protein throughout the brain with the greatest concentration of neurofibrillary degeneration
  located in the frontal and temporal lobes. \textit{Id.} at 52, 55. On average, most brains showed mild
  cerebral atrophy. \textit{Id.} at 55. The most common symptoms included memory loss, executive
  dysfunction, depression or mood swings, visuospatial difficulties, cognitive impairment,
  aggression, explosivity and concentration and attention difficulties. \textit{Id.} at 56. Less common
  symptoms include impulsivity, apathy, headaches and feeling of suicide. \textit{Id.} Two individuals
developed Motor Neuron Disease (MND) after exhibiting cognitive and behavioral abnormalities
and one exhibited MND prior to developing cognitive changes. \textit{Id.}

  \item See McKee et al., \textit{supra} note 27, at 59. Some features of stage IV CTE include atrophy of the
  cerebral cortex and white matter found in the brain. \textit{Id.} Mean brain weight was significantly
  smaller than stages I, II, or III. \textit{Id.} Neuron loss in the cortex and widely distributed severe tau
  abnormalities were found throughout the cerebrum, diencephalon, basal ganglia, brainstem and
  spinal cord. \textit{Id.} Symptoms were exhibited in the most severe cases of CTE with the most
  common preliminary symptoms found in individuals being executive dysfunction and memory
  loss. \textit{Id.} at 58-59. These individuals then developed severe memory loss associated with
dementia. \textit{Id.} at 59. Other common symptoms include a profound loss of attention and
concentration, executive dysfunction, language difficulties, explosivity, aggressive tendencies,
paranoia, depression, gait and visuospatial difficulties." McKee et al., \textit{supra} note 27, at 59. Less
common symptoms included impulsive tendencies, dysarthria and parkinsonism. \textit{Id.} One-third
of the participants were suicidal and two of the subjects developed MND after developing
cognitive and behavioral abnormalities. \textit{Id.} \textit{See also} What is Executive Function? \textit{WEBMD},
executive dysfunction is loss of control over cognitive skills necessary to conduct normal
activities).

  \item See Weinmeyer, \textit{supra} note 26, at 552-558 (discussing rationale and catalysts in the creation of
NFL’s MTBI Committee). The Commission intended to conduct an independent scientific
York Jets specializing in rheumatology, as chairperson despite his lack of experience in diagnosing and treating head injuries. The MTBI Committee subsequently launched an “independent scientific investigation to ‘foster [a] better understanding of the causes, diagnosis, treatment and prevention of concussions.” The MTBI Committee conducted a thirteen-part study that analyzed head injuries sustained while playing football. The study determined that a large percentage of players appeared to fully recover from sustaining a concussion after one hour. It also determined that post-concussion symptoms resolve more quickly in NFL players than in non-athletes. More significantly, the MTBI Committee found no cases of CTE in NFL players. The NFL argued that it had no duty to the players to release the data because the data was

investigation to “foster better understanding of the causes, diagnosis, treatment and prevention of concussion.” Id. The NFL MTBI Committee instead published a thirteen-part report denying the existence of any link between serious head trauma and playing professional football. Id. 36 See id. The MTBI Committee consisted of a team of NFL medical personnel and outside medical specialists in biomedical engineering, neurology and neurosurgery. Id. See also infra note 57 (discussing the MTBI Committee). This internal Committee conducted a series of research studies regarding the correlation between long-term brain damage and concussions specifically within the NFL. Weinmeyer, supra note 26, at 553. See also Weinmeyer, supra note 35 (discussing the purpose behind the MTBI committee). See also NFL Concussions Fast Facts, CNN, http://www.cnn.com/2013/08/30/us/nfl-concussions-fast-facts/index.html (last updated Aug. 23, 2015, 5:20 PM) (discussing findings of MTBI Committee compared to findings of independent researchers). 37 See supra note 35 (describing the value of safety regulated rule changes by the independent scientific studies). 38 See supra note 35 (describing the value of safety regulated rule changes by the independent scientific studies). 39 See supra note 35 (describing the value of safety regulated rule changes by the independent scientific studies). 40 See supra note 35 (discussing MTBI Committee report). One of the reports noted that “NFL players are a highly conditioned, physically fit population accustomed to playing with pain and highly motivated to return to play as soon as possible.” See Weinmeyer, supra note 26, at 553. 41 See supra note 35 (describing results determining the signs, symptoms, and management of repeat concussions of NFL players). See also Plaintiff’s Master Administrative Long-Form Complaint at 38 In re Nat’l Football League Players’ Concussion Injury Litig., No. 2:12-md-02323-AB (E.D. Pa. June 7, 2012), 2012 WL 2045382 (noting MTBI Committee alleged to selectively omit 850 baseline tests purported to show concussion damage). 42 See id. (referencing the Pellman study reports on concussions and symptoms).
primarily for the NFL's benefit, not the players'.

In 2005, independent researchers conducted a study that resulted in findings that linked repeated concussions with long-term cognitive impairment. A couple years later, in 2007, the NFL published a pamphlet on concussions and distributed it to all current NFL players. Information contained in the pamphlet downplayed the seriousness of sustaining a concussion. This information directly negated what independent researchers found through their study of concussions sustained by NFL players. The NFL's Concussion Committee ignored these outside findings until 2009, when pressure from both the media and Congress prompted the NFL to address the

\[\text{See Lauren Ezell, }\text{Timeline: The NFL's Concussion Crisis, FRONTLINE (Oct. 8, 2013, 9:57 PM), http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis/ (discussing NFL's argument it did not owe duty to retired players to release MTBI reports).}\]

\[\text{See Elizabeth Etherton, Systematic Negligence: The NCAA Concussion Management Plan and Its Limitations, 21 SPORTS LAWYERS J. 1, 15 (2014) (discussing the effect of concussions on cognitive disorders). One studied showed the link between concussions and cognitive disorders:}\]

In 2005, independent scientists "demonstrated that multiple NFL concussions cause cognitive problems such as depression and early-onset dementia." These were the first studies that confirmed that CTE, triggered by multiple concussions sustained as a professional football player, was at least a partial cause of the deaths of some retired players. However, the NFL Concussion Committee largely ignored the findings of these independent scientists until 2009, when combined media scrutiny and congressional pressure started a restructuring of the league's policy.

\[\text{Id. at 15-16.}\]


\[\text{Id. The pamphlet stated that "[c]urrent research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly." Id. at 2. The pamphlet further stated that "[i]t is important to understand that there is no magic number for how many concussions is too many." Id.}\]

\[\text{Id. But see Breslow supra note 28 (noting higher risk of CTE diagnosis dependent upon number of years played in NFL). See also What is CTE?, supra note 9. CTE is a progressive disease that continuously builds upon itself until the individuals death. Id. See also supra notes 9-10 (discussing permanent injury after sustaining repeated concussions).}\]
In 2009, the NFL amended regulations that determined when a player could return to play after sustaining a concussion. The NFL again amended its return-to-play regulations in 2014, in an attempt to minimize traumatic brain injuries. While

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48 See supra notes 9-10 (discussing permanent injury after sustaining repeated concussions). A number of lawsuits by former players became public and the media’s involvement led to further discovery of the risk of CTE diagnosis among players who played for the NFL for a number of years. See Duerson, 2012 WL 1658353; Easterling, 2011 WL 3627055; In re Nat’l Football League Players’ Concussion Injury Litig., 842 F. Supp. 2d 1378; Pear v. Nat’l Football League, No. 2:11-cv-08395-R.

49 See Weinmeyer, supra note 35 (noting new 2009 rule prohibited any player from returning to play if concussion symptoms exhibited). The former rule allowed a player to return to the game after being cleared by the team’s medical professional. Id. The new rule restricted players from playing or practicing the same day the concussion was sustained if the player exhibited concussion-like symptoms. Id. See New NFL Rules Designed to Limit Head Injuries, NFL, (Aug. 6, 2010, 5:33 PM), available at http://www.nfl.com/news/story/09000d5d81990bdf/article/new-nfl-rules-designed-to-limit-head-injuries. Other changes to the regulations included: restricting players from launching themselves “from the ground and using [their] helmet[s] to strike a player in a defenseless posture in the head or neck;” giving receivers an extra “split-second” after both feet have touched the ground to get into a position to defend themselves from a hit; immediately suspending the game clock if a player loses his helmet while the game clock is running; prohibiting defensive players to position themselves on the line directly across from the snapper during field goal kicks and extra point attempts; and requiring players to consult with an independent neurologist whenever a head injury is sustained. Id.

50 NFL Head, Neck and Spine Committee’s Protocols Regarding Return to Participation Following Concussion, NFL, (Aug. 21, 2014, 6:56 PM), available at http://static.nfl.com/static/content/public/photo/2014/08/21/0ap3000000381608.pdf (describing the 2014 protocol for a player’s return to participation following the diagnosis of a concussion was developed by the NFL’s Head, Neck and Spine Committee with input from the National Football League Player’s Association, NFL Physicians Society and the Professional Football Athletic Trainers Society. Id. Players diagnosed with a concussion must progress through each step outlined by the Head, Neck and Spine Committee. Id. Step One: Rest and Recovery requires the player to physically and mentally rest with limited exposure to activities such as electronics, social media and team meetings. Id. Players may also perform limited stretching and balance activity subject to the team physician’s discretion. Id. Neurocognitive testing is administered to assess the player’s level of cognitive function and to identify any deficits that might affect his ability to resume normal activities. Id. This testing can be done at any point after Step One and before Step Three or before physical contact activities. See NFL Head, Neck and Spine Committee’s Protocols Regarding Return to Participation Following Concussion, supra. Step Two: Light Aerobic Exercise includes light dynamic stretching and balance training under the direct oversight of the team’s medical staff with intensity gradually increasing over time. Id. The player may attend team meetings and film study and may advance to Step Three if the player has demonstrated the ability to engage in cardiovascular exercise without exhibiting any concussion like symptoms. Id. Step Three: Continued Exercise & Introduction of Strength Training includes increased supervised cardiovascular exercises including the
these rules may significantly decrease severe head injuries, the NFL is silent on the fact that if players abide by these rules, they are still capable of sustaining multiple concussions within a short period of time.51

III. FACTS

The first concussion-related lawsuit was filed against the NFL by retired players in July 2011.52 In the lawsuit, two former players alleged that the NFL breached its duty of care to players who sustained concussions.53 On January 31, 2012, after three additional actions were filed alleging the same breach of duty, the suits were

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51 See id. (describing the importance of monitoring injured players and protocol the for returning players). See also Master Administrative Class Action Complaint For Medical Monitoring at 21 In re Nat’l Football League Players’ Concussion Injury Litig., No. 2054482 (E.D. Pa. 2012). The New England Journal of Medicine published an article in 1952, recommending that the NFL instill a ‘three-strike rule’ wherein NFL players stop playing football after receiving their third concussion, thereby giving NFL players definitive guidelines as to when to retire from the sport. Id. See NFL Concussions Fast Facts, CNN (Aug. 23, 2015, 5:20 PM), http://www.cnn.com/2013/08/30/us/nfl-concussions-fast-facts/index.html. There were 202 reported concussions sustained in the 2014-2015 NFL season, and while that number slightly decreased from the previous year. Id.


53 Id. The lawsuit sets forth two allegations asserting that the NFL breached their duty to the players by “failing to take reasonable actions to protect players from the chronic risks created by concussive and sub-concussive head injuries and that the NFL Parties concealed those risks from the players.” Id. at 195.
subsequently consolidated into a multi-district class action lawsuit.\textsuperscript{54} Thereafter, several thousand retired NFL players filed related lawsuits against the NFL in districts throughout the United States, which were also consolidated into the multi-district lawsuit.\textsuperscript{55}

The primary allegation in the lawsuit was that the NFL did not adequately warn players of the consequences and risks of severe brain damage resulting from playing professional football.\textsuperscript{56} The players alleged that the NFL sought to conceal and deny the NFL-sanctioned committee's findings.\textsuperscript{57} The NFL, along with other interested

\textsuperscript{54} In re Nat'l Football League Players' Concussion Injury Litig., 842 F. Supp. 2d 1378, 1379-80 (J.P.M.L. 2012). See also 28 U.S.C. § 1407 (2012) (stating the statute giving power to consolidate lawsuits into class action); Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. at 191. Rule 23(a)(1) of the federal rules of civil procedure requires that the class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). See also Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. at 200. Accordingly, based on records of the NFL Parties in NFL Players Concussion Injury Litigation, there are over 20,000 settlement class members. Id.

\textsuperscript{55} Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. at 191 (discussing multi-district litigation laws). Over 5,000 suits were brought by former NFL players asserting that the NFL breached its duty to protect the players from "chronic risks created by concussive and sub-concussive head injuries..." Id. See also 28 U.S.C. § 1407; Plaintiffs Master Administrative Long Form-Complaint at 103, 257, 330, 373, 380 In re Nat'l Football League Players' Concussion Injury Litig., No. 2:12-md-02323-AB (E.D. Pa. June 7, 2012), 2012 WL 2045382. These lawsuits can be consolidated into one large multi-district lawsuit. 28 U.S.C. § 1407.

\textsuperscript{56} See Kounang & Smith, supra note 18 (discussing NFL lawsuit brought by former NFL players). See also Breslow, supra note 28. Players allege the NFL concealed the correlation between football and brain disease. Id.

\textsuperscript{57} See supra note 35 (discussing creation of MTBI Commission). The complaint further alleged that the MTBI Committee was established to research the effects of concussions incurred as a result of football, but concealed the results. Plaintiffs Master Administrative Long Form-Complaint at 14 In re Nat'l Football League Players' Concussion Injury Litig., No. 2:12-md-02323-AB (E.D. Pa. June 7, 2012), 2012 WL 2045382. See also Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. at 200 (discussing concealment by MTBI Committee of link between risk of CTE and playing football); Ezell, supra note 43 (noting the date which the MTBI Committee was established). The NFL argued that it did not owe retired NFL players a duty to release the reports by the MTBI Committee. Ezell, supra note 43. See also Michael Telis, Playing Through the Haze: The NFL Concussion Litigation and Section 301 Preemption, 102 GEO. L.J 1841, 1851 (2014). Discussing the NFL's purpose behind the creation of the MTBI Committee:

But the source of this argument is a theory of tort law that is inapplicable here, which states that "[a]n actor who undertakes to render services to another that the actor knows or should know reduce the risk of physical harm to the other
parties, denied liability for players’ head trauma and related diseases even though they were aware of the cognitive trauma risks associated with football since June 2010. 58

has a duty of reasonable care to the other in conducting the undertaking.” The League’s creation of the MTBI Committee was not an undertaking “to render services” to the Players, but rather a traditional function of the League’s role as overseer of the sport of professional football. Moreover, the League could not possibly have “known” that the undertaking would “reduce the risk of physical harm” to the Players because the Committee’s findings could not have been known when the Committee was established; the purpose of the Committee was to determine whether and what additional measures were necessary to protect Players from any unknown deleterious effects of concussions. Moreover, it would be bad policy to assign a duty to anybody that voluntarily establishes a committee to study an issue because such a policy would disincentivize the study of important issues for fear of tort liability.

Id. at 1859.

58 See Etherton, supra note 44, at 15-16. The NFL had no formal policy regarding traumatic brain injuries until 2010 even though the NFL was aware of the inherent risks of head injuries associated with football for decades. Id. at 15. Further, the NFL “did not acknowledge publicly until June 2010 that repeated TBI could lead to dementia, memory loss, CTE, and other related symptoms.” Id. However, the League remained silent on the correlation between long-term cognitive impairment and concussions sustained while playing in the NFL. Id. See also Amen, supra note 15, at 98-100 (discussing symptoms of CTE). In response to the 2011 and 2012 complaints against the NFL alleging that the NFL sought to cover up or deny any connection between repeated head trauma and mental diseases, John Mara, New York Giants CEO, stated that the allegations were “ridiculous.” Darren Heitner, New York Giants CEO John Mara: Calm That NFL Knew Concussion Long-Term Effects Is ‘Ridiculous,’ FORBES (July 11, 2012 9:20 AM), http://www.forbes.com/sites/darrenheitner/2012/07/11/new-york-giants-ceo-john-mara-claim-that-nfl-knew-of-concussion-long-term-effects-is-ridiculous/#2715e4857a0b5d20cdb5290f. The NFL’s donation of $30 million to the Sports and Health Research Program of the Foundation for the National Institutes of Health shows some acknowledgement by the NFL that some correlation exists between football related concussions and long term brain damage or at the very least, the need for further research. See Heard, supra note 9, at 248. Although the League once vehemently denied any correlation between football and CTE, it has since donated over $90 million to fund grants and research programs intended to develop better procedures to improve the diagnosis of brain injuries. Id. The NFL gave a five-year, $30 million grant to the Sports and Health Research Program of the Foundation for the National Institutes of Health in September 2012; the NFL partnered with General Electric and Under Armour funding a four-year, $60 million “Head Health Initiative.” Id. The NFL also redesigned and implemented new regulations specifically intended to reduce concussions among football players. Fainaru & Fainaru-Wada, supra note 14. See also See Ezell, supra note 43 (discussing the NFL’s non-assumption of any liability); supra note 50 (noting new procedures established and implemented by NFL in response to head trauma concussions). Interestingly, the Settlement Agreement denies and excludes any admission of wrongdoing, even though the NFL expects approximately one-third of all retired NFL players will develop a long-term cognitive disease, such as Alzheimer’s disease or Parkinson’s disease. Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. 191, 196-97 (E.D. Pa. 2014).
U.S. District Court Judge Anita Brody presided over the multi-district lawsuit. Judge Brody instructed the parties to mediate the case before retired U.S. District Court Judge Layn Phillips on July 8, 2013. Perry Golkin was subsequently appointed as the Special Master on December 16, 2013 to assist Judge Brody in analyzing the financial aspects of any resulting settlement agreement.

On January 6, 2014, the Plaintiffs filed their class action complaint and subsequently asked the court to enter an order granting preliminary approval of their proposed Settlement Agreement and conditional class certification. Judge Brody

60 Id. The parties participated in settlement discussions for nearly two months, attending multiple mediation sessions and aggressively asserting their own interests. Id. These mediations produced what became the foundation for the Settlement Agreement between the Parties. Id.
61 Id. Judge Brody appointed Perry Golkin as Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure in order for him to assist her in analyzing the financial aspects of any settlement. Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 195. Special Master Golkin provided insight, advice and financial expertise to the parties and to Judge Brody particularly on the issue of whether all retired football players who ultimately receive a qualifying diagnosis will be paid. Id. As a result of these communications, the Monetary Award Fund no longer has a cap at $675 million requiring the NFL parties to pay all valid claims for the next 65 years. Id.
62 Id. See also FED. R. CIV. P. 23(e)(2). A consolidated class action suit requires a court’s approval. Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 191. There are two stages in which a class action proceeds: the first stage requires parties to submit a proposed settlement agreement to the court, which must survive a preliminary fairness evaluation hearing held by the court. Id. at 197. At the preliminary fairness hearing, the settlement agreement is judged to either be facially acceptable or inadequate. Id. If the settlement is preliminarily approved, notice is then given to all class members that would be bound by the settlement agreement so that they may object, be heard on or opt out. Id. The second stage begins after all class members have been notified of the fairness hearing. Id. See also Nathan Fenno, Fewer Than 200 NFL Retirees Opt Out of Proposed Concussion Settlement, L.A. TIMES Nov. 3, 2014, 6:40 PM, http://www.latimes.com/sports/sportsnow/la-sp-nfl-concussion-settlement-20141103-story.html. If the court concludes after this formal hearing is held, that the settlement agreement is “fair, reasonable, and adequate,” then the settlement is given final approval. Id. Opting out of the settlement agreement precludes the players from any further involvement in any proceedings, including the right to formally voice their objection at the fairness hearing. Id. Just under 200 eligible former NFL players opted out of the Settlement Agreement prior to the October 14, 2014 opt out deadline date. Id. See also FED. R. CIV. P. 23 (e)(1)(B). The formal fairness hearing provides a public platform for class members to formally voice their objection to the Settlement Agreement. Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 197. The Motion was denied based on a $675 million cap on relief to fund the Monetary Award Fund after considering this Fund was proposed to have a 65-year life span providing current and future
subsequently denied this initial Settlement Agreement. After engaging in negotiations over a six-month period, the parties reached a revised Settlement Agreement. Judge Brody granted preliminary approval of the Settlement Agreement in June 2014, after both parties agreed to uncaps the NFL's $675 million dollar ceiling on payments awarded to former players diagnosed with a qualifying disease.

A fairness hearing was held on November 19, 2014, where all eligible parties were given an opportunity to raise their objections and concerns regarding the draft Settlement Agreement. The main argument raised on behalf of the class members

settlement class members with qualifying diagnoses, which was purported to encompass more than 20,000 members. Id. at 195. Considering the amount per award to be dispersed throughout the lifespan of the Fund, Judge Brody's concern was over the sizable relief per qualifying diagnoses award given to each player and the inadequacy of the Fund to cover those awards over the 65-year term. Id. Judge Brody denied the Plaintiffs' Motion to Grant Preliminary Approval on Jan. 14, 2014, citing the inadequacy of the Monetary Award Fund to cover all present and future qualifying diagnoses from class members, including current and future NFL players. Id.


Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. at 191. The Parties considered Judge Brody's January 14, 2014 opinion as well as utilized the Special Master's guidance to revise the Settlement Agreement. Id. The revised Settlement Agreement proposed to compensate all class members with qualifying diagnoses or other related claims set forth in the revised Agreement in addition to requiring the NFL to pay all valid claims within the 65 year lifespan, thereby uncapping the $675 million limit. Id. The revised Settlement Agreement encompasses the same terms regarding the monetary award levels as well as the administration costs to maintain these claims against the NFL as in the January 2014 Settlement Agreement. Id.

See supra note 64 (discussing Settlement Agreement). See also Kelley, supra note 63 (noting preliminary granting of Settlement Agreement by Judge Brody). By uncapping the Monetary Award Fund, the risk of depleting funds before the 65 year lifetime of the Fund is avoided. Id. This allowed any class member with a qualifying diagnosis to be fairly and equally compensated. Id.

See Fenno, supra note 62 (discussing fairness hearing); Gary Mihoces, Proposed NFL Concussion Settlement Faces Next Hurdle, USA TODAY SPORTS, Nov. 18, 2014, 4:16 PM, http://www.usatoday.com/story/sports/nfl/injuries/2014/11/18/proposed-nfl-concussion-settlement-faces-next-hurdle/19231563/ (discussing objections likely to be raised and support in favor of agreement at fairness hearing). See also Joseph M. Hanna, Fairness Hearing On NFL
who opposed the initial Settlement Agreement discussed the inherent unfairness of an agreement that provided a $4 million dollar award for former athletes diagnosed with CTE before July 7, 2014, yet withheld any compensation if they were diagnosed with CTE after that date. Another argument opposing the Settlement Agreement criticized the relatively small portion of money set aside to pay for the required diagnostic tests.

Judge Brody met with representatives of both parties on February 2, 2015, in order to broaden the Settlement Agreement’s scope of monetary award recipients. One suggested revision was to extend the CTE diagnosis date from July 7, 2014, until the finalization of the Settlement Agreement. An order was then issued urging the lawyers of interested parties to further revise the Settlement Agreement so that more

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67 See Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 191; infra notes 75, 121 (noting concern on monetary award restrictions for players diagnosed with CTE). Prior to the January 2014 preliminary hearing, the parties engaged in negotiations over a two-month period guided by Judge Layn R. Phillips and conducted numerous mediation sessions. Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 191. This culminated in the first draft of the Settlement Agreement presented to the Court for preliminary approval in January 2014, which was denied, without prejudice by Judge Brody due to her concerns over the adequacy of the $675 million Monetary Award Fund in light of the 65-year lifespan of the Monetary Award Fund. Id. The parties continued to engage in further “hard fought” negotiations focusing on Judge Brody’s concerns raised in her denial without prejudice of the first draft of the Settlement Agreement. Id. Judge Brody noted in her July 7, 2014 opinion that the revised Settlement Agreement was presumed to be fair to all parties and their respective interest because it was facilitated by a mediator, and was the “product of good faith, arm’s length negotiations.” Id. See also supra note 60 (discussing settlement discussions). See also WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS, § 11:41 (4th ed. 2010) (noting court’s “initial presumption of fairness…” when negotiations made at arms-length and presented in front of court).

68 See supra notes 63-65 (discussing the advantage given to the NFL through the Settlement Agreement). See also Hanna, supra note 66 (listing the concerns surrounding the Settlement Agreement). The NFL reserved the right to appeal any players’ diagnosis that would make them eligible to receive a monetary award under the Settlement Agreement. See id.

69 See Dale, supra note 8 (discussing Judge Brody encouraging lawyers to make changes to settlement).

70 Id. (discussing Judge Brody’s reasoning for broadening deadline dates for CTE diagnosis filing).
retired players diagnosed with CTE could utilize the benefits provided in this Agreement.\footnote{Id. (discussing need for extension of CTE diagnoses filings).}

The Settlement Agreement was finalized and approved by Judge Brody on April 22, 2015, and most notably, extended the "arbitrary cutoff date" for CTE diagnoses until the final approval date of the Settlement Agreement.\footnote{See Gary Mihoces & Rachel Axon, Judge Approves Settlement – at least $900M – to NFL Concussion Lawsuits, USA TODA (Apr. 22, 2015, 7:05 PM), http://www.usatoday.com/story/sports/nfl/2015/04/22/concussion-related-lawsuits-judge-settlement-nfl/26199011/ (noting approval and finalization of Settlement Agreement).} The final Settlement Agreement purported to compensate class members by "quickly and efficiently" distributing the monetary awards to players currently diagnosed with a qualifying disease.\footnote{Id. (discussing provisions of the Settlement Agreement).} However, former NFL player Craig Heimburger and his wife filed the first appeal on May 13, 2015, which delayed all of the Settlement Agreement provisions from being implemented and accessed by eligible players and their families.\footnote{See Jeff Nixon, NFL Concussion Settlement is Appealed, SPORTSBLOG (May 15, 2015), http://jeffnixon.sportsblog.com/posts/2441190/nfl-concussion-settlement-is-appealed.html (arguing that the appeal may delay the implementation of the Settlement Agreement). Heimburger played in 13 games from 1999-2002 as a lineman for Green Bay, Cincinnati, Buffalo and Houston. Id. As a result of the appeal, thousands of retired players currently suffering from devastating neurocognitive impairments will be forced to wait for all appeals to be exhausted in order to receive financial care and the benefits stemming from this Settlement Agreement. Id. See also Appeal Puts NFL Concussion Settlement On Hold, Ex-Bills, FOX NEWS (May 13, 2015), http://www.foxnews.com/sports/2015/05/13/appeal-puts-nfl-concussion-settlement-on-hold/ (reiterating that the appeal may affect former players who are in need of care); Mike Florio, Appeal of Concussion Settlement Filed, PROFOOTBALLTALK (May 13, 2015, 6:11 PM), http://profootballtalk.nbcSports.com/2015/05/13/appeal-of-concussion-settlement-filed/ (noting appeal is likely over CTE issue).}

Many retired NFL players and their representatives joined Heimburger and his wife in opposing the Settlement Agreement, claiming that compensation for CTE is unfairly restricted because the Settlement Agreement distributes awards to only those
CTE cases diagnosed between a limited range of dates. This limited time range does not allow for players with future diagnoses of CTE to be compensated. Additionally, the Settlement Agreement fails to compensate players exhibiting behavior commonly associated with brain trauma, such as mood swings, aggression, depression, and abnormal behavior.

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75 See Mihoces, supra note 19 (discussing unfair and 'nonsensical' provisions of the Settlement Agreement for players with CTE). The monetary award for retired players diagnosed with CTE would be restricted by only allowing NFL Players who were diagnosed before Jan. 1, 2006 and after July 7, 2014, the date of preliminary approval of the Settlement Agreement. Id. See also Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. 191, 208 (E.D. PA. Jul. 7, 2014) (discussing date range of diagnoses for CTE eligible for monetary award under Settlement Agreement); Dale, supra note 8 (noting restricted window for CTE diagnoses eligible for NFL payout). But see Mihoces & Axon, supra note 72 (noting CTE diagnosis deadline extended until Apr. 22, 2015). See also Breslow, supra note 28 (noting CTE can only be definitively diagnosed posthumously). Due to the inability to definitively diagnose CTE in a living person, players who fall outside of these deadlines would receive nothing for the head trauma they sustained while playing for the NFL. Id. See also Kelley, supra note 63 (noting “large group of players” diagnosed with CTE being excluded from Settlement Agreement); infra notes 96-98 (discussing benefit of monetary awards to players diagnosed with a qualifying disease under the agreement); infra notes 101-102 (discussing benefit of educational fund for eligible players.) Additionally, players are restricted from utilizing benefits afforded to them in the Settlement Agreement during their lifetime. Infra notes 106-108 and accompanying text (discussing in detail oppositions to a settlement agreement). See also Mihoces, supra note 19 (discussing the process of NFL concussion settlements).

76 See id. (discussing restrictions on NFL players to any compensation due to CTE related mental diseases). See also What is CTE?, supra note 9. “These changes in the brain can begin months, years, or even decades after the last brain trauma or end of active athletic involvement . . .” Id.

77 See Dale, supra note 8. The NFL’s failure to compensate for common behavioral disorders associated with head trauma is inadequate because a player with symptoms of impaired mood and behavior may still experience devastating changes in their lives even without significant cognitive impairment. Id. Such common devastating changes include “the inability to maintain employment, homelessness, social isolation, domestic abuse, divorce, substance abuse, excessive gambling, poor financial decision-making, and death from accidental drug overdose or suicide.” Id. See also Adam K. Raymond, Do These NFL Concussion Settlement Numbers Really Add Up?, ESQUIRE (Apr. 24, 2015), http://www.esquire.com/sports/a34586/nfl-concussion-settlement-details/ (discussing failure of NFL to account for compensation of behavioral disorders).
A. Terms of the Settlement Agreement Related to CTE

Three separate types of claimants are entitled to recover a monetary award from the NFL under the Settlement Agreement. The first category of claimants consists of all retired, living NFL players. To fall within this class, the claimants must be living, have played in the NFL, and either informally or formally retired from the NFL or any member club prior to the date of the preliminary approval and class certification order. The second category of claimants, representative claimants, includes any authorized representatives of any deceased, legally incapacitated, or incompetent NFL players. The third and final category of claimants, derivative claimants, includes any close family members of retired NFL players who are able to file suit because of their relationship to the NFL player.

The Settlement Agreement is divided into two subclasses with varying interests. The interests of subclass one greatly differ from that of subclass two.
Subclass one is defined as retired NFL players not yet diagnosed with a qualifying disease as of July 7, 2014, the date of the preliminary approval and class certification order. Subclass one is represented by Shawn Wooden, a retired NFL player who has not yet been diagnosed with a qualifying disease under the terms of the Settlement Agreement, but seeks to be included as a class member in case he is later diagnosed with a qualifying disease. Subclass two is represented by Kevin Turner, and encompasses all retired NFL players with a qualifying diagnosis prior to the date of the preliminary approval and class certification order dated July 7, 2014. NFL players in a similar situation, and players who may develop a similar debilitating disease sometime in the future.

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84 Id. at 196. The interests of subclass one, who have not received a qualifying diagnosis, include the ability not only to receive a future qualifying diagnosis and recover a monetary award at a later date, but also a guarantee that the NFL will be able to fund the monetary award. Id. The interests of subclass two include the immediate and largest possible monetary compensation for the qualifying diseases covered under the Settlement Agreement. Id.

85 Id. The qualifying diagnoses under the Settlement Agreement include Neurocognitive Impairment (early dementia), Neurocognitive Impairment (moderate dementia), Alzheimer’s disease, Parkinson’s disease, Amyotrophic Lateral Sclerosis (ALS), and death with CTE. Id. The qualifying diagnoses under the Settlement Agreement include Neurocognitive Impairment (early dementia), Neurocognitive Impairment (moderate dementia), Alzheimer’s disease, Parkinson’s disease, Amyotrophic Lateral Sclerosis (ALS), and death with CTE. Id.

86 Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 191. Wooden represents the NFL players who have not yet been diagnosed with a cognitive impairment or exhibited any signs of head trauma, but seeks to preserve his right to bring a claim for monetary damages if or when he is diagnosed with a qualifying diagnosis. Id. at 200-01. Wooden sued the NFL seeking a baseline assessment screening to determine whether he has any neurocognitive impairment resulting from his years of playing in the NFL. Id. Wooden sought to preserve his right to sue the NFL parties at a later date if he were to be diagnosed with any disease related to head trauma. Id. Subclass one encompasses all retired NFL players who have not yet been diagnosed with, but are at risk of developing, a qualifying disease including ALS, Parkinson’s Disease, Alzheimer’s Disease, Neurocognitive Impairment (moderate dementia), Neurocognitive Impairment (early dementia) or death with CTE. Id. Representative claimants and derivative claimants are included in this subclass. Id.

87 Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 191. Subclass two encompasses all retired NFL players who were diagnosed with a qualifying disease including ALS, Parkinson’s disease, Alzheimer’s disease, Neurocognitive Impairment (moderate dementia), Neurocognitive Impairment (early dementia), or death with CTE. Id at 196. Subclass two is represented by Turner who was diagnosed with ALS in 2010 after retiring from the NFL at the age of 31. Id at 201. Turner seeks immediate compensation from the NFL. Id. See also About: Kevin Turner 2012, KEVIN TURNER FOUND., http://www.brain-not-bell.com/#!story/c4v6c4v66 (last visited Dec. 3, 2015) (in an interview promoting HBO documentary, “American Man”).
future, are also covered by the Settlement Agreement if they are diagnosed with a qualifying disease. 88

Both subclasses include representative claimants and derivative claimants who are eligible under the Settlement Agreement. 89 The court may designate representatives to accept a payout from the Settlement Agreement for players who are eligible to collect a monetary award, but who are legally incapacitated, incompetent, or deceased. 90 Representative and derivative claimants are eligible to receive the full monetary award that the retired player would have received under the Settlement Agreement. 91 Similarly, derivative claimants may be entitled to accept a monetary award on their own behalf if their claim would survive independent litigation by reason of their relationship to a living or deceased retired NFL player. 92

88 Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 191. These future payments will take into account an increased cost of living of up to 2.5 percent per year times the monetary award given. Id at 196. The Settlement Agreement provides a monetary award for those NFL players who have not yet been diagnosed with a qualifying disease as of the date of the approved Settlement Agreement. Id. Turner is a strong proponent for the quick settlement and fast payout option due to the financial constraints he currently faces with Lou Gehrig’s disease. Kelly A. Heard, supra note 9, at 246. Explaining the significance of the settlement agreement:

It’s not about $2 billion, $4 billion, or $10 billion; it’s about having the right amount of money to do the deal now and not wait five or ten years for appeals to run out. Former Philadelphia Eagles and New England Patriots fullback Kevin Turner was happy with the settlement because it provides financial help now and avoids years of litigation. As for the critics, Turner stated, ‘There will always be people who said there should have been more, but they are probably not the ones with [Lou Gehrig’s Disease] (ALS) and at home.


90 Id. “Representative Claimants” are those authorized representatives ordered by the state court to collect the monetary award on behalf of a deceased retired NFL player. Id. The deceased player must have died prior to Jan. 1, 2006, and the claim must be able to survive a wrongful death or survival claim in state court. Id.

91 Id.

92 Id. Derivative claimants including spouses, parents, dependent children or any other person whose claim would survive independent litigation due to their relationship with the NFL player. Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 196. However, the monetary
B. The Settlement Agreement

The Settlement Agreement establishes three sources of financial support for class members diagnosed with a qualifying disease. The first source of compensation establishes and funds a $75 million Baseline Assessment Program ("BAP"), which utilizes a neuropsychological and neurological evaluation to determine the condition of the former players. Additionally, the BAP examination results may be used to compare against future BAP results in order to determine whether a retired player's cognitive conditions have deteriorated.

The second source of compensation in the Settlement Agreement provides for a sixty-five year Monetary Award Fund that awards cash to retired players already diagnosed with a qualifying disease or who will receive one in the future. The cash awards distributed to eligible NFL players are as follows: Neurocognitive Impairment award allocated to a derivative claimant is equivalent to 1 percent of the total monetary award allocated to an eligible representative claimant or retired NFL player.
(early dementia), $1.5 million; Neurocognitive Impairment (moderate dementia), $3 million; Alzheimer’s Disease, $3.5 million; Parkinson’s Disease, $3.5 million; Amyotrophic Lateral Sclerosis (ALS), $5 million; and death with CTE, $4 million, subject to limitations. If the NFL player receives a monetary award for a qualifying diagnosis and is subsequently diagnosed with another cognitive impairment that is eligible for a larger monetary award, the retired player is provided with a supplemental monetary award. The Settlement Agreement allows claimants to forego establishing a causal connection between the cognitive impairments and the concussion or sub-concussive head injuries sustained while playing in the NFL. Both settlement class members and the NFL parties reserve their right to appeal a decision regarding a class member’s entitlement to a monetary award. In addition to the $75 million BAP and the 65-year Monetary Award Fund, the

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97 Id. The limitations on these awards include a reduction in the award based on the retired player’s age at the time of diagnosis, the number of NFL seasons played, and other applicable offsets set forth in the Settlement Agreement. Id. at 196-97. The supplemental monetary award is awarded to ensure that the player receives the maximum award he is entitled to receive. Id. See also Fainaru & Fainaru-Wada, supra note 14. Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 197. See also Christopher L. Gasper, Concussion Settlement a Win for NFL Owners, BOSTON GLOBE, Aug. 30, 2013, http://www.bostonglobe.com/sports/2013/08/29/concussion-settlement-win-for-nfl-owners/bc7YuUQileGTdmJWAIqxs/story.html (last visited Nov 2, 2015). “I’m usually on the players’ side. I’m a union guy,” said [Boston College sports law professor Warren] Zola. ‘But proving causation on this one was not going to be a slam dunk.” Id. 98 Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 197. In the first draft of the Settlement Agreement, settlement class members who qualify for a monetary award are not required to dismiss pending lawsuits and are not precluded from bringing future lawsuits related to cognitive injuries against the National Collegiate Athletic Association (“NCAA”) or any other collegiate, amateur, or youth football organizations. See id. The NFL parties agreed not to petition for the agreed upon contributions, which include: attorney’s fees and costs (not exceeding $112.5 million irrespective of the BAP Fund) monetary awards for qualifying diagnoses; the education fund; and notice expenses and administrative costs. Id. In addition to attorney’s fees and costs, the NFL parties agreed to provide $4 million dollars for notice expenses in connection with this lawsuit. Id. In exchange for the benefits provided in the Settlement Agreement, settlement class members and their related parties must agree to release all claims and dismiss with prejudice all pending actions against the NFL and execute a covenant not to sue the NFL parties and other released parties over lawsuits substantially related to the issues contained in the Settlement Agreement. Id.
third source of compensation in the Settlement Agreement establishes a $10 million education fund promoting safety and injury prevention specifically related to NFL and youth football players.\textsuperscript{101} This fund purports to educate retired NFL players who are eligible for the monetary awards and to educate young children entering the sport of football.\textsuperscript{102} Additionally, the education fund provision seeks to educate the parents of youth football players about the risks involved in playing football, yet suppress or mitigate these same risks so that parents continue to allow their children to participate in football programs.\textsuperscript{103} Therefore, it is in the best interest of the NFL to retain full control over the flow of information conveyed to parents.\textsuperscript{104}

\textsuperscript{101} Id. This Fund also purports to educate retired football players regarding the NFL's medical and disability programs as well as other educational programs. \textit{Nat'l Football League Players' Concussion Injury Litig.}, 301 F.R.D. at 197.

\textsuperscript{102} Id.

\textsuperscript{103} Id. (noting education fund geared towards educating parents, not youth players). Robeson & King, supra note 2, at 390-40 (describing the risks involved in youth football). According to Dr. Omalu, the first doctor to diagnose CTE in a retired NFL player, "[t]en percent of mothers refuse to let their sons play football, the NFL would cease to exist." Id. Parents are key in evaluating the risks on behalf of the child that are associated with playing youth football. Id. See also Ken Belson, Goodell Speaks of Changes Needed in N.F.L. Culture, N.Y. TIMES, Nov. 15, 2012, http://www.nytimes.com/2012/11/16/sports/football/roger-goodell-nfl-commissioner-speaks-on-concussions.html?_r=0.15, 2015). Roger Goodell addressed the growing evidence surrounding the link between hits to the head and cognitive impairments at Harvard "as part of the League’s efforts to reject the perception that it has not done enough to protect its players." Id. Part of Goodell’s speech addressed parents' concerns with letting their young children participate in youth football. Id. See also Bob Hohler, Brain Risk Seen In Early-Age Football, BOSTON GLOBE, Aug. 11, 2015, https://www.bostonglobe.com/2015/08/10/study-finds-altered-brain-development-some-former-nfl-players-who-started-playing-before-age/T47bInHeNsKSUSYWa4nIHl/story.html (discussing risk of brain injury when football is played before twelve years old). See also Jon Solomon, Concussion Study: Ex-NFLers Who Started Football Young at Greater Risk who started football young at greater risk, CBS SPORTS (Aug. 11, 2015, 10:54 AM), http://www.cbssports.com/collegefootball/writer/jon-solomon/25266277/study-ex-nfl-players-who-started-football-younger-are-more-at-risk (explaining study that examines risks assumed when football is played prior to twelve years old). A study released on Aug. 10, 2015, consisting of former NFL players between the ages of 40-65 found a higher risk of altered brain development in players who began playing football before the age of 12 than players who waited until they were older. Id. This study performed by Boston University School of Medicine and Brigham and Women's Hospital is the first study to show a link between repetitive head trauma sustained early in life and structural brain changes later in life. Id.

\textsuperscript{104} Robeson & King, supra note 2, at 340 (discussing NFL's crucial need to control type of information being transferred to parents).
Proponents of the Settlement Agreement argue that approval of this Settlement Agreement is a win-win situation. However, opponents of the Settlement Agreement argue that the NFL is getting off too easy, and that the approval and finalization of the Settlement Agreement is a win for the NFL in different ways. First, the NFL escapes the dreaded discovery stage of pre-trial litigation, where it would be forced to disclose highly sensitive information that could prove to be more costly and embarrassing for the NFL. Second, the release of the NFL-sanctioned research could also subject the NFL to tort liability if the NFL was aware of any definite connection linking repetitive concussions to long-term brain damage. Therefore, approval and finalization of the Settlement Agreement is in the League's best interest. Similarly, many players

105 See supra note 99 and accompanying text (allowing claimants to forego establishing a causal connection between the cognitive impairments and head injuries sustained). The Settlement Agreement guarantees a floor and ceiling to the financial awards. Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. at 197.

106 See Heard, supra note 9, at 235 (discussing preemption in the NFL in regards to concussions that happen during the games). See also supra note 99 (providing examples of tort claims against the NFL regarding causation). The $765 million dollar payout funding the damage awards represents a small portion of the total revenue the NFL has generated by the effective “selling of violence.” Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. at 197. The discovery phase of the litigation allows the NFL to cease documents that they are legally compelled to produce to the plaintiffs. Id. The NFL gives no admission of liability through the approval of the Settlement Agreement, thereby setting no precedent for future lawsuits regarding similar allegations to abide by. Id.

107 See supra note 106 and accompanying text (discussing discovery phase); supra note 57 (discussing creation of MTBI Commission); infra note 111 (noting draft Settlement Agreement precludes disclosure of highly sensitive documents absent a whistleblower). The NFL effectively evades the costly unearthing of any documents that would place any liability revealing the league knew more or feared more about the effects of concussions than it initially disclosed to the players came to light by proposing and agreeing to the Settlement Agreement. See supra note 106 and accompanying text (examining preemption of in-game concussions by the NFL). Players who ultimately decided to opt out or appeal the Settlement Agreement may still force the NFL to disclose these highly sensitive documents, however, they face many jurisdictional hurdles prior to reaching the discovery stages of litigation. See supra note 106 (noting NFL's ability to seize documents that they are legally compelled to produce to plaintiffs). See also supra note 58 (citing complaints against NFL alleging they covered up connection between head trauma and mental diseases); infra note 127 (noting NFL potentially subject to tort liability if MTBI studies released).

108 See supra note 57 (noting potential serious consequences if NFL sanctioned reports released).

109 See supra note 57 (noting concealment by MTBI Committee hurts NFL's case). If the NFL were forced to comply with discovery rules and were required to disclose the NFL sanctioned
consider the Settlement Agreement to be highly favorable, considering the provisions
and benefits afforded to them and the fees and costs paid for by the NFL.\textsuperscript{110}

Proponents argue for swift passing of the Settlement Agreement by Judge
Brody so that they can receive compensation immediately.\textsuperscript{111} The NFL would likely
incur a substantially larger array of expenses in the form of court fees, administrative
costs, and attorney’s fees in defending individual lawsuits, which would be substantially

\textsuperscript{110} See supra note 100 (confirming NFL parties reserve right to appeal decision regarding class
member’s entitlement to monetary award). The NFL parties agreed not to petition for an appeal
if the attorney’s fees and costs do not exceed $112.5 million irrespective of the BAP Fund,
monetary awards for qualifying diagnoses, education fund and notice expenses and administrative
costs. \textit{Nat’l Football League Players’ Concussion Injury Litig.}, 301 F.R.D. at 197. In addition to
plaintiffs’ attorney’s fees and costs, the NFL parties agreed to provide $4 million dollars for
notice expenses in connection with this lawsuit. \textit{Id. See also supra note 93 (discussing three
sources of compensation for retired NFL players); supra note 94 (discussing BAP evaluating
players); supra notes 95-96 and accompanying text (noting BAP results will be compiled for
future research); supra note 97 (discussing monetary awards awarded for each qualifying
diagnosis); supra note 98 and accompanying text (noting additional monetary awards given to
players with more than one qualifying diagnosis); supra notes 101-103 and accompanying text
(discussing education fund for retired and youth football players).

\textsuperscript{111} See supra note 105 (noting the optimistic need for a speedy process to finalization); \textit{infra}
ote 114 (describing the Settlement Agreement package). Retired players may recoup the monetary
award they are eligible for only when the Settlement Agreement has been approved in final form
by Judge Brody. \textit{See Mihoces, supra note 19 (noting that there are objectors to settlement
agreement as well). See also Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 198.
Thus, supporters of the Settlement Agreement are arguing for the speedy finalization and
approval by Judge Brody so that a quick recovery of the monetary award per qualifying diagnosis
may be distributed to eligible retired players in need of the financial award. \textit{Id. However, if
retired players subject to this agreement decide to appeal any ruling by Judge Brody, no awards
will be paid until all appeals have been exhausted. \textit{Id. Supporters may appeal any judgment
ruling not in their favor through separate lawsuits filed by individual players for many years
thereby delaying the payout of the awards. \textit{Id. Retirees supporting the immediate approval of
the Settlement Agreement argued that opponents ignore the fact that the NFL is conceding in its
agreement to pay damages by not requiring retirees to link concussions sustained while playing in
the NFL to the qualifying disease. \textit{Id. Consolidation of lawsuits against the NFL for concussion
related injuries into a multi-district lawsuit would settle thousands of lawsuits in one long sweep.
\textit{Id. See also MaryClaire Dale, Lawyer Asks Judge To Approve NFL Concussion Deal, MISSOURIAN,
concussion-deal/article_26d70e9f-c24d-5ab2-bd59-134b58754607.html (noting separate and
individual litigation for each retired player would be expensive).
decreased in a consolidated multi-district class action. Additionally, suits would be handled much more quickly and efficiently, and would maintain some sort of uniformity in court rulings. Proponents further argue that securing a monetary award quickly and efficiently is of utmost importance, especially when dealing with such serious cognitive diseases. However, not all players agree that the Settlement Agreement would be so favorable to their specific condition.

Players and their families have mixed feelings about the overall fairness of the Settlement Agreement. Opponents to the Settlement Agreement argue that all

112 See supra note 110 (discussing fees and costs). The NFL parties have agreed to pay for all expenses up to $4 million in notice expenses; attorney's fees and costs up to $112.5 million without filing an objection, in addition to the monetary awards for each disease. Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. at 197. See also supra note 111 (noting advantage of a fast and efficient settlement).

113 See supra note 12 (noting advantages in settlement of multi-district lawsuits). Cases brought into federal or state court in an individual capacity may take decades to litigate and complete after all appeals have been exhausted all while the players' conditions continue to deteriorate. Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. at 191. Further, rulings by state and federal courts may potentially result in differing outcomes where rulings and awards vary significantly and with such high stakes being litigated in a highly uncertain arena with no assurance of any financial recovery. Id.

114 See supra note 111 (discussing the need for a speedy process to finalization). In dealing with parties whose health may be deteriorating rapidly, class action lawsuits provide a speedy route for these parties to recover their monetary award. Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. at 202. Resources are also made available upon the finalization and approval of a Settlement Agreement. Id. "A class action settlement that offers prompt relief is superior to the likely alternative—years of expensive, difficult, and uncertain litigation, with no assurance of recovery, while retired players' physical and mental conditions continue to deteriorate." Id. See also supra note 99 (noting difficulty of proving causation with connection between head trauma and concussions). Many of the players who did not opt out of the Settlement Agreement are doing so because commencing an independent lawsuit is too costly, time consuming and drawn out when these individuals need help and funds now. Id. Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. at 202.


116 See Kelley, supra note 63. Prior to the finalization of the Settlement Agreement, a group of former NFL players asked to modify it because it "arbitrarily cuts off payments to those who are diagnosed with a condition known as ... CTE, which is caused by repeated blows to the head and can lead to aggression and dementia." Id. Former NFL players diagnosed with CTE outside of the limited range of time, along with the current NFL players who currently play on an NFL team, receive nothing and are effectively excluded from any "meaningful benefit" by the acceptance of this Settlement Agreement. Id. See also Stuart Goldman, Ex-NFL Players Object to $765 Concussion Settlement, ATHLETIC BUSINESS, (Apr. 2015),
current NFL players who may develop a disease are not accounted for, as only retired
NFL players may be eligible as a class member.117 They further argue that the
provisions specific to compensation for CTE are misleading due to the fine print
caveats included in the Settlement Agreement.118 Additionally, opponents of the

http://www.athleticbusiness.com/contract-law/ex-nfl-players-object-to-765m-concussion-settlement.html. Players argue that their benefits should be enhanced. Id.

117 See Kounang & Smith, supra note 18 (noting upwards of 5,000 former players are involved in suit, but 20,000 may become eligible). See also Patrick Hruby, A Second Attempt, SPORTS ON EARTH (June 26, 2014), http://www.sportsonearth.com/article/81720376/nfl-concussion-lawsuit-revised-settlement-removes-cap-on-player-claim-fund. Current NFL players are not included in the Settlement Agreement because of the legal theory that they are aware of the dangers, however this has only been mentioned to them once. Id. The Settlement Agreement only encompasses those retired NFL players. Id.

118 See supra notes 75, 116 (discussing unfair and ‘nonsensical’ provisions of the Settlement Agreement); infra note 121 (discussing confusion over eligibility of players diagnosed with CTE to receive monetary award). One objection to the Settlement Agreement filed by former NFL players argued that while an attorney skilled in the practice of dissecting complex legal language contained in the Settlement Agreement, football players may not be able to easily determine their rights. Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 195-96. The provision in the Settlement Agreement alleged to be misleading states that “all valid claims under the settlement, without limitation, will be paid in full throughout the 65-year life of the settlement.” Id. at 195-96. Depending on the age of the retired player, baseline assessment examinations may take place between two and ten years as of the date of the Settlement in order to determine the level and severity of the cognitive impairment. Id. at 216. The Baseline Assessment Program offers baseline neuropsychological and neurological evaluations to determine the existence and extent of any cognitive impairment. Id. The level of severity of the cognitive injury corresponds with the award allotted to each NFL player. Id. Therefore, if the evaluation shows the retired NFL player to suffer from a more severe degree of one of the five qualifying diseases compensated under the Settlement Agreement, the player will receive supplemental benefits. Id. These supplemental benefits include specified medical treatment, evaluations, counseling and pharmaceutical coverage. Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 216. Additionally, these Baseline Assessment evaluations may be used for future comparison in assessing whether a retired NFL player’s cognitive abilities have deteriorated. Id. In order to receive the maximum award per qualifying diagnosis, a retired NFL player must have been diagnosed with a qualifying diagnosis prior to the age of 45 and have played in at least five eligible seasons in the NFL and have participated in the Baseline Assessment Program. Id. See also infra note 131 (noting mitigating factors decreasing monetary award payout). Because awards are based on an injury’s type and stage of development, players may also opt into participating in a baseline assessment examination in order to assess the level of neurological and neuropsychological impairment. Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 191. Eligible players must have formally or informally retired from the NFL or any member club including the American Football League, World League of American Football, NFL Europe League and NFL Europa League. Id. Players formerly on any roster for a member club named above may be eligible if they are not seeking active employment with any member club on any level. Id. The amount each player may receive is determined by the type of qualifying diagnosis received, the number of seasons played in the NFL, the age of the retired player at the time of
Settlement Agreement argue that the cutoff date for CTE diagnoses should extend through the entire sixty-five year term of the Settlement Agreement so that the families of all former NFL players diagnosed with CTE may be compensated. Of the estimated 20,000 eligible former players, the number of players who chose to opt out of the Settlement Agreement was just under one percent. The decision to opt out allows retired players to file lawsuits against the NFL in a separate proceeding, which is not subject to the monetary awards available in the Settlement Agreement.

See supra note 8 (discussing arbitrary cutoff date in NFL Settlement Agreement for CTE diagnoses).

See Fenno, supra note 62 (discussing number of retired players who opted out of concussion Settlement Agreement).

See Fenno, supra note 62. Athletes who opted out of the Settlement Agreement include Dallas Cowboys running back, Tony Dorsett, Washington Redskins running back, John Riggins, Kansas City Chiefs linebacker, Willie Lanier, and Seattle Seahawks linebacker, Vernon Maxwell, among many others. Id. Accordingly, the family of Junior Seau also decided to opt out of the Settlement Agreement and instead, filed a wrongful death lawsuit against the League. Id. Seau's family argued that the Settlement Agreement does not adequately compensate the decedents of former players diagnosed with a qualifying diseases for their own pain and suffering. Id. Additionally, others have challenged the fairness of the Settlement Agreement based on the limited deadline which precludes any further diagnoses of CTE to be compensated under the Agreement. Id. See also Mihoces, supra note 19 (describing the contrasting views of opting out of the CTE settlement). Likewise, the attorney for the Estate of Dave Duerson stated that the Settlement Agreement was "atrocious" by unfairly restricting compensation for CTE. Id. The Estate did not choose to opt out of the Settlement Agreement because a representative of the estate wanted to testify at the November fairness hearing that the settlement should be wholly rejected. Id. "Those that do not have a voice. They're done . . . . They have to wait around for Judge Brody at some point in time - maybe after all the appeals are done - to rule whether or not they can even proceed with their lawsuit or be sent to an arbitrator pursuant to the collective bargaining agreement." Id.
IV. ANALYSIS

A. The Cutoff Date to File a Qualified Diagnosis for CTE Unfairly Restricts a Large Class of Players from Receiving Compensation

In light of the NFL’s overall progression toward acknowledging that CTE in NFL players is caused by repeated concussions sustained while playing football, CTE compensation should be available for the full sixty-five year term of the Settlement Agreement, much like the way the Settlement Agreement treats the other qualifying diseases included in its provisions.\(^2\) One major controversial provision in the Settlement Agreement unfairly strips retired NFL players of their eligibility to receive a monetary award for CTE if it was diagnosed outside of a limited range of dates.\(^3\) However, the four other cognitive diseases compensated under the same Settlement Agreement do not have this limited time restriction, even though the NFL purports to

\(^{12}\) See McKee et al., supra note 27, at 44 (describing the different stages of CTE for athletes). CTE and other neurodegenerative disorders are so similar in kind that diagnoses are often confused with one another. \textit{Id.} Repetitive brain trauma builds upon pre-existing brain disorders accruing more and more tau-like proteins leading to more significant cognitive impairments. \textit{Id.} “\textit{R}epetitive brain trauma and hyperphosphorylated tau protein deposition promote the accumulation of other abnormally aggregated proteins . . . .” \textit{Id.} See also supra note 22 (discussing how definitive diagnosis of CTE can only be made post mortem). The main difference between players diagnosed with CTE and players diagnosed with any of the four remaining diseases encompassed in the Settlement Agreement is that these individuals are already deceased and therefore, cannot recoup the monetary award. \textit{See Wedro & Stöppler, supra note 13 (noting that boxing and football having similar concussion symptoms). See also Etherton, supra note 44, at 15-16. In 2005, independent scientists conducted research trials “demonstrate[ing] that multiple NFL concussions cause cognitive problems such as depression and early-onset dementia” and confirmed that CTE caused by multiple concussions while playing in the NFL “was at least a partial cause of the deaths of some retired players.” \textit{Id.}

\(^{13}\) See supra notes 111 and 114 and accompanying text (describing the players’ monetary award). Players who filed CTE diagnoses between Jan. 1, 2006 and Apr. 22, 2015 are eligible for the monetary award discussed within the Settlement Agreement. \textit{See also Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 191. Retired players without a qualifying diagnosis for CTE after this deadline are therefore ineligible to recover any monetary award set aside in this Settlement Agreement for CTE. \textit{Id.} See also infra note 133 and accompanying text (noting compensation for CTE diagnoses are extremely limited). Even though concussions resulting in CTE are what sparked widespread media attention towards the NFL’s liability for traumatic brain injuries, a large number of CTE cases do not receive any compensation under the terms of the Settlement Agreement. \textit{Id.}
compensate all retired players diagnosed with any of the qualifying diseases. The limited window for filing a CTE diagnosis is illogical because CTE symptoms do not greatly differ from those of the other four cognitive impairments covered under the Settlement Agreement. Many of the symptoms of ALS, Parkinson's, Alzheimer's, early to moderate Dementia, and CTE are indistinguishable without a proper brain scan during autopsy. Since the purpose of the Settlement Agreement is to ultimately...
compensate retired players for their resulting cognitive diseases, it is irrational for the NFL to completely cut off an entire class of retired players living with CTE, and dying with a subsequent CTE diagnosis, from any compensation or benefits stemming from the Settlement Agreement.  

Further, such a limited timeframe is too subjective and creates an unreasonable deadline to file a qualifying diagnosis for CTE since players and their families did not know of this extension until the deadline had already passed. There was no advanced notice of any extension of the filing of a qualifying diagnosis other than a suggestion by Judge Brody for the parties to continue negotiating the terms of the Settlement Agreement to possibly expand the limited timeframe for CTE filings. Large classes of performing a more advanced autopsy, Dr. Bennett Omalu diagnosed Mike Webster with CTE. Id. See also League of Denial: The NFL’s Concussion Crisis, supra note 1. Dr. Omalu performed a more advanced autopsy when he did not find the typical shrunken brain associated with Alzheimer’s, which became the first CTE diagnosis in an American football player. Id. See supra notes 27-34 (discussing McKee study on head trauma and CTE symptoms); supra note 26 (discussing progressive deterioration of brain causing mental and physical disabilities).

Large classes of retired NFL players and their families are being cut off from receiving any benefits and compensation from the Settlement Agreement. Id. This class includes those players diagnosed with CTE prior to January 1, 2006, and after the finalization of the Settlement Agreement on April 22, 2015. Id. at 221. See also supra note 125 (noting symptoms for qualifying diseases in Settlement Agreement are indistinguishable).

See Dale, supra note 8 and accompanying text (noting extension of cut off deadline for CTE diagnosis until April 22, 2015). See also First Amended Complaint for Damages, supra note 10, at 25-26. Dave Pear, a 61-year-old former Pro Bowl defensive tackle found out about the extension of the filing for a CTE diagnosis hoping to be included in the class of future players to receive compensation from the Settlement Agreement. Id. Pear experiences various football related impairments such as vertigo, memory loss, constant physical pain following multiple neck, back and hip surgeries. Id. Pear’s attorney informed him that the deadline had come and passed the day prior, before Pear or his attorney had become aware of the existence of an extension for filing. Id.

See supra note 8 (noting no notice of extension of CTE filing deadline, especially for players experiencing CTE symptoms). See also Hanna, supra note 8. On Feb. 13, 2015, the “arbitrary cutoff date,” was addressed by both parties who eventually agreed to extend the limited range of time by which retired NFL players could file qualified diagnoses for CTE in order to receive a monetary award. Id. Judge Brody ordered the parties to continue negotiations and suggested several revisions to the terms of the Settlement Agreement. Id. Dale, supra note 8. One revision was the extension of the filing deadline for CTE. Id. This suggestion was never set in stone, until the finalization of the Settlement Agreement on April 22, 2015. Id. NFL players were given
players and their families are now being left out of this deal and their only recourse is to appeal Judge Brody's decision.\textsuperscript{130} This path of recourse guarantees no chance of success on behalf of the appellants and leads to many players condemning the appellant for delaying what was supposed to be a quick and easy payout from the NFL.\textsuperscript{131}

The Settlement Agreement requires a qualifying diagnosis of one of five cognitive impairments, but a CTE diagnosis cannot be rendered until after the individual's death.\textsuperscript{132} Further, behavioral disorders, such as those associated with CTE,
are not covered or compensated by the Settlement Agreement, even though the coverage would greatly benefit players dealing with such symptoms. Players living with an undiagnosed case of CTE must silently suffer with the emotional and physical symptoms resulting from CTE without any compensation from the Settlement Agreement. Giving these ineligible players access to the same benefits would give them financial assistance as well as emotional assistance for the rest of their lives.

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133 See supra note 15 (discussing behavior of Mike Webster). Many times players exhibit symptoms associated with CTE such as severe bouts of anger or extreme forgetfulness, yet, they are not compensated for living with this disease until they are diagnosed with CTE after their death. See League of Denial: The NFL's Concussion Crisis, supra note 1. See also Nat'! Football League Players' Concussion Injury Litig., 301 F.R.D. at 217. Whereas players diagnosed with Alzheimer's, Parkinson's, ALS or early to moderate dementia, may recover immediately. Id. Because players diagnosed with CTE are only eligible for a monetary award may immediately recover the funds for use during their lifetime. Id. The diagnosis came between a small range of dates, coupled with the fact that the player may only be diagnosed with CTE after his death. Id. See also supra note 17 (noting individuals diagnosed posthumously with CTE many times succumb to early death due to suicide). Suicide, depression, impulsiveness and poor judgment are among the various symptoms associated with CTE. Id. See also supra note 29 (discussing McKee study using behavior as a contributing indication in diagnosing CTE). Dr. McKee's research study on CTE used 85 brains from donors with past head trauma, with most donors having played professional football at some point. Id. McKee obtained the donor's history of head trauma as well as interviewed friends and family of the donors to obtain history of behavior of donors to aid in the diagnosis of CTE. Id. See also supra note 17 (noting NFL's failure to compensate behavioral disorders). The devastating effects of such behavioral disorders associated with head trauma include “the inability to maintain employment, homelessness, social isolation, domestic abuse, divorce, substance abuse, excessive gambling, poor financial decision-making, and death from accidental drug overdose or suicide.” See Ex-NFL Players' Lawyer: 'CTE is the Industrial Disease of Football,' CBS, (Oct. 8, 2014 3:24 PM), http://washington.cbslocal.com/2014/10/08/ex-nfl-players-lawyer-cte-is-the-industrial-disease-of-football/ (discussing findings of Boston University researcher Robert Stern). See also supra note 94 (noting BAP available through Settlement Agreement only to eligible players). Counseling and financial assistance is also available only to eligible players through the Settlement Agreement. See Nat'! Football League Players' Concussion Injury Litig, 301 F.R.D. at 196. Allowing players who are exhibiting symptoms associated with CTE to participate in the Settlement Agreement would give them access to the benefits such as counseling and the Baseline Assessment Program. Id. If players were to be eligible to receive some type of compensation from the Settlement Agreement, players would be financially assisted and supported during their lifetime. Id.

134 See supra notes 26, 31-34 (discussing various symptoms associated with CTE). CTE is present in individual's brain while the player is living, yet a definitive diagnosis of CTE cannot be made until the individual has died. Id. See also supra note 8 (noting that CTE can only be diagnosed through autopsy). Conversely, the NFL's Settlement Agreement does not compensate players
B. Language in the Settlement Agreement is Misleading and Confusing

The language contained in the Settlement Agreement references CTE as being encompassed within a “qualifying diagnosis” eligible for a monetary award; however, this is not the case. More significantly, the Settlement Agreement contains factors that cause players diagnosed with CTE to easily become wholly ineligible for any monetary award if a qualifying diagnosis for CTE came before January 1, 2006, or after April 22, 2015. The individuals who are compensated by the Settlement Agreement who exhibit CTE-like symptoms and further, does not compensate those players or their families if a definitive CTE diagnosis has been made before Jan. 1, 2006 and after Apr. 22, 2015. Id. at 217. The Settlement Agreement defined a “monetary award”:

**Monetary Awards: 14. What diagnoses qualify for monetary awards?** Monetary awards are available for the diagnosis of ALS, Parkinson's Disease, Alzheimer's Disease, Level 2 Neurocognitive Impairment (i.e., moderate Dementia), Level 1.5 Neurocognitive Impairment (i.e., early Dementia) or death with CTE (the “Qualifying Diagnoses”). A Qualifying Diagnosis may occur at any time until the end of the 65-year term of the Monetary Award Fund.

Id. at 217. But see supra note 75 (noting large number of CTE diagnoses are not compensable). 137 See Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. at 219. The minimum and maximum monetary awards per qualified diagnosis granted to players opting into the Settlement Agreement substantially depend on the player's type of cognitive disease and age at the time of his diagnosis. Id. See chart below.

<table>
<thead>
<tr>
<th>Age at Diagnosis</th>
<th>ALS</th>
<th>Death w/ CTE</th>
<th>Parkinson's</th>
<th>Alzheimer's</th>
<th>Level 2</th>
<th>Level 1.5</th>
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<tbody>
<tr>
<td>Under 45</td>
<td>$5,000,000</td>
<td>$4,000,000</td>
<td>$3,500,000</td>
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<td>$3,000,000</td>
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<td>$4,500,000</td>
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<td>55-59</td>
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<td>$1,150,000</td>
<td>$950,000</td>
<td>$475,000</td>
</tr>
<tr>
<td>60-64</td>
<td>$3,000,000</td>
<td>$1,200,000</td>
<td>$1,000,000</td>
<td>$950,000</td>
<td>$580,000</td>
<td>$290,000</td>
</tr>
<tr>
<td>65-69</td>
<td>$2,500,000</td>
<td>$980,000</td>
<td>$760,000</td>
<td>$620,000</td>
<td>$380,000</td>
<td>$190,000</td>
</tr>
<tr>
<td>70-74</td>
<td>$1,750,000</td>
<td>$600,000</td>
<td>$475,000</td>
<td>$380,000</td>
<td>$210,000</td>
<td>$105,000</td>
</tr>
</tbody>
</table>
are members of the same classes of retired NFL players diagnosed with a qualifying mental impairment, easily creating confusion among the provisions in the Settlement Agreement. Retired players not represented by legal counsel and not skilled in interpreting legal documents must be more cautious and should be more protected from such misleading provisions in such a significant Settlement Agreement.

C. The Education Fund Provision

Youth football programs serve as the incubators from which future NFL superstars emerge. Encouraging a safer, less violent football culture begins with changing the warrior-like culture in youth football programs, and instead encouraging players and their parents to value their health before loyalty to the team. The need to

<table>
<thead>
<tr>
<th>Age</th>
<th>Amount 1</th>
<th>Amount 2</th>
<th>Amount 3</th>
<th>Amount 4</th>
<th>Amount 5</th>
<th>Amount 6</th>
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<td>75-79</td>
<td>$1,000,000</td>
<td>$160,000</td>
<td>$145,000</td>
<td>$130,000</td>
<td>$80,000</td>
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<td>$50,000</td>
<td>$50,000</td>
<td>$50,000</td>
<td>$25,000</td>
</tr>
</tbody>
</table>

See supra note 75 and accompanying text (noting CTE diagnoses after April 22, 2015 date not eligible to participate in Settlement Agreement).

*See Patrick Hruby, Cutting Them Short, Sports on Earth (July 18, 2014), http://www.sportsonearth.com/article/85045740/nfl-concussion-settlement-cuts-cte-coverage-short-patrick-hruby (discussing player's potential confusion in reading cash awards portion of the Settlement Agreement). See also supra note 118 and accompanying text (discussing players likely to skip over fine print of Settlement Agreement). This potentially confusing and misleading language regarding the eligibility or ineligibility of a player with CTE is significant considering these players may already have cognitive impairments affecting their ability to understand a confusing document. Id.*

*See supra note 118 and accompanying text (discussing possibility players will skip fine print of Settlement Agreement terms and provisions). See also supra note 127 (noting exceptions to monetary awards). Players are liable to skip important sections of the Settlement Agreement without regard to the exceptions of the monetary awards actually distributable. Id.*

*See supra note 103 (detailing the role of parents in young players' decision to play football). Dr. Omalu said that an NFL doctor stated, "if ten percent of mothers refused to allow their sons to play youth football, the NFL would cease to exist." Robeson & King, supra note 2, at 335. Parents play an important guardianship role in determining whether the risk in allowing their children to participate in a sport with significant physical contact, especially to the head, is worth allowing their child to participate. Id. Such a concern is so wide spread, NFL Commissioner Roger Goodell addressed this issue at a conference at Harvard in an effort to reject the perception that it has not done enough to protect its players. Id. Part of this speech addressed parent's concerns with letting their young children participate in youth football. Id.*

*Id. at 336. As more information comes out supporting the link between football-related concussions and head trauma, a cultural shift among youth players, their parents, coaches, teachers and physicians in beginning to accept the reality that serious health risks are inherently associated with playing football is here. Id. Further, the education fund provision purporting to
protect youth football players becomes increasingly apparent when considering the muscular and skeletal changes these young players undergo, and the fact that one strong hit to the head can affect their overall development. 142

Today, researchers are attempting to address the resulting mental and physical health-related issues arising out of playing football, but this research comes at the expense of these young football players. 143 Youth football is used as a laboratory to assess the effects of concussions, return-to-play protocols, rule changes, and equipment modifications. 144 A health-conscious culture must be encouraged and accepted, not just among the players, but also among parents, training staff, and coaches. 145 Encouraging children to report their injuries adequately and accurately is paramount in keeping youth...
D. Players’ Self-Diagnosis of Concussions Should be Prohibited and Instead Independent Neurologists Should Oversee Injuries and Assess Whether Players Should Return to Play

It is unclear whether the loyalty of the team’s medical staff ultimately lies with the player or with the overall interests of the team and its owners.147 Regardless of the NFL’s 2014 amended return-to-play stipulations and sideline concussion assessment protocol, players are still receiving life threatening head injuries at an alarming rate.148 Many NFL players deliberately fail to accurately report their injuries, especially

146 Id. at 336 (noting disinclination to report injuries associated with playing football if not made a habit). Players are less inclined to report their injuries because it means they potentially risk sitting out of one or more games and practice as well as risk their starting position. Id. But see Kaduk, supra note 2 (highlighting example of NFL rookie retiring at young age due to concussion related fears). Reporting injuries should be taught at a young age to encourage positive health conscious behavior instead of promoting it as negative and weak. See Belson, supra note 3 (calling for a need to change the culture promoting the “warrior mentality”).

147 Robeson & King, supra note 2, at 337 (discussing autonomy of player in declaring own fitness to return to game). For example, Robert Griffin III who had sustained a knee injury while playing at Baylor University required surgery for a ruptured anterior cruciate ligament. Id. While playing for the Washington Redskins, Griffin sustained a knee injury at the end of the 2012-2013 regular season. Id. Griffin was awarded the Heisman Trophy as the best player in 2011-2012 season and subsequently named “Offensive Rookie of the Year” leading the Redskins to their first playoff appearance in years. Id. Griffin’s knee injury kept him out of the final regular season game so he could rest and rehabilitate his knee for the post season games. Id. Griffin’s knee collapsed early in the playoff game, where it was later reported that he had sustained complete tears of both his anterior cruciate ligament and his lateral cruciate ligament, requiring reconstructive surgery. Id. Head coach Mike Shanahan and team surgeon Dr. James Andrews attempted to point the finger at each other for the poor decision making in playing Griffin in an attempt to absolve themselves of responsibility. Robeson & King, supra note 2, at 337. Ultimately, blame was placed upon Griffin and attributed to his competitiveness and loyalty to his teammates which he acknowledged and admitted. Id. Team doctors easily escape liability resulting from an injured player’s decision to continue playing the game, specifically in cases resulting in head trauma, due to the player having final authority and autonomy to evaluate his condition. Id. See also supra notes 2-4 (calling into question whether best interests of player or team are at forefront). NFL doctors are employed by the team for which they work, and therefore owe the team a legal and fiduciary duty to advocate and represent the best interests of that team. Robeson & King, supra note 2, at 338.

148 See supra note 50 (discussing 2014 amended return to play guidelines); supra note 51 (discussing the, slightly better, but overall ineffective changes that promote unhealthy return-to-play decisions). In the 2014-2015 NFL season, 202 concussions were reported. NFL Concussions Fast Facts, supra note 51. But see Robeson & King, supra note 2, at 337-338 (noting “putative warrior” mentality contributes to misrepresentation of neurological risk posed by game).
concussions or head injuries, even though medical staff encourages players to do so. Team doctors should be discouraged from relying on players to self-diagnose concussion-related symptoms because players rarely report their injuries in fear of being taken out of the game or ruining their tough image. Allowing players to subjectively self-diagnose concussion-like symptoms and determine whether they are ready to return to the game poses problems because it allows players to essentially choose between either continuing to play in the game or giving up and sitting out. More stringent regulations are necessary to prevent players from returning to the game after sustaining a life-threatening concussion.

149 See Robeson & King, supra note 2, at 338 (examining professional NFL recognition of the situation as evidenced by formation of first MTBI Committee). “Players are to be encouraged to be candid with team medical staffs and fully disclose any signs or symptoms that may be associated with a concussion.” Id. Compare with Tells, supra note 3. Tony Dorsett acknowledged even if he knew and was fully aware of all physical and mental consequences of traumatic blows to the head while playing professional football, he would “do it all over again.” Tells, supra note 3. Dorsett participated in the UCLA pilot program seeking to diagnose CTE prior to an individual’s death and was preliminarily diagnosed with CTE. Id. See also Heard, supra note 9, at 247 (noting warrior-like culture of NFL must change to defeat concussion epidemic in NFL). According to Mark Walzack, Junior Seau’s friend and former teammate stated, “Junior just didn’t report head injuries. I had (unreported) concussions, too . . . But you just don’t report them. You’re a football player. You’re tough. If you did report stuff like that, next thing you know you’re on waivers.” Players left to self-diagnose concussion-like symptoms are not in the best position to determine whether they should return to the game and risk further head trauma perpetuating the danger that has already occurred. Robeson & King, supra note 2, at 335.

150 See e.g., supra notes 2-4 (discussing the lack of autonomy of a player injured during a game). NFL players are implicitly encouraged to play through the pain and to “tough it out,” regardless of the injury. Robeson & King, supra note 2, at 334.

151 Compare Tells, supra note 3, at 1844 (presenting a case where the player chose to continue playing football despite preliminary diagnosis of CTE), with Robeson & King, supra note, 2, at 339 (acknowledging professional attempts at encouraging healthier decisions are regulating return-to-play standards). Professional football players rarely report their injuries to medical staff because it’s part of the NFL culture. Id. Players avoided reporting their injuries due to the risk of having to sit out of the game or practice and potentially losing their starting position and respect among players and coaches. Id NFL culture encourages ignorance pertaining to any real or substantial pain incurred by a hard tackle during a game often leading to the downplaying of any real injury. Id.

E. Release of Reports Would Aid in Future CTE Research for CTE

Diagnosis of CTE in living individuals is in the preliminary stages of actually producing reliable research, but the free flow of any research on this subject would greatly benefit and accelerate this process. Utilizing preliminary research results on this topic would advance the expansion of future research trials to definitively diagnose CTE and prevent and treat CTE symptoms. More significantly, if this research were made available to NFL players now, it would allow them to make informed decisions regarding the dangers and risks associated with playing football in the future. Future research allowing for the definitive diagnosis of CTE in a living person will be crucial for current and prospective NFL players. However, definitive diagnoses of CTE would also produce a large amount of controversy and questions surrounding the

153 See supra note 104 (discussing preliminary research providing foundation for developing tools to diagnose CTE in living persons).
154 See supra note 95 (noting evaluation of retired NFL players will provide foundation advancements in treatment); supra note 153 (establishing foundation to develop new goals for diagnosis of CTE in living persons). Continued research and evaluation of cognitive impairments in NFL players will provide the foundation for researchers to make advancements in treatment with the hope being the eventual diagnosis of CTE in a living human being. Fainaru & Fainaru-Wada, supra note 14. See also Fainaru & Fainaru-Wada, supra note 14. Protein build-up resembling that of tau, was found in living ex-NFL players' brain scans in a pilot study at UCLA. Id. See Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. 191, 196 (E.D. Pa. Jul. 7 2014) (discussing compiled medical data for use by medical researchers studying cognitive impairment and injury prevention).
155 Gasper, supra note 99. Players armed with more information regarding the long term health risks involved in playing in the NFL would allow them to make an educated decision effectively giving the players the power to determine their own “price tag on the cost of quality of life.” Id. “I didn’t have the information back then, and guys who played a while ago didn’t know any of this, the risks that were out there, specifically to this . . . now they know.” Id.
156 Id. Definitive CTE diagnosis in a living NFL player would allow the player to monitor head trauma sustained throughout the season giving the player more information on their mental health to determine when to retire from playing professional football. Id. Definitive diagnosis would allow players to be diagnosed with CTE while alive. Id. Players would then be eligible under the Settlement Agreement for compensation and access benefits afforded to those eligible players. Gasper, supra note 99. See also supra note 134 and accompanying text (noting Settlement Agreement doesn’t compensate players with CTE-like symptoms or diagnoses outside limited range).
inadequate preventative measures currently utilized in the NFL. Coincidentally, the NFL has now incorporated a provision into the Settlement Agreement whereby the research gathered by the Baseline Assessment Program will be made public for further study, subject to the players' consent.

The question remains as to whether the NFL has a duty to inform these players of the clinical research findings related to CTE, especially if the long-term side effects include depression, suicidal thoughts, paranoia, aggression, irritability, agitation, impulsiveness, poor concentration, memory loss, confusion, poor judgment, and death. A definitive CTE diagnosis on a living player may raise more questions than answers, but definitive CTE diagnoses will provide players with more control over their brain injury or retire. 

See supra note 95 (confirming CTE, at this time, can only be definitively diagnosed posthumously). Definitive diagnosis of CTE in living NFL players may prompt serious questions regarding the safety measures adopted by the NFL such as mandatory brain scans to determine if a current player already shows signs of CTE. Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. at 191. But a definitive diagnosis for CTE could also provide several treatment options for players living with CTE as well as prevent most suicides caused by symptoms of CTE. Id. Diagnosis of CTE in a living athlete would also give the athlete more autonomy in determining whether they want to continue their athletic career and exacerbate their brain injury or retire. Id.

See supra note 94 and accompanying text (discussing BAP's collection of research for use for future research).

See Fainaru & Fainaru-Wanda, supra note 14. CTE diagnosis for active NFL players will give players autonomy in making decisions regarding their mental health. Id. "Active players who show signs of CTE could use the information to decide when to retire and thus prevent further injury . . ." Id. The question as to whether the NFL has a duty to inform players of potential long-term effects may soon be eliminated due to the ability of new technology allowing players to obtain a diagnosis while still playing the game. Id. See also supra notes 7-8 and accompanying text (noting what constitutes a qualifying diagnosis under Settlement Agreement); supra note 43 (discussing the NCAA concussion litigation and NCAA shortcomings on concussion policy). The release of the NFL sanctioned studies on CTE may subject the League to liability if they knew or should have known of any connection between sustaining concussions and developing a cognitive impairment. See supra note 43 (discussing NFL's argument it did not owe duty to retired players to release MTBI reports). See also supra notes 58, 95 (noting need for foundational research to further develop benefits to players for diagnosis before death).
health and career longevity. Players will also be capable of making informed decisions based on their current mental health.

A definitive diagnosis of CTE in a living individual will fuel questions as to whether the NFL should require mandatory cognitive testing of professional football players or whether NFL players may individually choose to find out whether they are “vulnerable to a devastating disease.” Diagnosing CTE in living persons may also provide several treatment options for players living with CTE or those whose brain scans show preliminary buildup of tau protein, which makes them highly susceptible to developing CTE.

F. Clinical Research Trials Should Be Released

With the release of independent studies on the impact of head trauma associated with playing professional football and resulting CTE, some professional football players are beginning to take their careers and mental health into their own hands by retiring after one or two seasons. However, the NFL’s ignorance and

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160 See Fainaru & Fainaru-Wada, supra note 14 (noting preliminary research on definitive CTE diagnosis in living players); supra notes 155-156 (noting players may make more informed decisions regarding health with definitive CTE research and diagnosis). See also supra note 26 (noting long term symptoms of CTE).
161 See Fainaru & Fainaru-Wada, supra note 14 (discussing ‘thorny questions’ that may arise if CTE diagnosis capable in living NFL player). Players given information as to their current state of mental health will be capable of determining when to retire from the NFL. Id.
162 Id. (discussing possibilities in CTE diagnosis of living NFL players).
163 See supra note 95. Diagnosis and treatment options for living CTE patients may also prevent certain side effects such as suicide and further tau build-up exacerbating the symptoms. Nat’l Football League Players’ Concussion Injury Litig., 301 F.R.D. at 216.
164 See Kaduk, supra note 2. An increasing number of NFL players are retiring from the NFL after just one or two seasons due to concussion-related fears. Id. Chris Borland, linebacker for the San Francisco 49ers, retired from the NFL at the age of 24 after sustaining what he believed to be a concussion during training camp and playing professionally for just one year. Id. Borland was a third round draft pick and started in 8 games and had 107 tackles during the NFL season. Id. He earned $420,000 during his first season, collected a $617,000 signing bonus and was on track to earn millions more. Id. Borland stated he did not believe from what he’s researched and experienced, that playing professional football was “worth the risk.” Kaduk, supra note 2. "I thought about what I could accomplish in football, but for me personally, when you read about
subsequent denial of any findings has disadvantaged players and may have led to more deaths from cognitive diseases than if the results were released. The release of this clinical data will provide an indispensable look into the MBTI Committee's progress in conducting such research trials, giving neurologists studying CTE a wider range of statistics to analyze.

V. CONCLUSION

Current NFL players continue to risk their physical and mental health by sacrificing their bodies while playing in the NFL. Former players are now dealing with the effects of severe brain trauma caused by concussions sustained while playing professional football. The Settlement Agreement clearly demonstrates the NFL's continued denial of any wrongdoing or responsibility to protect its players and its failure to acknowledge any credible link between trauma-related disease and concussions. In Mike Webster and Dave Duerson and Ray Easterling [all players who died early deaths and whose autopsies revealed brain disease], you read all these stories and to be the type of player I want to be in football, I think I'd have to take on some risks that as a person I don't want to take on." Id. 165 See supra notes 37-40 (noting rationale for establishing MTBI Committee and scope of reports). See also Etherton, supra note 44, at 15. “[T]he NFL Concussion Committee largely ignored the findings of these independent scientists until 2009 when combined media scrutiny and congressional pressure started a restructuring of the league's policy.” Id. Clinical research was performed for the purpose of improving sports safety and informing the NFL community of the risks associated with playing in the NFL. Id. “As previously noted, the recognition of a football team as a research environment is essential in professional play, where innovation is often a response to the risks of harm posed by innovation.” Robeson & King, supra note 2, at 339. The diagnosis of CTE in living individuals could provide a variety of treatment options as well as several preventative options to fatal symptoms brought on by CTE such as suicide. Id. Players actively playing in the NFL have the option of making the informed decision of when to retire, preventing further harm to the brain. Id. See also supra note 157 (discussing benefits of definitively diagnosing CTE in living NFL players). However, the NFL never released the findings from these research trials even though, if made public, the information gained from these trials would greatly benefit future research on safety procedures in football. Nat'1 Football League Players' Concussion Injury Litig., 301 F.R.D. at 216. See also supra note 122 (discussing independent research showing multiple NFL concussions cause cognitive problems). This research also confirmed that CTE caused by multiple concussions while playing in the NFL “was at least a partial cause of the deaths of some retired players.” Id. 166 See supra notes 58, 97 (noting release of MTBI reports would have provided foundational research for future researchers to build upon).
order for the NFL to decrease the number of concussions sustained, thereby decreasing the number of cognitive impairments, the NFL must implement more stringent rules in diagnosing NFL players with concussions and require players to retire after sustaining a certain number of concussions. By creating a safer environment for players to play professional football, the NFL would be in a far better position financially by decreasing the number of players who retire with diagnoses eligible for a monetary award.