

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
THIS DOCUMENT RELATES TO: ALL ACTIONS	Hon. Anita B. Brody

SETTLEMENT IMPLEMENTATION DETERMINATION

The Settlement Agreement compensates Class Members for head injuries suffered while playing in the National Football League. Class Members can receive Monetary Awards for specific diagnoses that are related to head trauma. To receive a maximum Monetary Award for a specific cognitive deficit, a Class Member Player must have played at least five “Eligible Seasons.”¹ Conversely, if a Player played less than five seasons, then the amount of the Monetary Award is offset for each Eligible Season under five. This offset is based upon the rationale that the number of Eligible Seasons serves as a proxy for the number of concussive hits suffered by a Player. Therefore, Players with more Eligible Seasons likely suffered more hits to the head and are accordingly entitled to a larger award.

The Claims Administrator is in charge of determining how many Eligible Seasons a Player has accrued. Section 2.1(kk) of the Settlement Agreement grants a Player an Eligible Season if he was on a Club’s “Active List” “on the date of three (3) or more regular season or

¹ There are other factors that may limit a Player’s Monetary Award.

postseason games.” The Claims Administrator interpreted “on the date of” to require that a Player must have been on the Active List at the *time* of the game to get Eligible Season Credit. Therefore, when a Club reduced its 53-Player Active List to its 45-Player Active List on the day of a game, the eight players made “Inactive” that day, but who practiced with the team all week, would not receive game credit towards an Eligible Season. The Claims Administrator applied this interpretation to the claims of three Class Members to withhold Eligible Season credit for weeks that the Players were moved from Active to Inactive on game day. Those players appealed the Claims Administrator’s decision.

On December 5, 2017, in response to those appeals, Special Master Wendell Pritchett issued a Ruling that Players moved from their Club’s 53-Player Active List to its Inactive List on the day of a game accrue that game toward the Players’ Eligible Seasons because those Players were on the Active List “on the date of” the game. ECF No. 9513. The Ruling interpreted the Settlement Agreement and therefore was a conclusion of law. The National Football League and NFL Properties LLC (the “NFL Parties”) objected to Special Master Pritchett’s decision.

The Court reviews *de novo* any objections to conclusions of law from its Special Masters. *See* ECF No. 6871 at 4-5 (appointing the Special Masters and defining their roles). “The decision of the Court will be final and binding.” Settlement Agreement § 9.8.

Based on a review of the Special Master’s Ruling, a review of the NFL Parties’ objection, and a review of the oppositions to the NFL Parties’ objection, including oppositions filed by Co-Lead Class Counsel and two individual Class Members,² I approve and adopt the conclusions in Special Master Pritchett’s Ruling. Accordingly, the NFL Parties’ objection is **DENIED**.

² The filings reviewed by the Court are attached to this Settlement Implementation Determination. They have been redacted to remove identifying Player information.

2/28/2018

DATE

s/Anita B. Brody

ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to:

Copies **MAILED** on _____ to:

**Objection of the NFL Parties to the Special Master’s Ruling on
Application of the Definition of Eligible Season to Game Day Roster Designations**

The National Football League and NFL Properties LLC (the “NFL Parties”) respectfully submit this Objection to the Special Master’s Ruling on Application of the Definition of Eligible Season to Game Day Roster Designations (the “Special Master Ruling,” Doc No. 9513) because that Ruling erroneously interpreted the Settlement Agreement definitions of “Eligible Season” and “Active List.” Pursuant to Federal Rule of Civil Procedure 53(f)(4) and this Court’s July 13, 2016 order appointing the Special Masters, this Court reviews *de novo* objections to the Special Master’s conclusions of law, including the interpretation of Settlement Agreement terms. (Doc. No. 6871.)

INTRODUCTION

The Settlement Agreement negotiated by the NFL Parties and Co-Lead Class Counsel is clear: It provides credit for an Eligible Season only to Retired NFL Football Players who were on a Member Club’s 45-player roster¹—its “Active List”—and therefore eligible to play on game day, unless the Club declared that player inactive due to a concussion or head injury.

Specifically, as explained below, the Settlement Agreement definition of an “Eligible Season” distinguishes between those players able to play in a game—that is, those on the Member Club’s 45-player “game-day” roster—and those who were not able to play in a game—that is, those players on the Club’s 53-player “seasonal” roster. To that end, the Settlement Agreement states that, in order to earn credit for an Eligible

¹ The size of these respective roster sizes changed over time, but the NFL Parties refer herein to the “45” and “53” player rosters for ease of reference. By way of background, and as an illustrative example, the structure of a 53-player roster, with 45 players active for game day, began in 1993. (*See* Ex. 1, Declaration of Ken Fiore ¶ 6.) Later, the 2011 Collective Bargaining Agreement expanded the game-day roster from 45 players to 46, while keeping the broader 53-player roster in place. (*Id.* ¶ 8.) Because of the non-static nature of these roster sizes, the Parties did not define the Active List in the Settlement Agreement by reference to a given number of players.

Season under the Settlement’s terms, a player must show that he was on a Member Club’s “Active List”—namely, players on the 45-player game-day roster—on the date of three or more regular or post season games, *or* on the Active List on the date of one such game and then spent two games on the injured reserve list *or inactive list due to a concussion or head injury*.

The Settlement Agreement’s definition of the Active List confirms the point: It is the list of players “eligible” to play for a Member Club “on a particular game day”—the key distinction between a player on the 45-player roster (someone who is eligible to play) and the remaining eight players on the 53-player roster who have been deemed ineligible to play, namely those on the “inactive list.” These interpretations are the only explanations of the Settlement Agreement’s defined terms that do not render meaningless provisions of the Settlement Agreement and are consistent with the facts of NFL roster operation.

The Special Master Ruling, by contrast, erroneously determined that a player who was placed on the inactive list *on game day*—even when *not* due to a concussion or head injury—earns credit towards an Eligible Season because he purportedly was on the “Active List” “on the day of” the game, even if he was not eligible to play in the game. To give meaning to the language of the Settlement that provides credit to a player only when placed on the inactive list *due to a concussion or head injury*, the Special Master Ruling held that such limitation would apply when a player was placed on the inactive list prior to game day. The Special Master’s interpretation of the Settlement Agreement, however, is belied by the plain meaning of the Settlement Agreement and the facts.

First, the Special Master Ruling ignores entirely the word “eligible” in the “Active List” definition. By definition, players placed on the inactive list, at any time, are ineligible to play. Thus, only players on the 45-player roster are eligible to play on game day and are on the Active List.

Second, because the Special Master incorrectly interpreted the Settlement’s Active List to mean the 53-player seasonal roster on the day of a Member Club’s game, that interpretation impermissibly renders meaningless the Settlement provision that provides credit toward an Eligible Season *only* when a Member Club places a player on the inactive list or injured reserve list *due a concussion or head injury*. Specifically, all players on the inactive list remain on the 53-player seasonal roster, and therefore, under the Special Master Ruling, would be on the “Active List” on game day and receive Eligible Season credit. For example, under this interpretation of the Active List, a player placed on the inactive list on Wednesday due to an *ankle injury* still would be on the Active List “on the day of” the game and thus earn credit toward an Eligible Season. The Special Master Ruling noted that such result would be contrary to the terms of the Settlement Agreement (*see* Special Master Ruling at 5), which therefore confirms the error of the Special Master’s interpretation of the Settlement Agreement definition for the Active List.

Third, the Special Master’s interpretation of the Settlement Agreement also rested on the false factual premise that Member Clubs placed players on the inactive list earlier in the week than game day. (*See id.*) But since 2001, Member Clubs can *only* place a player on the inactive list *on game day*. Thus, at the least, the Special Master Ruling renders the “due to a concussion or head injury” provision meaningless because, under

the Special Master Ruling, all inactive players since 2001—regardless of the injury—will be on the “Active List” “on the day of” the game under the Special Master’s erroneous ruling.

Finally, although the Parties could have negotiated to provide Eligible Season credit for players who practiced during the week but were placed on the inactive list each game day, that is not what occurred. Such line drawing always ensues in the negotiation of settlements, and the NFL Parties are entitled to enforce the Agreement as intended, negotiated and judicially approved.

For these reasons, and those set forth below, the NFL Parties respectfully request that the Court overrule the Special Master Ruling and order that the Settlement Agreement’s definitions of Eligible Season and Active List be enforced as negotiated and agreed to by Co-Lead Class Counsel and the NFL Parties, as set forth herein.

BACKGROUND

A. The Settlement Agreement’s Definitions of Eligible Season and Active List

Under the Settlement Agreement, an Eligible Season means “a season in which a Retired NFL Football Player or deceased Retired NFL Football Player was: (i) on a Member Club’s Active List on the date of three (3) or more regular season or postseason games; or (ii) on a Member Club’s Active List on the date of one (1) or more regular or postseason games, and then spent at least two (2) regular or postseason games on a Member Club’s injured reserve list *or inactive list due to a concussion or head injury.*” (Settlement Agreement § 2.1(kk) (emphasis added).)

The Settlement Agreement defines Active List as “the list of all players physically present, *eligible* and under contract *to play for a Member Club on a particular game day*

within any applicable roster or squad limits set forth in the applicable NFL or American Football League Constitution and Bylaws.” (Settlement Agreement § 2.1(a) (emphasis added).)

Although NFL roster sizes have changed over time, since 1993, Member Clubs have maintained a 53-player roster for the regular season (the seasonal roster), and further reduce their roster of players eligible to play on game day to the 45-player (and, since 2011, 46-player) “Active List” or game-day roster. (Ex. 1, Fiore Decl. ¶¶ 6, 8.) The Member Club must place the other 7 or 8 players who are on the seasonal roster onto the inactive list for the game—which renders them ineligible to play, or to participate in warm-ups, dress in uniform, or represent the team in pregame ceremonies. (*Id.* ¶ 7.)² In other words, consistent with the Parties’ intent to credit an Eligible Season only to those players who actually were eligible to play in a game, the Settlement Agreement’s Eligible Season and Active List definitions distinguish between players who were *active* for games (and eligible to play) and those players who were *inactive* for games.

The Settlement Agreement language specifying the *eligibility to play* on a particular game day is critical because the term “Active List” as used in the NFL Constitution and Bylaws—as opposed to in the NFL Settlement Agreement—can have either a broad or narrow meaning depending on how it is used. At its broadest, “Active List” under the NFL Constitution and Bylaws means all players eligible to play during the *season*—whether the preseason, regular season or postseason. (*See, e.g.*, Exhibit 1, 2006 NFL Constitution and Bylaws § 17.2.) But as stated above, “Active List” is also the

² *See also* Exhibit 1, 2006 NFL Constitution and Bylaws § 17.3 (ninety minutes prior to kickoff on game day, “each club is required to establish its 45-player Active List for the game by notifying the Referee of the players on its Inactive List for that game”). These rules are also embedded in the Player Personnel Handbook governing roster operations. (Ex. 1, Fiore Decl. ¶ 3.)

term used in the NFL Constitution and Bylaws to refer specifically to the 45-player roster eligible to play in a *particular game*. The Settlement Agreement specifically and expressly defined Active List to capture that narrower meaning and distinguish between players who are eligible and ineligible to play on game day.

B. The Special Master Ruling

The Special Master Ruling interpretation of the “Eligible Season” and “Active List” definitions deviated from their plain and intended meaning by erroneously concluding that *any* Retired NFL Football Players who were on the 53-player seasonal roster “on the calendar day of their Club’s particular regular season or postseason game shall receive credit toward that game for the purposes of calculating an Eligible Season, even when the Player was placed on the Inactive or Injured Reserve Lists prior to the start of the game.” (Special Master Ruling at 8.) In purported support, the Special Master relied heavily on the temporal part of the Eligible Season definition requiring the player to be on the Active List “on the date of” a game, and the Active List definition requiring the player to be present, eligible and under contract to play “on a particular game day.” (*Id.* at 6-7.) The Special Master misunderstood the “on the date of” and “on a particular game day” language to mean that if a player was on the 53-player seasonal roster the morning of a game, but placed on the inactive list prior to the game—which would indisputably make him ineligible to play on game day—that player would still somehow be on the Active List for purposes of receiving an Eligible Season.

In turn, with an express understanding that such broad interpretation could not read out of the Eligible Season definition the provision that credits only games for which a player was on the inactive list “due to concussion or head injury,” the Special Master held that such provision would still be given effect if it is the applicable rule for crediting

players placed on the inactive list on days *prior to the date of the game*. (*Id.* at 5.) But since 2001, Member Clubs can *only* place a player on the inactive list on the day of the game. (Ex. 1, Fiore Decl. ¶ 11.)³ Simultaneously, Member Clubs deem a player “eligible” to play by establishing the 45-player roster—that is, the Active List for game day—by notifying the referee of the players on the inactive list.

For the reasons below, the Special Master’s stretched interpretation of the Settlement Agreement’s language conflicts with the Settlement Agreement’s plain meaning, the law, and the facts.

ARGUMENT

I. The Settlement Agreement Definitions Are Clear and Unambiguous

Section 27.1(a) of the Settlement Agreement provides that the Settlement Agreement “will be interpreted and enforced in accordance with the laws of the State of New York, without regard to conflict of law principles.” Under New York law, settlement agreements are interpreted like any other contract, and courts are bound to the “plain terms” of the contract and must interpret the contract according to the intent of the parties if such intent is “discernible from the plain meaning of the provisions of the agreement.” (Special Master Ruling at 4-5 (quoting various controlling case law).) In addition, the contract must be interpreted in a manner that does not render any of its provisions meaningless. (Special Master Ruling at 5; *see also In re G-I Holdings, Inc.*, 755 F.3d 195, 202 (3d Cir. 2014) (holding “[a] court should interpret the contract in such a way as to not render any of its provisions illusory or meaningless”).)

³ For the 1993 through 2000 seasons, Member Clubs placed four players on the inactive list on Friday and then another four players on game day. (*Id.* ¶ 11.) For the 1988 through 1992 seasons, Member Clubs established the 45-player active list and a two-player inactive list on the business day prior to the game. (*Id.*) For the majority of prior seasons, there was no inactive list, with limited exceptions and varying structures. (*See id.* ¶ 9.)

Here, the Settlement Agreement unambiguously reflects the intent of the Parties to award Eligible Season credit to those players eligible to play in the game and only to those ineligible because of a specific type of injury—a concussion or head injury. That intent is made clear by the Settlement’s definition of Active List, which specifically and expressly incorporates the requirement that the player is “*eligible*” to play “*on a particular game day*.” (Settlement Agreement § 2.1(a) (emphasis added).) The concept of playing eligibility distinguishes those players declared *active* for play (*i.e.*, on the 45-player game-day roster) as opposed to *inactive* (*i.e.*, on the 53-player seasonal roster but not on the 45-player roster) for the game. Indeed, the very purpose of the NFL’s inactive list is to reduce the 53-player seasonal roster to 45 players eligible for the game. (*See* Ex. 1, Fiore Decl. ¶ 7.)

For this reason, the Settlement Agreement is clear that, contrary to the Special Master Ruling (at 6-7), the Active List is limited to those players actually eligible to play in the game on game day—the 45-player roster—and an Eligible Season is awarded to only those players unless they are on the inactive list because of a concussion or head injury. Nowhere do those definitions state, as they easily could have, that players placed on the inactive list for any reason on game day still receive an Eligible Season. To the contrary, the Settlement Agreement is clear that the only limited path towards Eligible Season credit is for a player on the inactive list because of a concussion or head injury.

II. The NFL’s Interpretation Is the Only One That Does Not Render Meaningless a Contract Provision and Is Consistent With the Facts

Tellingly, the NFL’s interpretation of the defined terms is the only one that does not render other provisions meaningless and the only one consistent with the facts of NFL roster operation.

First, the Special Master’s alternative interpretation of the Settlement Agreement’s definition of Active List to mean the 53-player seasonal roster as of the “calendar day” of the game would render meaningless the Settlement provision that only provides players on the inactive list *due to a concussion or head injury* with credit towards an Eligible Season because the players on the 53-player roster who are deemed ineligible would receive credit when inactive for *any* reason. This is because players on the inactive list *remain on the 53-player seasonal roster*. (Ex. 1, Fiore Decl. ¶ 10.) Thus, if Active List is interpreted to mean the 53-player roster, as the Special Master erroneously ruled, an inactive player is *always* on the Active List “on the date of” a game, regardless of the day of the week the Club placed him on the inactive list, and therefore would always receive Eligible Season credit under the Special Master’s interpretation. Moreover, under the Special Master Ruling, any player declared ineligible and thus “inactive” the morning of a game would earn Eligible Season credit regardless of the reason he was declared inactive.

Second, the Special Master’s interpretation rested on the flawed premise that Member Clubs placed players on the inactive list earlier in the week than game day. (*See* Special Master Ruling at 5.) But since 2001, Member Clubs can *only* place a player on the inactive list *on game day*. (Ex. 1, Fiore Decl. ¶ 11.) For these players, there can be no distinction that credits players towards an Eligible Season when placed on the inactive list due a concussion of head injury on game day but not if placed on the inactive list earlier in the week.

In sum, because the *only* interpretation of the Settlement Agreement that does not render meaningless the inactive list limiting provision, and is consistent with fact, is that

“Active List” means the 45-player roster eligible to play on game day, then “the NFL’s interpretation of this provision must control” under basic rules of contract interpretation. The Special Master Ruling conceded as much by stating “[t]he Special Master concurs that unless there is a possible interpretation of § 2.1(kk) that credits all games in which a Player was placed on the Inactive List ‘on the date of’ the game *without* rendering superfluous the provision crediting a specified subset of games spent on the Inactive List, then the NFL’s interpretation of this provision must control.” (*Id.* at 5.)

III. The Line Drawing in the Settlement Agreement Was Fair and Approved

The NFL Parties do not contest that the negotiated parameters of an Eligible Season result in a player on the practice squad for a season earning 0.5 Eligible Seasons while a player who was on the 53-player seasonal roster yet never made a 45-player Active List for game day earns no Eligible Season credit. There was—and always will be—line-drawing that occurs in this type of Settlement. But as the Court wrote with respect to training camp and preseason participants who do not receive Eligible Season credit, “[w]hile the Settlement may have been more generous if [those] Retired Players received Eligible Season credit,” “the lack of credit does not render the Settlement unfair.” *See In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 410 (E.D. Pa. 2015), *amended* No. 2:12-MD-02323-AB, 2015 WL 12827803 (E.D. Pa. May 8, 2015), *and aff’d* 821 F.3d 410 (3d Cir. 2016), as amended (May 2, 2016). The NFL Parties are entitled to the benefit of their bargain.

CONCLUSION

For the reasons set forth herein, the NFL Parties respectfully request that the Court reverse the Special Master Ruling and adopt the NFL Parties’ interpretations of the Settlement Agreement definitions of “Eligible Season” and “Active List.”

Dated: January 12, 2018

Respectfully submitted,
PAUL, WEISS, RIFKIND,
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/s/ Brad S. Karp_____

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*ATTORNEYS FOR THE
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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION

Kevin Turner and Shawn Wooden,
on behalf of themselves and others similarly situated,
Plaintiffs,

v.

National Football League and NFL Properties, LLC,
successor-in-interest to NFL Properties, Inc.,
Defendants.

THIS DOCUMENT RELATES TO:
ALL ACTIONS

No. 2:12-md-02323-AB

MDL No. 2323

Hon. Anita B. Brody

CIVIL ACTION NO: 14-00029-AB

DECLARATION OF KENNETH FIORE

I, Kenneth Fiore, hereby declare as follows:

1. I am Vice President, Player Personnel at the National Football League. I have personal knowledge of the facts set forth herein and if called and sworn as a witness, I could and would testify competently thereto.

2. The Player Personnel Department at the National Football League oversees the operation of Member Club rosters and contracting, including transactions through which Member Clubs sign and release players, or place players on various roster lists, including the Active, Inactive, Reserve/Injured, Reserve/Physically Unable to Perform, Reserve/Non-Football Illness/Injury, Reserve/Suspended, Practice Squad, Exempt, and Future lists. I submit this declaration to provide the Court with an understanding of how Member Clubs' rosters have

operated in recent decades where relevant to the “Eligible Season” and “Active List” definitions under the Class Action Settlement Agreement (as amended on February 13, 2015).

3. The detailed rules governing roster construction are included in the annual Player Personnel Handbook provided to Member Clubs. The general rules are also included in the Constitution and Bylaws of the National Football League and, in certain areas, the Collective Bargaining Agreements governing NFL football.

4. As a general matter, each NFL Member Club is permitted to keep only a certain number of players on its roster each season. In addition, each Member Club must further reduce its roster of players who are eligible to play in a specific game.

5. For several decades, the Constitution and Bylaws has referred to both the list of players eligible to play during a season, and the list of players eligible to play in specific games, as the “Active List.” For this reason, these designations are often referred to colloquially by the number of players they allow, such as the “53-player roster” or “45-player roster” as opposed to the term Active List.

6. The seasonal Active List consists of all players under contract to a given Member Club who are eligible to play in any preseason, regular season, or postseason game. The seasonal Active List for the regular season fluctuated in size between 45 players and 49 players over several decades before increasing to its current 53-player limit beginning with the 1993 NFL season.

7. In turn, Member Clubs each week must decide which players on the seasonal Active List will be placed on the Active List for a given game and which players will be placed on the Inactive List. Member Clubs establish the Active List by informing the referee which players are on the Inactive List for that game. The players on the Active List for a game are eligible to play. The players on the Inactive List for a game generally are not eligible to play, or

to participate in game day warm-ups, dressing in game uniforms on game days, or representing their Clubs in pregame ceremonies. For the purposes of this Declaration, I do not address certain exceptions, such as for a third quarterback.

8. The size of the Active List and Inactive List for a given game also has fluctuated over time. Most recently, the 2011 Collective Bargaining Agreement governing NFL football increased the Active List for a game to 46 players from 45 players, thereby reducing the number of players placed on the Inactive List each game from eight players to seven players.

9. This general Active List/Inactive List structure has been in place since the 1987 season. Prior to that time, the structure varied. For example, Member Clubs maintained both an Active List and an Inactive List for each game during the 1977 and 1982 seasons, but the Inactive List did not exist for the 1978-1981 and 1983-86 NFL seasons.

10. When the NFL has maintained the Active List/Inactive List structure, players placed by their Member Clubs on the Inactive List for a game remain on the seasonal Active List. For example, in the 2006 NFL season, Clubs maintained a 53-player seasonal Active List and a 45-player Active List for a given game. Put another way, the eight players placed by a Member Club on the Inactive List for a given game remained on the 53-player seasonal Active List.

11. In addition, the timing of when Member Clubs are permitted to place players on the Inactive List for a game has changed over time. Beginning with the 2001 NFL season, Member Clubs have been permitted to place players on the Inactive List *only on game day*. From 1993 through the 2000 NFL season, Member Clubs placed four players on the Inactive List on the Friday of a game week and another four players on the Inactive List on game day. For certain earlier NFL seasons, such as from 1988 through 1992, Member Clubs placed players on the Inactive List on the business day prior to the game.

I, Kenneth Fiore, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on this 22 day of December, 2017.



Kenneth Fiore

Opposition by Co-Lead Class Counsel to the Objection of the NFL Parties to the Special Master’s Ruling on Application of the Definition of Eligible Season to Game Day Roster Designations

OVERVIEW & BACKGROUND

Co-Lead Class Counsel submits this Opposition to the NFL Parties Objection to the Special Master’s Ruling on Application of the Definition of Eligible Seasons to Game Day Roster Designations (“Objections”). As the Court recognized in granting final approval to the Settlement, the “Eligible Season” was intended to serve as “a proxy for the number of concussive hits a Retired Player experienced as a result of playing NFL Football.”¹ Accordingly, consistent with the plain language of the Settlement Agreement—in alignment with the Settlement’s broader context—the Special Master properly ruled that Retired NFL Football Players on the Active List (that is the full 53-Man Roster) should earn credit toward an Eligible Season. Ruling at 8.

The NFL through its Objection again tries to strip Retired NFL Football Players who practiced all week (and were on their team’s Active List, but simply did not “suit up” for that week’s game) of any credit toward an Eligible Season. In the NFL’s view, notwithstanding their full participation and exposure to NFL activities—and hits—during the practice week, such inactive, but healthy, players get zero credit towards an Eligible Season for all of their Active List efforts. In sharp contrast, even those players who were never on an Active List but instead were only on a team’s developmental or practice squads would earn credit toward half an

¹ *In re Nat. Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 409 (E.D. Pa. 2015), *amended sub nom. In re Nat’l Football League Players’ Concussion Injury Litig.*, No. 2:12-MD-02323-AB, 2015 WL 12827803 (E.D. Pa. May 8, 2015), *and aff’d sub nom. In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016), *as amended* (May 2, 2016), *cert. denied sub nom. Gilchrist v. Nat’l Football League*, 137 S. Ct. 591, 196 L. Ed. 2d 473 (2016), and *cert. denied sub nom. Armstrong v. Nat’l Football League*, 137 S. Ct. 607, 196 L. Ed. 2d 473 (2016).

Eligible Season. Indeed, were the NFL's tortured interpretation of the Settlement Agreement operative, Retired NFL Football Players on the Active List who did not "suit up" for a game would be treated no better than those Retired NFL Football Players who were unable to engage in football-related activities due to injuries or otherwise.

The NFL's arguments were considered by the Special Master, and were properly rejected: "[T]he plain meaning of the terms of the [Settlement] Agreement" requires that "NFL Players who were on the Active List on the calendar day of their Club's particular regular season or postseason game shall receive credit toward that game for the purposes of calculating an Eligible Season." Ruling at 8. The Court should affirm the Ruling of the Special Master and, in so doing, ensure that Retired NFL Football Players receive all of the benefits negotiated on their behalf.

The Settlement Agreement

In granting Final Approval of the Settlement, the Court succinctly summarized the allegations of the dire situation faced by the Retired NFL Football Players after years of on-going exposure to head hits throughout their NFL careers:

MDL Plaintiffs allege that the NFL Parties fostered a culture surrounding football that glorified violence and a gladiator mentality, encouraging NFL players to play despite head injuries.

* * * *

MDL Plaintiffs allege that head injuries lead to a host of debilitating conditions, including Alzheimer's Disease, dementia, depression, deficits in cognitive functioning, reduced processing speed, attention and reasoning, loss of memory, sleeplessness, mood swings, and personality changes. MDL Plaintiffs also allege that the repetitive head trauma sustained while playing football causes a gradual build-up of tau protein in the brain, resulting in Chronic Traumatic Encephalopathy ("CTE"). CTE allegedly causes an increased risk of suicide, and many symptoms often associated with Alzheimer's Disease and dementia, as well as with mood disorders such as depression and loss of emotional control.

307 F.R.D. at 362.

In negotiating the Settlement Agreement, the Parties established a measure of the risk to which any given Retired NFL Football Player was exposed—the “Eligible Season.” While a Retired NFL Football Player did not need to establish any Eligible Seasons to register for the Settlement or to receive a Monetary Award when he was diagnosed with a Qualifying Diagnosis, the number of Eligible Seasons earned throughout his career determines the amount of his Monetary Award.² If a Retired NFL Football Player earned five or more Eligible Seasons, he is eligible for the full award at his age (subject to other offsets). Settlement Agreement § 6.7(b)(i). However, if a Retired NFL Football Player earned fewer than five Eligible Seasons, his award will be subject to increasing offsets, with a Retired NFL Football Player who earned no Eligible Seasons facing a reduction of his Monetary Award of 97.5%. *Id.*

An Eligible Season is not measured by how many years a Retired NFL Football Player was under contract with an NFL team. Rather, it considers the nature of a Retired NFL Football Player’s exposure to the risk of head hits. For example, a Retired NFL Football Player who was on his team’s Active List on the date of three or more regular or post-season games in a season earned an Eligible Season for that season. A Retired NFL Football Player who was not on the Active List, and only on his team’s developmental, taxi, or practice squad for eight or more games earned half an Eligible Season. Finally, a Retired NFL Player who was inactive due to injury would earn no credit toward an Eligible Season, unless he had a concussion or head injury.

The Settlement Agreement provides in full that an “Eligible Season” means:

a season in which a Retired NFL Football Player or deceased Retired NFL Football Player was: (i) on a Member Club’s Active List on the date of three (3) or more regular season or postseason games; or (ii) on a Member Club’s Active List on the date of one (1) or more regular or postseason games, and then spent at

² Additionally, to be eligible for the other major benefit of the Settlement, the free examination under the Baseline Assessment Program, a Retired NFL Football Player needs to have earned at least one-half an Eligible Season. Settlement Agreement § 5.1.

least two (2) regular or postseason games on a Member Club's injured reserve list or inactive list due to a concussion or head injury.

A "half of an Eligible Season" means a season in which a Retired NFL Football Player or deceased Retired NFL Football Player was: (i) on a Member Club's practice, developmental, or taxi squad roster for at least eight (8) regular or postseason games; or (ii) on a World League of American Football, NFL Europe League, or NFL Europa League team's active roster on the date of three (3) or more regular season or postseason games or on the active roster on the date of one (1) or more regular or postseason games, and then spent at least two (2) regular or postseason games on the World League of American Football, NFL Europe League, or NFL Europa League injured reserve list or team inactive list due to a concussion or head injury.

Settlement Agreement § 2.1(kk).

The Settlement Agreement defines "Active List" as "the list of all players physically present, eligible and under contract to play for a Member Club on a particular game day within any applicable roster or squad limits set forth in the applicable NFL or American Football League Constitution and Bylaws."³ Settlement Agreement § 2.1(a).

By way of comparison, the NFL Constitution and Bylaws ("NFL Constitution") provides that the "Active List . . . shall consist of all players eligible to play in any preseason, regular season, playoff, championship, or postseason game then under contract to the club within the applicable player limit as set out in the preceding section [Section 17.1]." NFL Constitution §

³ The Constitution and Bylaws applicable to the majority of Retired NFL Football Players first went into force on February 1, 1970 and was subject to occasional revision through to 2010. A copy of Article XVII of the NFL Constitution – "Player Limits and Eligibility" accompanies this Opposition. The Settlement-Agreement reference to the term "roster" only appears in the NFL Constitution and Bylaws when discussing the full 80 man roster, and required "roster reduction to [53] players on the Active List." NFL Constitution § 17.1 (C) and (D). The term "squad" only appears when discussing the "Practice Squad" (which consists of a limited number of free agents who will participate in practice from week to week and is separate from the Active List), and the "Left Squad" (which is part of the Reserve List). *Id.* §§ 17.1, 17.5, 17.17.

17.2.⁴ The “preceding section” of the NFL Constitution, Section 17.1, sets forth the applicable player limits at particular points in time, noting that a team is required to reduce its Active List to 53 players from its full 80 man roster by the end of preseason. *See generally id.* § 17.1; *id.* § 17.1(F). Within the context of the Settlement Agreement, each of these 53 players would be under contract and eligible to play on a particular game day, thus satisfying the Settlement Agreement’s definition for inclusion on the team’s Active List on the date of a particular game.⁵

Approval of Eligible Seasons as a Reasonable Proxy for Head Injuries

In support of Final Approval, the Parties made clear in their respective submissions that Eligible Seasons was a “proxy for the number of concussive hits a Retired Player experienced as a result of playing NFL Football.” For example, in their Memorandum of Law in Support of Final Approval of the Class Action Settlement Agreement and in Response to Objections (ECF No. 6422) (“NFL Final Approval Mem.”), the NFL said plainly that “to the extent retired players have alleged that playing football caused their injuries, it makes good sense to use the amount of

⁴ Section 17.14 of the NFL Constitution makes clear that there are three “lists” on which a player can be listed: Active List, Reserved List, and Exemption List. The NFL endeavors to use the term “eligible” to establish that the Parties could mean only the “45 Man” roster for the term Active List as used in the Settlement Agreement. However, the NFL Constitution (which drives the definition in the Settlement Agreement, says otherwise. Players on the full 53-Man Active List are eligible to play in any game. *Id.* § 17.2. Players on the Reserved List and Exemption List are ineligible to play. *See Id.* §§ 17.5, 17.6(A), 17.14(A) (taking players on the Exempt list off of the Active List). Players on the Active List who are announced to be inactive on any given week’s game day (the so-called “Inactive List”) are simply a subset of those on the Active List which are all the players eligible to play. A subset of the inactive players will be injured and may also be injured due to “concussion or head injury” as contemplated in the Settlement Agreement, Section 2.1(kk)(ii)(2). The NFL Parties repeatedly use a term “seasonal Active List” in their Objections, but there is no such list.

⁵ Within a separate provision, the NFL Constitution further delineates the Active List, providing that one hour and 30 minutes prior to kickoff, requiring each club to establish its “45-player Active list” *for the game*, *id.* § 17.3 (emphasis added)—a distinction eschewed by the Settlement Agreement. Accordingly, the Special Master noted that “[i]f the parties had intended to specify that a Player must be on the Active List at the particular moment that the game starts [*i.e.* the 45 player roster] . . . they could have written the provision accordingly.” Ruling at 7.

time a retiree played in the NFL as a fair proxy for alleged exposure to repetitive concussive and subconcussive events—the key common allegation in all these cases.” NFL Final Approval Mem., at 6; *see also id.* at 18, 106-107, 108 n.48. Indeed, the NFL acknowledged that Monetary Awards under the Settlement are tied directly to the Retired NFL Football Player’s exposure to risk: “as a proxy for the exposure of a Retired NFL Football Player to repetitive head impacts while playing in the NFL, the Settlement Agreement applies an Offset based on the number of Eligible Seasons played. Thus, the more Eligible Seasons played, the smaller the Offset.” *Id.* at 18. Thus, in contrast to a Retired NFL Football Player on an “Active List”, a Retired NFL Football Player on injured reserve with a broken leg would earn nothing toward an Eligible Season: “the notion that a player should be given credit for the time he served on an injured reserve list for an injury . . . *other than a concussion or head injury*, makes no sense. For example, a Retired NFL Football Player who suffers a broken leg on the first day of training camp is unlikely to have experienced the same level of exposure as a player who played for a Member Club all season long.” *Id.* at 112.

Accepting the arguments of the Parties, and rejecting those of certain objectors, the Court found that Eligible Seasons, as a measure of a Retired NFL Player’s career, was “a proxy for the number of concussive hits a retired Player experienced”⁶

Proceedings Below & Ruling of the Special Master

As summarized by the Special Master, the NFL wanted an absolute exclusion of any Retired NFL Football Player who was listed as inactive during any week, whether or not they

⁶ *In re Nat. Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 409. The Court of Appeals for the Third Circuit concurred “with the District Court that the definition of eligible season in the settlement was reasonable because it is a proxy for the number of head injuries.” *In re Nat’l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 444 n.14 (3d Cir. 2016), *as amended* (May 2, 2016) 821 F.3d 410, 444 n.14

were injured, arguing that allowing such player to earn credit toward an Eligible Season would render superfluous the crediting of “games on the Inactive List *due to a concussion or head injury.*” Ruling at 3. In contrast, the Special Master noted that “Co-Lead Class Counsel argue that the ‘letter and spirit’ of the Settlement Agreement is violated by excluding rostered Players who practice the week leading up to the game but were placed on the Inactive List 90 minutes before kickoff from Eligible Season accrual” as argued for by the NFL. *Id.*

The Special Master rejected the arguments of the NFL, and held that “the plain meaning of the terms of the Agreement” requires that “NFL Players who were on the Active List on the calendar day of their Club’s particular regular season or postseason game shall receive credit toward that game for the purposes of calculating an Eligible Season.” Ruling at 8. Following the letter of the Settlement Agreement, the Special Master also recognized that players who were sidelined with injuries (on Injured Reserve or inactive due to injury⁷) would not receive credit toward an Eligible Season unless they had a “concussion or head injury.” Ruling at 5, 7. The Special Master noted that this allowed players who received head hits throughout the week to receive credit towards an Eligible Season (rather than no credit). Ruling at 7-8.

Importantly, the Ruling, like the arguments of the Parties, was based on the language of the Settlement Agreement and the revisions of the 1970 NFL Constitution and Bylaws which provide that the list of inactive players is made minutes prior to the game. The NFL made no

⁷ The designation of “Injured Reserve” carries severe consequences for both the team and the player: a player on Injured Reserve is ineligible to play for the remainder of the season, even if he had been on the Active List and eligible to play. *See e.g.* NFL Constitution § 17.6 and 17.18. Accordingly, for the purposes of the Settlement Agreement, when injuries were not sufficiently grave to put a player on “the injured reserve list,” he will merely be placed on “the injured inactive list,” thereby missing practice and perhaps a game (and all related head hits) in the interim, but not sidelined for the entire season.

argument before the Special Master regarding the following, and upon which they now seek a different outcome than the one set forth in the Ruling:

- The bald assertion that some earlier revisions of the NFL Constitution (which the NFL did not present) provided that some players would be listed as inactive prior to game day, without providing extant copies of these earlier versions. Objection at 9.
- The new concern that injured players who are listed as inactive on game day might be given credit toward an Eligible Season even if they had not suffered a “concussion or head injury.” Objection at 3, 9.
- The declaration of Kenneth Fiore, which presents entirely new facts and relies (often without citation and always without providing copies) on documents other than the NFL Constitution—documents that are not incorporated by reference into the definition of “Active List” in the Settlement Agreement.

ARGUMENT

Game day was the culmination of an entire week’s practice for Retired NFL Football Players on the Active List, but not all of these player would be allowed to “suit up” for the game. And only some of those who suited up would ever make it to the field. The Settlement seeks, among other benefits, to compensate Retired NFL Football Players for the harm they suffered over the course of their NFL careers, including (and often most critically) throughout a week’s practice. Recognizing the medical link between repeated head hits and certain neurocognitive conditions, the Settlement provides for Monetary Awards to Retired NFL Football Players who develop a Qualifying Diagnosis. The amount of a Monetary Award takes into account the length and nature of the Retired NFL Football Player’s career, by calculating his Eligible Seasons. As the Special Master held, Retired NFL Football Players on the Active List earn a full credit for the risk they were exposed to throughout the week, whether or not they ever ended up on the field. Retired NFL Football Players on developmental, taxi, or practice squads also earn credit, albeit less credit. Retired NFL Football Players sidelined with injuries earn no credit, unless their injuries relate to a head hit.

The Objections of the NFL should be rejected for two reasons. First, the NFL objects to the Ruling of the Special Master primarily through new arguments and new (and irrelevant) facts not raised earlier, including, most obviously, the entire Declaration of Kenneth Fiore. While the Court reviews *de novo* conclusions of law by the Special Master,⁸ the Parties do not, thereby, enjoy *de novo* argument; new arguments and facts should be ignored by the Court.⁹ Otherwise, referral made by the Court would be turned into a meaningless exercise.¹⁰

Second, even if the Court were to consider the new facts and arguments improperly offered by the NFL in its Opposition, the Court can and should affirm the holding of the Special Master: “NFL Players who were on the Active List on the calendar day of their Club’s particular regular season or postseason game shall receive credit toward that game for the purposes of calculating an Eligible Season.” And, by the plain language of the Settlement Agreement, players who were sidelined with injuries (except concussions and other head injuries) would not receive credit. This is the very purpose of the proxy established by the term “Eligible Seasons”—as a stand-in for head hits throughout any given week.

⁸ While review is *de novo*, the Court may rely on the Ruling to the extent it deems proper. *Gemmer v. Surrey Svcs. for Seniors, Inc.*, Civ. No. 10-810, 2010 WL 5129241, at *1, n.1 (E.D. Pa. Dec. 13, 2010).

⁹ See, e.g., *Lewis v. Astrue*, Civ. No. 11-3986, 2012 WL 1231878, at *6 (E.D. Pa. April 11, 2012) (citing *Jimenez v. Barnhart*, 46 Fed. Appx. 684, 685 (3d Cir. 2002); *Commissariat A’ L’Energie Atomique v. Samsung Electronics Co.*, 245 F.R.D. 177, 179 (D. Del. 2007) (noting similarity to *de novo* review, rather than *de novo* hearing, under Rule 53 and 28 U.S.C. § 636); *Dunkin’ Donuts Franchised Restaurants LLC v. Mehta*, Civ. No. 07-0423, 2007 WL 2688710, at *1 (W.D. Pa. Sept. 11, 2007) (rejecting declaration not previously submitted).

¹⁰ See, e.g., *Net2Phone, Inc. v. Ebay, Inc.*, No. CIV.A. 06-2469 KSH, 2008 WL 8183817, at *4 (D.N.J. June 26, 2008) (“courts generally exclude evidence of new arguments on objections ... because systematic efficiencies would be frustrated and the Special Master's role reduced to a mere dress rehearsal.... In addition, it would be fundamentally unfair to permit a litigant to set its case in motion before the Special Master ... and—having received an unfavorable recommendation—shift gears before the reviewing judge.”) (citations and quotations omitted).

The NFL's late discovery of variations on the day the list of inactive players was announced does not change the letter and spirit of the Settlement Agreement. Indeed, none of the arguments put forth by the NFL below and none of the new facts and arguments made here compel any different outcome.¹¹ The question of whether a player is "eligible" to play is answered simply by being on the Active List. A player who was sidelined with injuries (either injured reserve or inactive) earns no credit unless the injury relates to a head hit. The question of whether a player inactive due to injuries will earn any credit turns on the nature of his injuries (or being on Injured Reserve and simply not eligible to play) not, as the NFL now endeavors to argue, on the date or time when the so-called Inactive List was announced. Indeed, the NFL's renewed effort to use the "Inactive List" to deny uninjured players on the Active List credit toward an Eligible Season leads again to the absurd result condemned by the Special Master. Active List players who did not "suit up" for a week's game would earn no credit toward an Eligible Season while players on the Practice Squad receive credit towards the specified half Eligible Season. *See* Ruling at 7-8.

CONCLUSION

For all of the foregoing reasons, the Special Master's Ruling on Application of the Definition of Eligible Seasons to Game Day Roster Designations should be affirmed and the Objections of the NFL thereto denied.

¹¹ The Court, of course, has the power to modify the Ruling to preserve the core holding by the Special Master in light of facts it may decide to consider. *See, e.g. Johnson v. Smithkline Beecham Corp.*, Civ. No. 11-5782, 2015 WL 1004308, at * 8 (E.D. Pa. Mar. 9, 2015) (on *de novo* review under Rule 53(f), the Court may "adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.").

Dated: February 12, 2018

Respectfully submitted,

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Exhibit

**CONSTITUTION
AND BYLAWS
OF THE
NATIONAL
FOOTBALL LEAGUE**



**Effective February 1, 1970
(Revised as of June 1, 2010)**

*Provisions of the Constitution relating to players (in particular, Articles XII, XIV, XV, XVI, XVII, and XVIII) remain subject to the provisions of the Collective Bargaining Agreement.

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Article XVII

Player Limits and Eligibility

Cutdowns and Player Limits

- 17.1 (A) Subject to paragraphs (B) through (D) of this Section 17.1, clubs will be limited to a year-round roster limit of 80 players on the following combined lists: Active, Inactive, Reserve/Injured, Reserve/Physically Unable to Perform, Reserve/Non-Football Illness/Injury, Reserve/Suspended, Practice Squad, Exempt, and Future. The 80-player limit will not include any players on the following lists: Reserve/Retired, Reserve/Did Not Report, Reserve/Left Squad, Reserve/Military, un-signed draft choices, unsigned Veteran Free Agents, Unprotected Players, and players who have been declared ineligible to participate (suspended) by the Commissioner.
- (B) Any players placed on Reserve/Injured prior to the roster reduction to 65 players on the Active List will not count on the club's overall roster limit of 80 players, provided that the club requested waivers on the player with the designation "injured" and placed the player on Reserve/Injured immediately after the expiration of the claiming period and provided that all such players will count on the club's overall 80-man roster limit after 4:00 p.m., New York time, on the day of the cutdown to 65 players.
- (C) Any players placed on Reserve/Physically Unable to Perform or Reserve/Non-Football Injury/Illness prior to the roster reduction to 65 players on the Active List will not count on the club's overall roster limit of 80 players, provided that the club requests waivers on the player with the designation "Failed Physical" immediately upon reporting to training camp and failing the club's physical examination and that the club places the player on Reserve/PUP or Reserve/NF/I immediately after the expiration of the claiming period. All such players will count on the club's overall roster limit after 4:00 p.m., New York time, on the day of the cutdown to 65 players. All players so placed on Reserve/PUP or Reserve/NF/I shall not be eligible to play or practice for that club for the remainder of the regular season and postseason, notwithstanding other provisions in this Constitution and Bylaws. The same provisions shall apply to a Vested Veteran who is placed on Reserve/PUP or Reserve/NF/I immediately upon failing the training camp physical examination, provided that the club declares to the League office at such time that the player shall be ineligible to practice or play for the remainder of the regular season and postseason.

- (D) If a player has passed his club's training camp physical examination and is placed on Reserve/Non-Football Injury/Illness prior to the roster reduction to 65 players on the Active List, he will not count on the club's overall roster limit of 80 players, provided that the club requests waivers on the player with the designation "Non-Football Injury/Illness" and provided that the club places the player on Reserve/NFI immediately after the expiration of the claiming period. All such players will count on the club's overall roster limit of 80 players after 4:00 p.m., New York time, on the day of the cutover to 65 players. All players so placed on Reserve/NFI shall not be eligible to play or practice for that club for the remainder of the regular season and postseason. The same provisions shall apply to a Vested Veteran who is placed on Reserve/NFI after passing his club's training camp physical examination.
- (E) If a player, after reporting to training camp, leaves his club without permission, and the club is granted an exemption, such player will not count on the club's overall roster limit of 80 players until 4:00 p.m., New York time, on the day of the cutover to 65 players on the Active List, or until the player returns to the club, whichever occurs first.
- (F) Subject to the provisions of Section 17.3 of this Article, clubs will be required to reduce their Active Lists to 75 players by 4:00 p.m., New York time, on the Tuesday after the third preseason weekend and to 53 players by 6:00 p.m., New York time, on the Saturday of the fourth preseason weekend. The claiming period for players on waivers at the final cutover shall be 12 noon, New York time, on the following day (Sunday).
- (G) No player may play with any team unless an executed contract with that team is on file in the office of the Commissioner, pursuant to the provisions of Section 15.6. This number shall include all veteran players upon whom options have been exercised for the applicable year, except a veteran player discharged for military service subsequent to June 1st in the applicable year.
- (H) Notwithstanding other provisions of this Constitution and Bylaws allowing recall of waiver requests under certain circumstance, the following rules are in effect with respect to waivers involving players who do not meet the physical standards of the club: Any waiver request on an injured player and any waiver request on a player who fails the club physical may not be recalled and no claim on any such player may be withdrawn.

Active/Inactive Lists

- 17.2 The Active List, for the purposes of this Article, shall consist of all players eligible to play in any preseason, regular season, playoff, championship, or postseason game then under contract to the club within the applicable player limit as set out in the preceding section. This Section 17.2, and succeeding Section 17.3 are in force only within the provisions of the applicable player limit in a given year.
- 17.3 One hour and 30 minutes prior to kickoff, each club is required to establish its 45-player Active List for the game by notifying the Referee of the players on its Inactive List for that game. Each club may also identify one player on its Inactive List who may dress for the game, provided that (1) such player is a quarterback; (2) the club has two quarterbacks on its 45-player Active List; (3) if the third quarterback enters the game during the first three periods, he must replace one of the club's other two quarterbacks, neither of whom may thereafter return to the game under any circumstances; and (4) if the third quarterback enters the game during the fourth period or any overtime period, he must replace one of the club's other two quarterbacks, either of whom is permitted to return to the game.

Players on the Inactive List, except for the Third Quarterback, are prohibited from participating in game day warm-ups with their teams for all preseason, regular season, and post-season games, except the Super Bowl game. Except for the Third Quarterback, they are also prohibited from dressing in game uniforms on game days, or representing their teams in pregame ceremonies. They may be in the bench area during the game provided they dress in clothing issued by the club to its game staff and display appropriate bench area credentials.

For the Super Bowl game only, Inactive List players may participate in game day warm-ups in their uniforms. During the game, they are permitted in the bench area, provided they dress in clothing issued by the club (which may include game jersey) to its game staff and display appropriate bench area credentials.

Any club that makes a roster change on game-day, subject to the provisions outlined above, also has the responsibility of confirming such change by NFLNet to the League office the following day.

Future List

- 17.4 (A) The Future List, for the purpose of this Article, shall consist of all players under contract to a club for a succeeding year or years but not for the current year. Clubs may not sign free agent players to their Future List until the day after the last day of the final regular season weekend (Tuesday if the final regular season game begins

on Monday). If the club of a Practice Squad player has completed its season (i.e., is not participating in the playoffs or has lost in the playoffs), such Practice Squad player may thereafter be signed as a free agent to any club's Future List. A free agent signed to a club's Future List is not eligible to be signed by any club for the current season. Contracts for players signed to a club's Future List will begin on February 1 of the subsequent year.

- (B) No player may practice with a club unless such player is signed to a contract with that club for the current or succeeding season or seasons. All contracts including contracts of players on the Future List must be filed with the Commissioner in accordance with the provisions of Section 15.3 hereof.

Reacquisition of Players

- (C) A player who has been traded or assigned via waivers cannot return to the club that took such action until two seasons, including the season of the year in which he left the club, have elapsed, unless one of the following exceptions applies:

Reacquiring Traded Player

- (1) Traded player must have been on the Active List of the assignee club, any club beyond the assignee club, or a combination thereof, for a minimum of four (4) regular season games, after which the original assignor club may reacquire the player by waiver assignment or free-agent signing. The four-game requirement specified herein may span two regular season if applicable; or
- (2) Traded player must have been on the Active List of the assignee club, any club beyond the assignee club, or a combination thereof, for less than four (4) regular season games and must have been placed on waivers and terminated by the assignee club or any subsequent club, in which case the original assignor club may reacquire the player only by free-agent signing. The original assignor club under these circumstances must not reacquire such player by trade or assignment via waivers; or
- (3) Traded player, before participating in any practice or game for the assignee club, must have reverted to the assignor club through conditions of a trade requiring his reporting to or passing the physical examination of the assignee club, or through a condition requiring him to execute a previously agreed-upon contract with the assignee club within a period of time agreed upon by the clubs, but in no event longer than

three business days after the trade has been approved by the Commissioner.

Reacquiring Player Assigned Via Waivers

- (4) Player assigned via waivers must have been on the Active List of the assignee club, any club beyond the assignee club, or a combination thereof, for a minimum of four (4) games while a player limit is in effect (preseason or regular season games, or a combination thereof), after which the original assignor club may reacquire the player by trade, waiver assignment, or free-agent signing. The four-game requirement specified herein may span two seasons if applicable; or
- (5) Player assigned via waivers must have been on the Active List of the assignee club, any club beyond the assignee club, or a combination thereof, for less than four (4) games while a player limit is in effect (preseason or regular season games, or a combination thereof) and must have been placed on waivers and terminated by such assignee club or any subsequent club, in which case the original assignor club may reacquire the player only by free-agent signing. The original assignor club under these circumstances must not reacquire such player by trade or assignment via waivers.

Reacquiring Terminated Player

- (6) There are no restrictions on reacquiring, in the same or a subsequent season, players who have been terminated via the waiver system, subject to restrictions that may appear in other parts of this Constitution and Bylaws.

Evasion of Reacquisition Rules

- (7) Any evasion of the rules covering reacquisition of players, including but not limited to procedures by a club to place a player on another club's roster in order to evade the former club's player limit, will result in appropriate discipline by the Commissioner against all involved clubs that are proven to have taken part in such maneuvers with prior knowledge of the evasion.
- (D) No player who opts for free agency under the waiver system section of the Collective Bargaining Agreement can re-sign with the same club in the same season or in the following season.

Reserve List

17.5 The Reserve List of each club may consist of players in the following categories:

- (A) Retired
- (B) Did not report
- (C) Left squad (quit team)
- (D) Injured
- (E) Physically unable to perform (at the time of the training camp physical)
- (F) N-F/I (Non-football injury or illness)
- (G) In military
- (H) Selected in Selection Meeting by the club, but never under contract
- (I) Suspended or declared ineligible, or expelled from the League for violation of the contract between the player and the club or for other reasons permitted by this Constitution and Bylaws.

Players placed on Reserve in the manner prescribed in (A), (B), (G), and (I) may apply to the Commissioner for reinstatement. Players placed on Reserve under (C) shall be governed by the provisions of Article 17.15(C).

Players placed on Reserve under (D) shall not be eligible to play or practice with the club for the remainder of the regular season and postseason under any circumstances. Players placed on Reserve under (E) are subject to the provisions of Article 12.3(E). Players on Reserve under (H) may be activated upon signing.

A player on a club's Reserve List shall not be eligible to contract with any other club unless and until the player is released or his contract assigned as provided in this Constitution and Bylaws.

Reserve List Limitations

17.6 (A) Unless this Constitution and Bylaws provides otherwise, any player on the Active List of the club who reports to the club and is thereafter placed on the Reserve List by reasons other than military service may not play with his club for the balance of that preseason or regular season unless waivers have been asked on such player, which waivers may not be recalled; provided, however, that if such player becomes an active player with another club and such other club thereafter asks waivers on him, and he is either claimed, released on waivers, or plays with another club in its league in that season, then the original club is entitled to restore such player to its Active List if it acquires him in a manner permitted by this Constitution and Bylaws or the rules of the League. If another club acquires such player from the Reserve List of another club by

means of a trade following the establishment of 65 active players, such player cannot play for the acquiring club for the balance of that season unless the acquiring club waives such player without recall.

- (B) Whenever a player is placed on the Reserve List of a club for any reason, the club must promptly submit a written report to the Commissioner stating the reason for such action. Upon receipt of such information, the Commissioner shall investigate the circumstances thereof in such manner as he deems appropriate. The Commissioner shall have the right to request further explanation or substantiation of the matter, and the club shall supply the same. In the event the Commissioner determines that placing such player on the Reserve List violated the provisions of Section 17.7 of the Constitution and Bylaws of the League, the Commissioner shall have the power to remove such player from the Reserve List and to take such other action against the club that he believes appropriate. Additionally, when such determination is made by the Commissioner, all expenses incurred by the Commissioner in any investigation thereof shall be charged against the involved club and such club shall be obligated to pay such expenses upon demand by the Commissioner.

Evasion

- 17.7 No club shall place any player on its Reserve List in order to evade the player limit.

College All-Star Players

- 17.8 Any player injured while a member of a preseason All-Star squad in connection with a game approved by the League may thereafter be carried without being counted as an Active Player for the determination of the applicable player limit and without requiring the club to place such player on its Reserve List. Such privilege shall continue until such player is able to play football. If such player, after being listed and counted as one of the Active Players within the applicable player limit, has a reoccurrence of the same injury, then such player may again be carried as a player of the club without being counted as an Active Player or being placed on the Reserve List until he again recovers from such reinjury. A medical report of the All-Star participant's injury must be filed with the League office as soon as possible after the All-Star game.

Retired Players

- 17.9 A Retired Player is defined as a player who discontinues professional football play in the League while under contract or option to a club. A Retired Player shall not be eligible to play football in the League until he shall have been reinstated by the Commissioner as provided in Section 17.13. Upon his reinstatement such player shall be eligible to play football only for the club entitled to his services at the time of his retirement or its assignee.

Notwithstanding the above, if such retirement occurs prior to the date that such player is required to report to the club's training camp, the player must provide written notification to the Commissioner of his retirement before his club shall be permitted to place him on its Reserve List, provided that no club shall be permitted to place a player on Reserve/Retired until 4:00 p.m., New York time, on the 15th day following the receipt of such letter by the Commissioner.

Such letter must be in a form acceptable to the Commissioner and must acknowledge that if the club places the player on Reserve/Retired prior to the date that such player is required to report to its training camp, such player shall not be eligible to be reinstated in the same season.

At any time prior to the expiration of the 15-day period that follows the receipt by the Commissioner of a player's retirement letter, a player may revoke such letter by written notification to the Commissioner, in which case the club shall not be permitted to place the player on its Reserve/Retired list prior to the date that such player is required to report to its training camp.

If any player is placed on Reserve/Retired on or after the date that he is required to report to his club's training camp, he shall be eligible for reinstatement pursuant to the provisions of Section 17.13.

Military Service List

- 17.10 Any player on the Active List for the first regular season game who is thereafter inducted into the Armed Forces of the United States shall automatically be placed on the Reserve List of his club and shall not count in the Active Player limit of said club nor be permitted to play or practice with the club until his reinstatement to the Active List, subject to the provisions of Section 17.13 and Section 9.3(C)(4).

The following additional rules shall apply in respect to the military service of a player:

- (A) No player who reports to his club after the commencement of training camp because of any reserve military obligations affecting

such player need be counted on the Active Player roster of the club until he receives one (1) day's practice for every day missed because of his military obligation, but not to exceed four (4) weeks, provided, however, if such player plays in one or more preseason games, he must be counted on the Active List.

- (B) No player reporting to his club after October 15 in any year need be counted on the Active or Inactive List unless the club wishes to activate such player for a regular season game.
- (C) Whenever a player reports to his team and thereafter is placed on military reserve to permit such player to fulfill the required two weeks of active military duty, such player shall be allowed one week following his return to the club before such player must be counted as an active player. However, if the club elects to play such player in any preseason or regular-season game, such player must be included on the Active List of such club.
- (D) None of the privileges accorded under the provisions of this Section 17.10 shall apply to players having military service obligations of less than a period embracing fourteen (14) days.
- (E) All clubs are obligated to notify the League office within forty-eight (48) hours of the time when any of its players are released from active military service and shall specify the date such player reported to the club. Failure of a club to comply with this provision will require the League office to treat the date such player was released from the service as the date when such player reported to the club.
- (F) Any player released from military service after October 15 and under contract to the club for such season may be placed on the Inactive List of that club and may be named to the Active List of the club and participate in any Divisional Playoff game, Conference Championship game, or Super Bowl game in accordance with the provisions of Section 20.6.

Suspended Players

- 17.11 A club or the Commissioner may suspend a player for violation of this Constitution and Bylaws, his NFL Player Contract, or the rules and regulations of the League or the club. During the period of suspension, a player shall not be entitled to compensation and shall be ineligible to play with any club. Any player suspended by a club shall have the right to appeal to the Commissioner, who shall have authority to order his reinstatement upon such terms as he deems proper. Players suspended by either the Commissioner or a club will be placed in the category of Reserve/Suspended. If the immediate former category of a player

suspended by a club was the Active List and the club wishes to lift his suspension and return him to the Active List, it may do so without requesting procedural-recall waivers, despite the provisions of Section 17.6(A) of this Constitution and Bylaws. Any club that places a player on Reserve/Suspended to evade the Active List limit will be subject to appropriate disciplinary action by the Commissioner.

Ineligible Players

- 17.12 The Commissioner may, on application of a club or on his own motion, declare ineligible a player who violates his contract, is guilty of conduct detrimental to the best interests of professional football, or who violates this Constitution and Bylaws or the rules and regulations of his club. Any ineligible player shall not be entitled to play for any club in the League until he shall have been reinstated by the Commissioner.

- 17.13 All players in the categories of Reserve/Retired, Reserve/Did Not Report, and Reserve/Veteran Free Agent Asked to Re-Sign will continue to be prohibited from being reinstated in the last 30 days of the regular season. Additionally, no player in such category will be reinstated between the trading deadline of the applicable season and the normal 30-day deadline unless the club initiates the reinstatement request and the Commissioner approves it.

Listing of Players

- 17.14 All players must be listed by the club on one of the following lists:
 - Active List
 - Reserve List
 - Exemption List

Exemption List

- (A) The Exemption List is a special player status available to clubs only in unusual circumstances. The List includes those players who have been declared by the Commissioner to be temporarily exempt from counting within the Active List limit. Any request for an Exemption must be sent to the Commissioner by NFLNet, e-mail, facsimile or other similar means of communication, and must include complete facts and reasons to support such request. Only the Commissioner has the authority to place a player on the Exemption List; clubs have no such authority. Except as provided in paragraph (1) of this subsection (A), no exemption, regardless of circumstances, is automatic. The Commissioner also has the authority to determine in advance whether a player's time on the Exemption List will be finite or will continue until the Commissioner deems the exemption should be lifted and the player

returned to the Active List. The following additional provisions govern the Exemption List:

- (1) Clubs participating in the American Bowl games shall be granted roster exemptions for any international players signed for such game, provided that the exemption extends for no more than 10 days and expires at 4:00 p.m., New York time, on the first business day after the game.
- (2) In no event will the Commissioner grant an exemption of more than two games in cases where a player fails to report to his club at the prescribed time. Whenever an exemption is granted in a case of late-reporting, it will be rescinded and the player added to the Active List as of 4:00 p.m., New York time, on the last League business day before he appears in playing uniform at a game of his club. A late-reporting player is defined as a player already under contract on his club's Active List or Reserve List or a player on his club's Reserve List as an unsigned draft choice or unsigned Veteran Free Agent who fails to report to his club at the prescribed time.
- (3) If a player who is eligible for a two-game roster exemption reports to camp prior to the time that a roster limit is in effect, the two-game maximum will be reduced by the number of games that the club has played since the player reported, provided that the club notifies the League office as soon as the player reports that it desires a roster exemption and provided that the player does not dress for or participate in a game.
- (4) If a player, after reporting, leaves his club without permission and the club is granted an exemption, such exemption will expire immediately upon the player's return to the club, unless the Commissioner deems it reasonable that the player is not in sufficient physical condition to return to regular participation.
- (5) It is permissible for a club to trade or request waivers on a player who is on the Exemption List. If such player is assigned to another club and the involved exemption is for a finite period of time, the assignee club will have available to it only the portion of the exemption which has not expired. If such player is assigned to another club and the involved exemption is not for a finite period of time, the player will immediately count on the assignee club's Active List unless the Commissioner deems it reasonable that the player is not in sufficient physical condition to begin or return to regular participation.

Player Leaving Camp

- 17.15 If a player leaves the camp of his club during either the training season or the regular season without permission, the following provisions shall apply in respect to such player:
- (A) If such player returns to his club within five (5) days from date of his departure, then the club shall be limited to the exercise of one of the following alternatives:
 - (1) The club may restore such player to its Active List, provided it either has maintained or immediately provides a place on its Active List within the applicable player limit; or
 - (2) The club may waive or trade such player.
 - (B) If such player does not return to his club until five (5) or more days shall have elapsed from the date of his departure and the club did not retain a place on its active roster for such player, then the club shall have the right to exercise any one of the following options:
 - (1) The club may place such player on its Reserve List as a Retired Player; or
 - (2) The club may reduce its active roster to provide a place thereon for such player; or
 - (3) The club may waive such player or another player from its Active List.
 - (C) Any player placed on the Reserve List as a Retired Player under the circumstances described in Section 17.15(B)(1) above shall remain on the Reserve List of the club for the balance of that season. In such event the obligation of the player to perform services as a professional football player for the club in that season shall be tolled. The term of such player's contract to his club for the balance of that season shall be extended and shall not commence until the player returns to professional football for such club. Additionally, any renewal option for such player's services shall be tolled and shall remain in effect until the end of such extended term of the contract. During any such retirement period, such player shall not be allowed to play football for any other club engaged in professional football; neither shall such player be entitled to any compensation, expenses, or other payments from his club under his contract.

- (D) Any player placed on the Reserve List as a Retired Player under the provisions described in Section 17.15(B)(1) shall not be entitled to reinstatement as an Active Player for the balance of the season in which such retirement occurs.
- (E) He cannot practice for the season.
- (F) Any violation or attempt to evade the player limit is conduct detrimental to football.

Reserve/Injured

17.16 The following rules govern Reserve/Injured:

- (A) **Purpose.** Reserve/Injured is a category of the Reserve List. A club may use this category for a player who is injured in a practice session or game of his club in any year after having passed the club's physical examination in that year. If a player fails the club's initial physical examination in any year, he is not eligible for Reserve/Injured; the club may instead use the procedures of Physically Unable to Perform or Non-Football Injury/Illness, whichever is applicable. A Non-Football Injury or Illness case may, in some circumstances, fall under the procedures of Reserve/Injured, but only if such injury or illness occurs after the player has passed the club's physical for that year.
- (B) **Participation While on Reserve/Injured.** Players on Reserve/Injured at any time may not play or practice or engage in any drill or any physical activity other than that required as part of their rehabilitation with that club for the remainder of the season, including postseason, under any circumstances. Players on Reserve/Injured are prohibited from appearing in games, participating in game-day warm-ups with their teams, dressing in game uniforms on game days, or representing their teams in pregame ceremonies. Reserve/Injured players may, however, attend team meetings, engage in rehabilitative work under the direction of the club's physician or trainer, observe practice, and serve their clubs on the sidelines, provided they perform a necessary function connected with the game, dress in clothing issued by the club to its game staff, and display appropriate credentials under the prevailing rules covering the bench areas.
- (C) **Compensation While on Reserve/Injured.** Players on Reserve/Injured are compensated at the full rate of their NFL Player Contracts (Paragraph 5).

(D) **Injury Definition.** For purposes only of administering the procedures of Reserve/Injured, a minor injury is one which renders a player physically unable to play football for any period less than six weeks (42 calendar days) from the date of injury. Conversely, a major injury is one which renders a player physically unable to play football for a minimum of six weeks (42 calendar days) from the date of injury.

(E) **Documentation.** All determinations of recovery time for major and minor injuries must be by the club's medical staff and in accordance with the club's medical standards. Such prognosis must be documented on the form "Verification of Injury/Illness Report," which must be completed in full by the club physician and countersigned by a working club executive or the head coach. This form must be filed in the League office within 15 days after the date the player is officially added to Reserve/Injured; if not, the club forfeits a spot on its Active List until it complies. The prognosis of the player's recovery time should be as precise as possible. When the verification form is received by the League office, the case receives a major or minor injury classification, which remains fixed unless the Commissioner grants special permission to reclassify after considering a revised prognosis by the club.

The League's medical examination procedures shall include a network of qualified neutral physicians in each club's territory (including the training camp area). Such physicians shall be available to examine players within a short time (usually less than a week) after a player is injured.

(F) **Evasion.** The Commissioner is authorized to take whatever steps he deems necessary to investigate any Reserve/Injured case that he has reason to believe may not have been handled properly by the involved club. If he determines that a club has abused the procedures of Reserve/Injured in order to evade the player limit or for any other reason, he may take appropriate disciplinary action.

(G) **Minor Injuries.** If a club places a player with a minor injury onto Reserve/Injured, such player must be placed on no-recall waivers as soon as, in the judgment of the club, he is physically able to play football. Such players may not be reacquired by the club for the remainder of the season, including the postseason. This definition of a minor injury shall be applicable throughout the remainder of the season, including postseason, even if less than six weeks remain in a club's season. If, despite the original classification of minor injury, the player's recovery time continues into the following year, the waiver request must be before April 15.

- (H) **Contract Restrictions.** Whenever a player becomes subject to waivers under the rules governing Reserve/Injured, there must be no subsequent renegotiations or modification of his contract that constitutes a deterrent to claims by other clubs.
- (I) **N-F/I After Passing Physical.** Players who go onto the Reserve List under Non-Football Injury or Illness after passing the club's physical examination may not play or practice with the club for the remainder of the season, including postseason, under any circumstances, except for players placed on Reserve/NF/I pursuant to the terms of the NFL Drug Policy. Players on Reserve/Non-Football Illness/Injury shall not be traded.
- (J) **Trading From Reserve/Injured.** Players on Reserve/Injured may not be traded.
- (K) **Settlements.** Any financial settlement agreed to between a club and player concerning an injury shall cover a fixed period of time and shall be reported in detail to the League office. Such player then shall be carried on the club's Reserve/Injured list for the specified period covered by the settlement. Such listing must be for procedural purposes only, and the player must not practice with or be affiliated with the club in any way other than normal rehabilitation treatment. At the end of such specified period, the player must be placed on waivers.

Clubs also have the option of immediately requesting waivers on a player with whom they have negotiated a financial settlement. Any such waiver request shall carry the notation "Injury Settlement," and any such financial settlement must be reported in detail to the League office and must specify that the agreement does not obviate the League's waiver system. Players with whom a club has reached an injury settlement and for whom it has requested waivers (or terminated without waivers if the player had four or more pension-credited seasons) may not be reacquired by that club during the same season until a period of time has elapsed since the date of termination that is six regular or postseason games longer than the number of regular season games represented by the settlement (a bye week counts as a game). The above procedure shall also be applicable to a player who has been placed on Reserve/Injured or for whom a club has requested waivers with the designation "injured," provided that no later than 4:00 p.m., New York time, on the fifth business day after the date that the player was placed on Reserve/Injured or that waivers were requested, whichever occurs first, the club (1) executes and files an Injury Settlement with the league office, and (2) requests waivers for the player with the designation "Injury Settlement" (or terminates him without waivers if the player has four or more pension-credited seasons). A

player for whom waivers have been requested pursuant to an injury settlement is permitted to be claimed, and any player terminated pursuant to an injury settlement is permitted to sign with any other club, subject to customary rules. Clubs are permitted to pay the settlement amount in weekly installments or in other arrangements acceptable to player and club, provided that any amounts paid to the player are received no later than the last game represented by the settlement. Upon termination, such players are free agents and shall have no further contact with the club, other than a tryout and/or physical examination, until the date that they have become eligible to be re-signed by the club. The tryout and/or physical examination must be conducted within 14 days of the date that such players are eligible to be re-signed.

For purposes of this rule, Saturdays, Sundays, and holidays shall not be included in the five business days, even if the Player Personnel department is open for business and/or a Personnel Notice is transmitted on that day.

Practice Squad

17.17 After 12 noon, New York time, on the Monday prior to the first regular season game, clubs may establish a Practice Squad of five players, which is limited to players who are free agents and who do not have an accrued season of free agency credit, unless that season was achieved by spending an entire regular season on Reserve/Injured or Reserve/Physically Unable to Perform. A player who achieved his accrued season on Reserve/Injured or Reserve/Physically Unable to Perform may be signed to the Practice Squad of any club except the club that placed him in that category. Practice Squad players are eligible to be signed to the Active/Inactive List of other NFL clubs.

See 2004 Resolution MC-1 (providing that, subject to negotiation and agreement with the NFL Players Association, clubs may employ up to eight practice squad players for the 2004 season, and the League has the option to extend this arrangement for subsequent seasons), App., p. 2004-18

See also 2005 Resolution G-3 (extending 2004 Resolution MC-1, permitting clubs to employ practice squads not to exceed eight players for the 2005 season), App., p. 2005-7

See also 2006 Resolution G-3 (extending 2005 Resolution G-3), App., p. 2006-15

Players Waived Injured

17.18 (A) Players waived injured will continue to be no-recall and count against the applicable player limit if they clear waivers.

- (B) If a player is placed on injured waivers and the club remains below the applicable player limit at all times until such player clears waivers, the club may at that time return the player to its roster and use him in a game as soon as he is physically able.
- (C) If a player is placed on injured waivers and the club reaches the applicable player limit before such player clears waivers, the club cannot return the player to its roster but must immediately place him on Reserve/Injured.

**RESPONSE IN OPPOSITION TO NFL PARTIES’ OBJECTION TO THE SPECIAL
MASTER’S RULING ON THE “ELIGIBLE SEASON” DEFINITION**

Representative Claimant [REDACTED] files her Opposition to the NFL Parties’ Objection to Special Master Pritchett’s application of the “Eligible Season” definition (D.E. 9513, dated Dec. 5, 2017), asking the Court to affirm the ruling and stating the following in support¹:

OVERVIEW²

[REDACTED] a defensive back drafted by [REDACTED], played five, full seasons on their 53-man roster beginning in 2007-08. At the conclusion of that same preseason training camp, his college teammate [REDACTED]—who never made the 53-man roster—signed with the [REDACTED] practice squad. [REDACTED] and [REDACTED] literally played the same position. Their roles were indistinguishable, Monday through Saturday; both practiced daily, receiving daily head-hits. On Sundays, however, only [REDACTED] as a member of the team’s Active List, was eligible to play in games. Nine weeks into the season, the team released [REDACTED] from its practice squad, while [REDACTED] remained on the Active List throughout a 20-week regular and post-season. In this real-life example, the NFL’s rejected application of operative Settlement Agreement (“SA”) terms would have resulted in only [REDACTED]s, not [REDACTED]’s, receiving of any Eligible Season (“ES”) credit. [REDACTED] would have received one-half ES; [REDACTED], on the other hand, who played *on the actual team*, on its Active List for all 20 regular and post-season weeks, would have accrued zero ESs. As the Special Master ruled, indeed, this “would lead to an absurd result.” Ruling, at 8.

Beyond simply leading to an absurd result, the NFL’s proposed application also radically departs from the plain meaning of SA §§ 2.1(a) (“Active List”) and (kk) (“ES”). These provisions

¹ Ms. [REDACTED] incorporates by reference and attaches as Exhibits: her Statement of Appeal (Ex “A”); class counsel’s briefing as ordered by SM Pritchett (Ex “B”), and SM Pritchett’s ruling.

² Ms. [REDACTED] avoids recapitulating the entirety of the arguments below, referring the Court to the attached briefing while focusing this overview on those issues raised by the NFL Parties’ Objection.

allow for ES accrual in one of two ways: *either* by (a) spending three or more regular or post-season games on an “Active List” (the list of “all players physically present, eligible, and under contract to play for a Member Club on a particular game day within *any* applicable roster or squad limits”, as defined by the NFL Constitution applicable to the given player); or (b) spending one of these game-weeks on the Active list and two or more inactive due from head injury and/or off of a roster entirely and on “Injured Reserve”³ due to head injury. As explained below and supported by a former NFL Executive of the Year (*ex. “A”*), ██████████ met the ES criteria under this straightforward, plain-language application of these terms. The team chose not to play him, but he remained eligible⁴ for play each week.⁵

The NFL objects to the Special Master’s ruling through two arguments. First, it asks the Court to ignore the definition of Active List within Section 17.2 of the NFL Constitution & Bylaws, applicable for 07-08, and interpose a separately-defined term from a separate section (17.3) of that NFL Constitution: “45-player Active List.” But the term “45-player Active List” is literally nowhere within the SA, and nowhere is discussed in the SA in terms of eligibility. The SA references *only* an applicable Constitution’s definition of Active List, further describing such an

³ NFL Constitutions denominate three lists through which to categorize fully-rostered (*e.g.*, non-practice squad) players: Active; Reserve (*e.g.*, injuries, retirement, military service); and Exemption (*e.g.*, suspension, death.) Players suffering serious injury are removed from team Active Lists altogether, and placed onto the “Reserve/Injured” list, colloquially known as “Injured Reserve” or “IR.” The IR list is altogether separate from the Active List.

⁴ As the NFL points out, at various times throughout the roughly 85 NFL league-years governed by the SA, this structure has changed. *See, Obj.*, at 1, n.1; 14. For the majority of league-years at issue, some players would be designated “inactive” on calendar dates other than game-day. Regardless, during ██████████ ES at issue, as the Special Master also found, he was eligible to play on the date of the game. the Active List definition refers only to those “eligible” to play in games; not those who actually did play. This Circuit has long observed the distinction between being *eligible* for something versus actually doing it. *See, e.g., United Steelworkers of Am. v. Crane Co.*, 605 F.2d 714, 718 (3rd Cir. 1979) (differentiating pension-eligibility from actual payment of benefits). ██████████ remained *eligible* for play, the team’s decision *not to actually* play him does not change his eligibility.

⁵ Importantly, it frequently happens in the modern NFL that teams “stash” still-developing talents (like ██████████ in his rookie year) on their Active Lists rather than signing them to practice squads. This prevents other teams from offering these players full, Active List contracts, per CBA rules. Nevertheless, he was healthy and available all season.

Active List as encompassing “*any*” applicable roster or squad limits, *e.g.*, the full roster which is eligible to play. And while the NFL attempts to explain away—what is at best—an astonishing lack of clarity as being for “ease of reference” and due to the fact that “game day rosters changed at various points in time”, this is belied by the comprehensive nature of the SA and further by the fact that it certainly could have referenced the phrase “game day rosters” within § 2.1(a); yet it did no such thing. Second, the NFL contends that the Special Master’s application of these terms renders the latter portion of § 2.1(kk) meaningless, purportedly because every player now receives Active List credit even when inactive for a game due to non-head-injury. This is simply incorrect. As the NFL itself points out, the rules governing timing for teams to designate “inactives” changed over time. This provision retains meaning because there are literally thousands of players who were designated “inactive” on days other than game days.

Special Master Pritchett’s application of these terms is the one most consistent with the letter and spirit of the settlement. As he explained, this construction does not impair the meaning of either term, because the two ES provisions “can be reasonably interpreted to conclude that players who are first placed on the Inactive list 90 minutes before kickoff *were* on the club’s Active List ‘on the date of’ the game ...” Ruling, at 5. Nevertheless, there will continue to be thousands of examples of players designated inactive on days *other than* game day. Thus, the term retains meaning and does not merely grant an eligible season to every player, as the NFL Defendants seem to suggest. For these reasons, the Court should affirm the Special Master’s application of these terms.

FACTUAL AND PROCEDURAL BACKGROUND

In 2013, [REDACTED] became a widow and Representative Claimant, [REDACTED]
[REDACTED] a mere

20 months removed from five full seasons spent on 53-man active lists, whereupon post-mortem examination revealed CTE. Although Ms. ██████ originally opted out, she reconsidered and released her claims, relying on a seemingly pre-determined Monetary Award of \$4,000,000.⁶ But her claim was erroneously calculated to her \$800,000 detriment, using the flawed application of SA terms to deny this ES. Again, had the family of ██████ received an identical Monetary Award, theirs would have included \$400,000 from ██████ participation in *half* of a 2007-08 practice-squad season for the Chargers. Paradoxically, had ██████ not made the 53-man roster and been a practice player, his widow would have fared better than she did with her husband actually having made the team. Instead, because he was *on the team*—the NFL’s reading of the SA left Ms. ██████ to receive *zero* for the same exposures. Ms. ██████ raised this result’s absurdity on appeal, alongside her straightforward argument on the meaning of “Active List.”⁷

She included a supporting and unrebutted declaration (*id*) from the 2001 NFL Executive of the year, which clarified that the operative SA term (Active List) in concert with the *applicable* NFL Constitution and Bylaws⁸ meant her husband accrued an ES for 2007-08. *See id.* The NFL Defendants rebutted ██████’s Active List status for that year by conflating this constitutionally-derived term with a separate defined-term: “45-player Active List.” As Defendants concede⁹, such a differentiation (between two purported active lists) is *nowhere* within the SA, even though—as the Special Master’s ruling points out—it certainly could have been, had that been the intent. As

⁶ This is of course also true with respect to those SCMs playing only one full season in the NFL on a 53-man Active-Roster, without game-play; these SCMs released their claims, understanding they would be BAP-eligible; under the NFL’s reading of the SA, players on the Active 53-man roster, inactive for games get absolutely zero BAP benefit yet released their claims forever. Their counterparts on practice squads would receive an Eligible half-season.

⁷ ██████ Appeal at 1-2. (*Ex. “A”*).

⁸ *See* SA § 2.1(a) (“Active List”).

⁹ NFL Defendants’ Opposition to Statement of Appeal at 2; *see also* NFL 27, n.1.

Ms. ██████'s declarant clarified, ██████ indeed *was* a member of his team's Active List, and this could be the only reasonable interpretation of "Active List", particularly where the SA never references the separately defined term "45-player Active List." The NFL further responded, echoed in its objection to the ruling, that unless the applicable constitution's definition for "45-player Active List" was substituted for the definition of "Active List", the SA's definition of ES would be "rendered meaningless." Special Master Pritchett's ruling rebutted the NFL's flawed reasoning. As he held, "the plain meaning [] is evident: [] players who were on the Active List on the calendar day of their club's regular or post-season game shall receive credit toward that game for the purposes of calculating an ES, even when that player was placed on the Inactive or Injured Reserve Lists prior to the start of the game." This left intact meaning in both subparts of § 2.1(kk).

THE NFL PARTIES' ARGUMENTS ARE UNAVAILING

In objecting to the Special Master's ruling, the NFL Defendants continue to advance their we-really-meant-the-45-player-Active-List argument. As discussed above, this does not comport with the terms as defined within the SA. If one simply reads the provisions at issue alongside whichever NFL Constitution governs, one can only conclude the regular season Active List to be the 53-man roster. This list comprises the menu from which coaches select players to play. The NFL conflates the concept of eligibility to play in a game with the actual event of players playing in games.

As the Special Master wrote, "had the parties intended to specify [this], they could have [done so.]" Ruling, at 7. Excluding seasons fully spent playing football on active rosters would have been easy to explain to Ms. ██████ and to numerous class-members forever releasing valuable rights on (what would be) mistaken beliefs as to their MAF awards or BAP-eligibility. The NFL's

preferred application is simply not fairly read from the plain-text of the SA and applicable Constitution.

Their rendered-meaningless argument fares no better, as the Special Master addressed this issue squarely in his ruling. First, although the NFL claims the Special Master’s ruling would result in all players being counted on the Active List, as the NFL’s own submissions reveal (*Obj.*, at 7, n.3, 9) this is plainly not the case. Possibly for that reason, and for the first time, the NFL Defendants additionally ask the Court, on its *de novo* review of a purely legal question, to reconsider this issue through new *evidence*, claimed to support their argument that the prevailing application renders the purported “limiting” term (ES) meaningless. *Obj.*, 8-9 (*citing Fiore Decl.*) The Court should decline this invitation as it falls beyond the scope of *de novo* review, *e.g. Mills v. Philadelphia Gas Works*, 264 Fed App’x 239, 241-42 (3rd Cir. 2008) (refusing to consider new affidavits on *de novo* review of summary judgment.) But even if the Court considered this evidence, the NFL’s position would be no less infirm. The NFL’s evidence merely establishes that in many—and indeed most—NFL league years, players could be designated as inactive prior to the date of the game for injury *or* on the date of the game. Thus, it is simply inaccurate to argue the Special Master’s ruling renders meaningless the term “inactive list.”

CONCLUSION

This Court should affirm the Special Master’s ruling and clarify that ██████████’s rookie season in 2007-08 spent on the Active List earns his widow the corresponding ES.

Dated: February 9, 2018

Respectfully submitted,

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RESPONSE TO NFL'S APPEAL OF SPECIAL MASTER RULING

JR Wyatt Law submits this response in support of (a) the Special Master's December 4, 2017 Ruling, (b) Co-Lead Class Counsel Seeger Weiss' application, and (c) ██████████ request that his 2006 season be considered an Eligible Season, as that term is defined in the Settlement Agreement.¹

A. Let's Draw On The Right Side Of The Line

The NFL's argument that eliminating ██████████ right to a recovery is 'fair line drawing' is belied by his, and many other players' reality.

██████████ played 3 seasons in the NFL; however, none of these seasons is currently considered an Eligible Season, effectively depriving him of an award. The only season relevant to this application is ██████████ 2006 season.

In 2006, ██████████ played in 2 games. For an additional 12 games, ██████████ practiced for the entire week, but was deactivated a few hours before kick-off. Exhibit A. Despite not being active to play in 12 games, ██████████ was physically present with the team on the date of each of these games. ██████████ was eligible to play on the date of each of these games (i.e., he was not on IR, suspended or otherwise ineligible to play). Finally, ██████████ was under contract for the entire 2006 season. Exhibit B.

While ██████████ is not eligible for one the larger awards, the NFL's 'fair line drawing' would deny him any monetary award. ██████████ would not even be entitled to a baseline

¹ To the extent this response is publicly filed, JR Wyatt Law respectfully requests that it be redacted to exclude client information.

examination. Similar to ██████, many of the players effected by Special Master's Ruling are at the bottom of the recovery spectrum. Many are also unrepresented. There is nothing fair about drawing lines that deny men such as ██████ a substantive recovery under the Settlement.

B. The Plain Meaning Of The Settlement Agreement Is Clear

██████ was a member of the ██████ roster on the date of 14 games in 2006 and each game should count toward an Eligible Season. It is unclear what textual basis exists to support the NFL's argument that a player must be active during a game. Specifically, the Settlement Agreement in 2 places requires only that a player be active on the **date of the game**:

- Section 2.1(kk) requires that ██████ be active "on the date of three ... games" *without reference to a requirement that he be active for the game.*
- Section 2.1(a) requires a player to be active "on a particular game day" *and again fails to require that he be on the 45-Man Roster.*

The Special Master correctly found that the NFL's interpretation of 'day' and 'date' is inconsistent with how these words are generally used and as is provided in Section 2.1 of the Settlement. See Date, Black's Law Dictionary (10th Ed. 2014)(defining 'date' as 'the day when an event happened or will happen' ...for example active on game day); Settlement Agreement §2.1(defining 'day' as a 'calendar day').

The Special Master also argues compellingly that the NFL's interpretation would require splitting a given day into separate parts. Effectively, the NFL requests that the Court split a day between pre-game and in-game periods to achieve its desired result. This type of day-splitting is awkward, unwieldy and not favored by the law. See In re Puglisi, 230 F. 188, 189 (E.D. Pa. 1916); Garelick v. Rosen, 8 N.E.2d 279, 281 (N.Y. 1937) ("[I]n the absence of an express limitation, the law does not take notice of a fraction of a day."); 2 WILLIAM

BLACKSTONE, COMMENTARIES *141 (“In the space of a day all the twenty-four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes.”).

The NFL could have drafted the Settlement to narrowly define which roster or what part of a day qualifies for the purposes of Section 2.1(a) eligibility, for example:

- Section 2.1(a): ‘Active List’ means all players physically present, eligible and under contract to play for a Member Club ~~on a particular game day~~ *during a game* within any applicable roster or squad limits.
- Section 2.1(kk): ‘Eligible Season’ means a season in which a Retired NFL Football Player ... was on a Member Club’s Active List ~~on the date~~ *during* of three (3) or more regular or post season games.”

The Agreement is simply not drafted this way; and clever construction arguments notwithstanding, the NFL should not be allowed to re-write these Sections after-the-fact.

C. The Concussion Protocols And The Intersection Between Sections 2.1(a) And 2.1(kk) Of The Settlement

The NFL’s plain meaning and construction arguments ignore its own concussion protocols and how Sections 2.1(a) and (kk) are intended to intersect.

The Section 2.1(a) definition of Active List includes players “present, **eligible** and under contract to play for a Member Club on a particular game day”. A player under concussion protocol is obviously and utterly **ineligible** to play in a game until cleared by appropriate medical personnel. Because a player under concussion protocol is not eligible to play, he is excluded from the Active List no matter what squad, roster or team he plays on.

Denying a player game credit toward an Eligible Season because he is excluded from the Active List due to a head injury would undermine the Settlement; accordingly, a savings clause was drafted into Section 2.1(kk). While players on the Active List receive credit

toward an Eligible Season, so do players who are inactive or on injured reserve *due to a head injury*:

1. The first mechanism for a player to qualify for an Eligible Season is to be on the “*Active List* on the date of three (3) or more regular season or postseason games.”
 - A player under concussion protocol can’t qualify under this provision because he is ineligible to play in games; and thus, excluded from the Active List.
2. The second mechanism for a player to qualify for an Eligible Season is to be on the “Active List on the date of one (1) or more ... games and then spen[d] at least two games on a Member Club’s *injured reserve list or inactive list due to a concussion or head injury*.”
 - Because of the clause *due to a concussion or head injury* in Section 2.1(kk), a player with a head injury gains credit toward an Eligible Season despite being excluded from the Active List and being ineligible to play.

This is the simple and clear interpretation of the relevant sections of the Agreement, providing each word and clause meaning and effect.

D. Construction Does Not Support The NFL’s Requested Re-Write Of The Agreement

The NFL’s construction arguments are strained, circular and unable to withstand critical review.

No Part Of The Settlement Is Rendered Meaningless By The Special Master’s Ruling

The Special Master’s Ruling does not render any part of the Settlement meaningless. The Special Master determined situations exist where a player will only receive credit for a game because his deactivation was *due to a concussion or head injury*.

For example, the NFL admits in Paragraph 11 of the Fiore Affidavit that players were not always placed on the inactive list on game day:

“From 1993 through the 2000 NFL season, Member Clubs placed four players on the Inactive List **on the Friday** of a game week and another four players on the Inactive List on game day. For certain earlier NFL seasons, such as from 1988 through 1992, Member Clubs places players on the Inactive List **on the business day prior to the game.**”

A player placed on the inactive list on the Friday before a game will not receive credit for that week’s game, *unless deactivated because of a head injury*. Let’s compare 2 situations for clarity:

1. It is week 1 of the 1999 season. Player A is placed on the inactive list on the Friday before a Sunday game because of his poor play. As provided in Section 2.1(kk), Player A **does not** receive credit for the week 1 game because he was deactivated before the date of the game.

Versus

2. It is week 1 of the 1999 season. Player B is placed on the inactive list on the Friday before the Sunday game because of a head injury. Player B **does** receive credit for the week 1 game. Under Section 2.1(kk), Player B only receives credit because he was deactivated *due to a concussion or head injury*.

As the Special Master determined, a player can be placed on the injured reserve list in the middle of the week. This player will not receive credit for the upcoming game unless he was placed on the injured reserve *due to a concussion or head injury*. Let’s again compare 2 situations for clarity:

1. It is week 1 of the 2010 season. Player C is placed on the injured reserve list on the Friday before a Sunday game because of an ankle injury. Player C **does not** receive credit for the week 1 game because he was deactivated before the date of the game.

Versus

2. It is week 1 of the 2010 season. Player D is placed on the injured reserve list on the Friday before the Sunday game because of a head injury. Player D **does** receive credit for the week 1 game. Player D

only receives credit because he was deactivated *due to a concussion or head injury*.

As there are situations in which the clause: *due to a concussion or head injury* is given effect, the NFL's argument that this text requires the Court to change the plain meaning of the Settlement is without foundation.

Inclusion of The Word 'Eligible' Does Not Support The NFL's Argument

The NFL's argument concerning the word *eligible* is a red herring. The use of the word *eligible* has nothing to do with either the 53 or 45-man roster.

A simple interpretation of *eligible* within Section 2.1(a) excludes players from the Active List that violated team/league rules and are suspended from play.²

Sections 17.11 and 17.12 of the NFL Bylaws provide as follows:

“Suspended Players

17.11 A club or the Commissioner may suspend a player for violation of this Constitution and Bylaws, his NFL Player Contract, or the rules and regulations of the League or the club. During the period of suspension, a player shall not be entitled to compensation and shall be *ineligible* to play with any club.”

-and-

“Ineligible Players

17.12 The Commissioner may, on application of a club or on his own motion, declare *ineligible* a player who violates his contract, is guilty of conduct detrimental to the best interests of professional football, or who violates this Constitution and Bylaws or the rules and regulations of his club. Any *ineligible* player shall not be entitled to play for any club in the League until he shall have been reinstated by the Commissioner.”

² There may well be many reasons a player might be ineligible to play on a given Sunday in addition to being under concussion protocol or suspended from play.

Examples of reasons a player might be suspended include: a) betting on football; b) drug violations; c) violent or illegal activities; d) violation of in-game rules; e) violation of fairness rules; or f) violation of team rules.

Let's compare 2 situations for clarity:

1. Player E deflates footballs and the Commissioner suspends him for the next game. Player E is **ineligible** to play on the next "game day within any applicable roster or squad limits," and will be excluded from the Active List. There is no reason to give Player E credit for this game as he can't play due to his own misconduct.

Versus

2. Player F has not violated any rules and arrives at the game on Sunday ready to play. Regardless of whether he actually does play, Player F is **eligible** to play on that game day.

Perhaps more to the point, the NFL's argument that eligible means *eligible to play in the game* again requires that this Court re-write the text of the Settlement. There is no basis to add language to an agreement, where, as here, there is a sensible reading that gives each and every word in the agreement meaning.

Absurd/Unfair Result

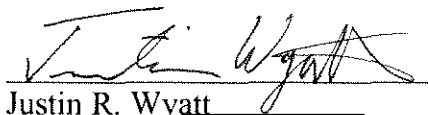
The NFL's interpretation creates a substantial inconsistency within the Settlement. Practice squad members – who don't play on game day – are eligible for ½ seasons. Players on the 53-man roster – who are more actively involved on a team and were exposed to more head-related injuries than practice squad players – are denied any recovery by the NFL's interpretation. An interpretation that is unfair on its face and creates such a blatant inconsistency should not be countenanced.

E. Conclusion

As is provided in Co-Lead Class Counsel Seeger Weiss' application and the Special Master's Ruling, and for the reason stated herein, [REDACTED] respectfully requests that his 2006 season be considered an Eligible Season as that term is defined Settlement.


Dated: New York, New York
February 6, 2018

JR WYATT LAW, PLLC



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Exhibit “A”

 **Transactions**

Position: [Redacted]
College: [Redacted]
Current Club: [Redacted]
Current Status: [Redacted]





Date	Start Club	Result Club	Potential Club	Initial Status	Result Status	Description	Comments
8/28/2008	[Redacted]	[Redacted]	[Redacted]	Waivers/No Rec.	Free Agent	Terminated Via Waivers, all contracts	
8/27/2008	[Redacted]	[Redacted]	[Redacted]	Active	Waivers/No Rec.	Waived, No Recall	
2/11/2008	[Redacted]	[Redacted]	[Redacted]	R/PUP	Active	Activated, from Reserve	
8/27/2007	[Redacted]	[Redacted]	[Redacted]	Active/PUP	R/PUP	Reserve/Physically Unable to Perform	
7/30/2007	[Redacted]	[Redacted]	[Redacted]	Active	Active/PUP	Declared Physically Unable to Perform	
2/5/2007	[Redacted]	[Redacted]	[Redacted]	R/Injured	Active	Activated, from Reserve	
12/19/2006	[Redacted]	[Redacted]	[Redacted]	Inactive	R/Injured	Reserve/Injured	
12/17/2006	[Redacted]	[Redacted]	[Redacted]	Active	Inactive	De-Activated	
12/13/2006	[Redacted]	[Redacted]	[Redacted]	Inactive	Active	Activated, from Inactive	
12/10/2006	[Redacted]	[Redacted]	[Redacted]	Active	Inactive	De-Activated	
12/6/2006	[Redacted]	[Redacted]	[Redacted]	Inactive	Active	Activated, from Inactive	
11/30/2006	[Redacted]	[Redacted]	[Redacted]	Active	Inactive	De-Activated	
11/15/2006	[Redacted]	[Redacted]	[Redacted]	Inactive	Active	Activated, from Inactive	
11/12/2006	[Redacted]	[Redacted]	[Redacted]	Active	Inactive	De-Activated	
11/8/2006	[Redacted]	[Redacted]	[Redacted]	Inactive	Active	Activated, from Inactive	
11/5/2006	[Redacted]	[Redacted]	[Redacted]	Active	Inactive	De-Activated	
11/1/2006	[Redacted]	[Redacted]	[Redacted]	Inactive	Active	Activated, from Inactive	
10/29/2006	[Redacted]	[Redacted]	[Redacted]	Active	Inactive	De-Activated	
10/18/2006	[Redacted]	[Redacted]	[Redacted]	Inactive	Active	Activated, from Inactive	
10/15/2006	[Redacted]	[Redacted]	[Redacted]	Active	Inactive	De-Activated	
10/11/2006	[Redacted]	[Redacted]	[Redacted]	Inactive	Active	Activated, from Inactive	
10/9/2006	[Redacted]	[Redacted]	[Redacted]	Active	Inactive	De-Activated	
10/4/2006	[Redacted]	[Redacted]	[Redacted]	Inactive	Active	Activated, from Inactive	
10/1/2006	[Redacted]	[Redacted]	[Redacted]	Active	Inactive	De-Activated	
9/27/2006	[Redacted]	[Redacted]	[Redacted]	Inactive	Active	Activated, from Inactive	
9/24/2006	[Redacted]	[Redacted]	[Redacted]	Active	Inactive	De-Activated	
9/20/2006	[Redacted]	[Redacted]	[Redacted]	Inactive	Active	Activated, from Inactive	
9/17/2006	[Redacted]	[Redacted]	[Redacted]	Active	Inactive	De-Activated	
9/13/2006	[Redacted]	[Redacted]	[Redacted]	Inactive	Active	Activated, from Inactive	
9/10/2006	[Redacted]	[Redacted]	[Redacted]	Active	Inactive	De-Activated	
3/13/2006	[Redacted]	[Redacted]	[Redacted]	Active	Active	Option Exercised	
2/14/2006	[Redacted]	[Redacted]	[Redacted]	R/Injured	Active	Activated, from Reserve	
8/30/2005	[Redacted]	[Redacted]	[Redacted]	Active	R/Injured	Reserve/Injured	
8/1/2005	[Redacted]	[Redacted]	[Redacted]	R/Draft; Unsign	Active	Selection List Signing	
4/23/2005	[Redacted]	[Redacted]	[Redacted]	R/Draft; Unsign	R/Draft; Unsign	Reserve/Selection List	

Exhibit “B”

Exhibit B

STATE OF OKLAHOMA :
 : SS
COUNTY OF PONTOTOC :

[REDACTED]

I, [REDACTED] being duly sworn according to the law, do hereby depose and say the following:

1. [REDACTED] is a former NFL football player currently institutionalized for concussion-related conditions. [REDACTED] played 3 seasons in the NFL; however, none of these seasons is currently considered an Eligible Season, effectively depriving him of an award. The only season relevant to this challenge is [REDACTED] 2006 season with the [REDACTED]

2. In 2006, [REDACTED] played in two games. For an additional 12 games, he practiced the entire week, but was deactivated for the game a few hours before kick-off. Specifically, a few hours before a game, NFL teams must reduce their 53-Man Roster to a 45-Man Roster. Only players on the 45-Man Roster are eligible to play in a game. [REDACTED] was on the 53-Man Roster for 14 games, but only on the 45-Man Roster for 2 games.

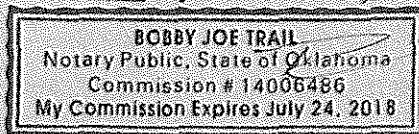
3. Despite not being active to playing 12 games, [REDACTED] was physically present with the team on the date of each of these games. [REDACTED] was eligible to play on the date of each of these games (i.e., he was not on IR, suspended or otherwise ineligible to play). Finally, [REDACTED] was under contract for the entire 2006 season.

I declare under penalty of perjury pursuant to the laws of the State of Oklahoma and the United States of America that the foregoing is true and correct.

Dated: 11.15.17



Sworn and signed before me this
15 day of November, 2017.



**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Hon. Anita B. Brody

SETTLEMENT IMPLEMENTATION DETERMINATION

Before the Court is an objection from a finding by the Special Master that Appellant, an ex-wife of a Retired NFL Player, is not entitled to a Derivative Claimant Award.

The Court reviews de novo any objections to conclusions of law from its Special Masters. See ECF No. 6871 at 4-5 (appointing the Special Masters and defining their roles). "The decision of the Court will be final and binding." Settlement Agreement § 9.8.

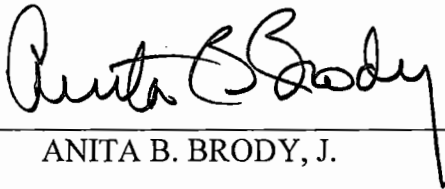
A claimant is entitled to a Derivative Claimant Award if she had a relationship with the Retired NFL Football player that would provide "the right under applicable state law to sue independently and derivatively." Settlement Agreement § 7.2. The Retired NFL Player here was diagnosed with Death with CTE. That diagnosis corresponds to a wrongful death suit. Under Texas law, applicable to this case,¹ a wrongful death suit is only available to a spouse married to the deceased at the time of death. See *Malik v. Bhargava*, No. 05-13-00384-CV, 2014 WL 1022358, at *1 (Tex. App. Feb. 19, 2014) (finding no standing for wrongful death by ex-spouse

¹ Appellant does not dispute that Texas law applies.

when divorce occurred before the time of death). In this case, the divorce occurred in 2012 and the Retired NFL Football Player died in 2013. Therefore, the ex-wife was not a spouse at the time of death and could not bring a suit for wrongful death under Texas law. As applied to the Settlement Agreement, that means that she is not entitled to a Derivative Claimant Award from a Death with CTE diagnosis.

Based on the review of the Special Master's Findings and Remedies (attached), I approve and adopt its conclusions. Accordingly, the Appellant's objection is **DENIED**.

DATE



ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to:

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

Kevin Turner and Shawn Wooden,
*on behalf of themselves and
others similarly situated,*
Plaintiffs,

Hon. Anita B. Brody

Civ. Action No. 14-00029-AB

v.

National Football League and
NFL Properties, LLC,
successor-in-interest to
NFL Properties, Inc.,
Defendants.

APPEAL OF
REGARDING DENIAL OF
DERIVATIVE CLAIMANT AWARD

**FINDINGS AND REMEDIES OF THE SPECIAL MASTER
PURSUANT TO SECTION 9.5 REGARDING THE APPEAL OF A DENIAL OF A
DERIVATIVE CLAIMANT AWARD**

I. INTRODUCTION

This matter requires the Special Master to rule on whether Appellant – a Derivative Claimant and ex-wife of a Retired NFL Player – has a sufficiently-close relationship with the Player to entitle her to a Derivative Claimant Award under the Settlement Agreement. For the reasons stated below, the Special Master holds that Appellant is not entitled to a Derivative Claimant Award. The determination of the Special Master is final and binding.

II. STANDARD OF REVIEW

The Special Master must decide an appeal of a Derivative Claimant Award based on a showing by the appellant of clear and convincing evidence that the determination of the Claims Administrator was incorrect. (Order Appointing Special Masters, 5.) “Clear and convincing evidence” is a recognized intermediate standard of proof – more demanding than preponderance of the evidence, but less demanding than proof beyond a reasonable doubt. In re Fosamax Alendronate Sodium Prods. Liab. Litig., 852 F.3d 268, 285-86 (3d Cir. 2017) (“Black’s Law Dictionary defines clear and convincing evidence as ‘evidence indicating that the thing to be proved is highly probable or reasonably certain.’”).

III. FACTUAL AND PROCEDURAL HISTORY

(hereinafter, “Appellant”) married Retired NFL Player in 1983. (Doc. 133056, at 4.) played 11 seasons in the NFL. (*Id.*) Appellant and divorced in 2012, and died later that same year. (*Id.*)

In February of 2013, received a Qualifying Diagnosis of Death with CTE from a Board-Certified Neurologist. (Doc. 53027, at 5-6.) In June of 2017, Representative Claimant – his son – received a Monetary Award. (Doc. 84453.)

After the Monetary Award was issued, Appellant timely registered as a Derivative Claimant with the Settlement Program. (Doc. 110139.) challenged Appellant’s Derivative Claim. (Doc. 110256.) The Claims Administrator reviewed the Derivative Claim and determined that Appellant was not eligible to receive a Derivative Claimant Award. (Doc. 126552.) The Claims Administrator then rejected Appellant’s objection to the initial determination. (Doc. 140716.) Appellant timely appealed this determination to the Special Master, on the grounds that the applicable state law (Texas law) was not applied correctly.¹ (Doc. 133056, at 2.)

IV. DISCUSSION

Section 7.2 of the Amended Class Action Settlement Agreement (hereinafter, “the Settlement Agreement”) sets forth the conditions that a Derivative Claimant must meet to receive a Derivative Claimant Award. Section 7.2(d) requires that the Claims Administrator make the following determination before granting a Derivative Claimant Award:

[B]ased on a review of the records provided in the Derivative Claim Package and applicable state law...the Derivative Claimant has a relationship with the subject Retired NFL Football Player that properly and legally provides the right under applicable state law to sue independently and derivatively.

¹ Pursuant to §9.5 of the Class Action Amended Settlement Agreement, the Claims Administrator’s determination as to whether a Settlement Class Member is entitled to a Derivative Claimant Award is appealable to the Special Master based on the good-faith belief that the determination was incorrect.

When the Retired NFL Player's Qualifying Diagnosis is Death with CTE, the relevant state law for determining Derivative Claimant eligibility is the wrongful death law of the applicable state.² (Derivative Claimant Review Procedure.)

The Claims Administrator found that Texas was the applicable state law for Appellant's claim.³ (Doc. 126552.) The Claims Administrator denied Appellant's right to relief because Texas law provides that a wrongful death action is available for the "exclusive benefit of the surviving spouse, children, and parents of the deceased." Tex. Civ. Practice Code § 71-004 (2015).

A spouse only has the right to bring a wrongful death suit under Texas law if they were married to the decedent at the time of death. See, e.g., Apamibola v. City of Hous., 2016 WL 4045480, at *4 (S.D. Tex. July 12, 2016), report and recommendation adopted, No. CV H-15-2566, 2016 WL 4046799 (S.D. Tex. July 27, 2016) ("Plaintiff was not legally married to [Decedent] at the time of his death...therefore, Plaintiff lacks standing to bring any action on [Decedent's] behalf."). Appellant and _____ divorced in 2012, prior to _____ death later that year. (Doc. 133056, at 4.) Accordingly, Appellant was not a "surviving spouse" of the deceased, and cannot bring a wrongful death suit under Texas law.

Appellant does not have the right to sue under applicable state law, and thus has not established by clear and convincing evidence that the decision of the Claims Administrator to deny her a Derivative Claimant Award was incorrect.

V. CONCLUSION

The Special Master denies this appeal, and upholds the decision of the Claims Administrator.

Date: March 24, 2018


Wendell E. Pritchett, Special Master

² Appellant also asserted a claim for, *inter alia*, loss of consortium. (Doc. 133056, at 4.) Loss of consortium is the relevant state cause of action for analyzing other Qualifying Diagnoses. (Derivative Claimant Review Procedure.) However, it does not apply to Death with CTE, and received only a Qualifying Diagnosis of Death with CTE. (Doc. 53027, at 6.) No other causes of action may be considered by the Claims Administrator. (Derivative Claimant Review Procedure; see also Settlement Program FAQs, Quest. 171.)

³ Texas was determined to be applicable state law because _____ was a "long-time resident of Texas at the time of his death." (Doc. 110256.) Appellant did not challenge the determination that Texas is the applicable law, appealing only on the grounds that Texas law was improperly applied. (Doc. 133056, at 2.)

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

No. 2:12-md-02323-AB
MDL No. 2323

THIS DOCUMENT RELATES TO:

Hon. Anita B. Brody

ALL ACTIONS

ORDER

AND NOW, this 14th day of November, 2018, it is **ORDERED** that Defendants' request for stay of payment is **GRANTED**. Payment of the 17 claim awards which are the subject of Defendants' two pending appeals shall be stayed until the Court rules on these appeals.¹

s/Anita B. Brody

ANITA B. BRODY, J.

Copies **VIA ECF on 11/14/2018**

¹ Co-Lead Class Counsel is correct in identifying the four factors that this Court must consider in determining whether a stay is appropriate. *See Hilton v. Braunskill*, 481 U.S. 770, 776–77 (1987) (listing factors). Because the Court plans to rule on the merits of Defendants' appeals quickly, the affected Class Members will not be substantially harmed. Balancing the factors weighs in favor of a stay.