

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

MDL No. 2323

THIS DOCUMENT RELATES TO:
GOLDBERG PERSKY & WHITE v.
SPID 950001953
ATTORNEY'S LIEN DISPUTE

INTRODUCTION

The Firm ultimately filed two Claims on the Player's behalf. The Claims Administrator denied the first, but approved the second—after an audit process—on February 23, 2022. On May 5, 2022, before he was paid, the Player terminated his relationship with the Firm.

I therefore respectfully submit this Report and Recommendation.²

² See ECF No. 12343, Explanation and Order, (Sept. 21, 2023) (appointing me to “resolve controversies between counsel relating to their counsel fees”). Pursuant to that Order, I authored, and the Court approved, new Rules Governing Attorneys’ Liens. ECF No. 12348-1, Rules Governing Attorneys’ Liens, (Sept. 21, 2023). This is the first report and recommendation I have issued under these rules.

FACTUAL AND PROCEDURAL HISTORY

I take these facts from the Firm's Statement of Dispute, which the Player did not contest, and the records in the Player's Claim Portal.

The Firm states that the Player formally retained it sometime in May, 2012.³ It filed a multi-plaintiff complaint on the Player's behalf on May 3, 2012 in the Superior Court of Los Angeles County, before filing a short-form complaint on July 12, 2012 for the Player in the multi-district litigation ("MDL") in the Eastern District of Pennsylvania. Firm Stmt. of Dispute at Ex. B.

Professor William B. Rubenstein, the Court-appointed fees expert, divided the litigation into three phases: Phase 1, Individual Litigation; Phase 2, MDL; and Phase 3, Class Action Settlement.⁴ Regarding Phase 2, Professor Rubenstein wrote:

Arguably, from the time that the NFL made its motion to consolidate these cases into an MDL (November 15, 2011)—and certainly, from the time the motion was granted (January 31, 2012)—lawyers contracting to represent clients were well aware that the costs of doing so had been greatly reduced: pre-trial proceedings would now be consolidated and undertaken once and the likelihood that any case would be remanded for trial declined significantly.⁵

As the Player here retained the Firm in May, 2012, the representation arose squarely in Phase 2. Furthermore, the Claim Portal records the following:

Date	Significant Event
February 10, 2017	The Firm registered the Player in the Settlement Program. Doc. 12580.
February 5, 2019	The Firm submitted a first Claim for the Player. Doc. 198484.
May 28, 2019	The first Claim was denied. Doc. 207566.
May 3, 2021	The Firm submitted a second Claim for the Player. Doc. 235162.
December 3 2021- January 5, 2022	The Firm corresponded with the Claims Administrator concerning an audit of the Player's Claim. Doc. 241587.
February 23, 2022	The second Claim was approved. Doc. 243084.

Throughout the ten-year period of representation, the Firm states that it engaged in around 130 written communications with the Player, advising him on various aspects of the litigation and the Settlement. Firm Stmt. of Dispute at Ex. B. It describes the following additional work on the Player's behalf.

³ The Firm notes that the signed retainer was lost in an office relocation. Firm Stmt. of Dispute at 1. However, the Player has not disputed that he signed a retainer with the Firm sometime in May 2012 and that the retainer agreement attached as Exhibit A to the Firm's Statement of Dispute is an accurate copy of the one the Player signed. *Id.*

⁴ ECF No. 9526, Expert Report of Professor William B. Rubenstein, (Dec. 11, 2017), at 25-26.

⁵ *Id.* at 26.

Date	The Firm reports that it:
February 14, 2015, July 22, 2015, and February 4, 2016	Reviewed the Player's records. Firm Stmt. of Dispute at Ex. B.
August 11, 2016	Advanced \$2,550.00 for a medical evaluation. <i>Id.</i> at Ex. C.
March 10, 2017	Advanced \$1000.00 for a medical evaluation. <i>Id.</i>
March 21, 2017	Reviewed the Player's records. <i>Id.</i> at Ex. B.
March 27, 2017	Reviewed the Player's NFL contract. <i>Id.</i>
June 9, 2020	Took a third party affidavit for the Player. <i>Id.</i>
January 11, 2021	Arranged for the Player's BAP evaluation. <i>Id.</i>

Finally, the Firm states, and the Player has not disputed, that the only thing standing between the Player and the Monetary Award at the time he terminated the Firm, on May 5, 2022, was an outstanding signature on a form. Firm Stmt. of Dispute at 2.

DISCUSSION

Only one law firm has represented this Player in the Settlement: the Player did not actively represent himself prior to receiving the Notice of Monetary Award on February 23, 2022. Doc. 243084.

Having not been presented with an alternative, and following Judge Strawbridge's decisions, I apply the *McKenzie* factors in asking if the Firm's work was sufficiently connected to the success of the Claim to render its fee fundamentally fair.⁶ These factors are: (1) circumstances at the agreement's inception, (2) circumstances later, (3) the quality of the work, (4) the results obtained, and (5) the substantiality of the connection between the work and the results.⁷

On the undisputed facts presented in the Firm's Statement of Dispute, I would conclude that the Firm directly contributed to the success of the Claim that led to the Monetary Award.

1. Factors 1 and 2: "circumstances existing at the time the arrangement is entered into, and thereafter."⁸

I analyze the first two *McKenzie* factors together to compare them and observe change over time.⁹ The inquiry is simple where only one law firm is involved. If a contingency fee agreement was reasonable when entered into, and only that firm represented the Player throughout the

⁶ See ECF No. 10368, Report and Recommendation, (Jan. 7, 2019), at 12 ("Under Third Circuit precedent, we are obligated to review CFAs to determine if the fee sought is reasonable in light of the five factors enumerated by the Third Circuit in *McKenzie*."); *McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97, 100 (3d Cir. 1985) ("*McKenzie I*") ("An attorney has the burden of proof as to the reasonableness of his fee when he sues to recover from his client."); *McKenzie Constr., Inc. v. Maynard*, 823 F.2d 43, 45 (3d Cir. 1987) ("*McKenzie II*") ("The applicable standard in an attorney fee dispute is the reasonableness of the fee, applying principles of equity and fairness.").

⁷ *Id.*

⁸ *Id.*

⁹ See ECF No. 12328, Report and Recommendation, (Sept. 5, 2023), at 11 (analyzing the first two *McKenzie* factors together to assess the "impact of changed circumstances").

process of obtaining a Monetary Award, the agreement is presumably also reasonable at the time of enforcement—subject, of course, to the District Court’s fee cap.¹⁰

Reasonableness at the time of the agreement’s inception turns on “(1) the legal challenges in the plaintiff’s pursuit of a monetary recovery and (2) the time-intensive nature of the litigation.”¹¹ As noted above, the agreement arose in the context of Phase 2, MDL.¹²

The legal challenges and the time-intensive nature of the litigation in Phase 2 were more significant than in Phase 3 (“*Class action settlement*”), but less significant than in Phase 1 (“*Individual litigation*”).¹³ Agreements beginning in Phase 2 saw a decrease in the “*volume* of work to be undertaken by a law firm representing a retired player” relative to Phase 1.¹⁴ However, substantial risks remained “as to the *legal* challenges faced by the plaintiffs at this phase in the litigation,” including those “surmounting the issues of preemption and establishing causation.”¹⁵ Therefore, at the time the Player retained the Firm, their contingency agreement, subject to the cap of 22%, was reasonable.

The Firm represented the Player for ten years. Firm Stmt. of Dispute at Ex. B. During that time, the litigation moved into Phase 3, a shift which significantly decreased the risks of representing the Player “thanks to the efforts of Class Counsel and those other lawyers who served on various MDL committees and performed work for the common benefit.”¹⁶ The time intensive nature of the litigation also decreased as it became clear that individually retained plaintiffs attorneys “would be primarily responsible only for processing their clients’ claims through the claims facility.”¹⁷ Even so, the change in circumstances “does not alter the fact” that the Firm here “undertook the representation of Player at a time of significant risk.”¹⁸

McKenzie factors (1) and (2) counsel in favor of the Firm’s asked-for fee.

2. Factor 3: “the quality of the work performed.”¹⁹

In *McKenzie I*, the Court emphasized promptness and efficiency as key characteristics in quality attorney work.²⁰ In addition, individually tailored legal advice, regular attorney-client communication, and action which preserves a client’s legal rights are hallmarks of quality work.²¹

¹⁰ See *id.* (noting that “the District Court has already adjusted fee agreements through the Fee Cap to account for the changed circumstances that occurred over the course of this litigation”).

¹¹ *Id.* at 12.

¹² See ECF No. 9526, at 25-26 (describing three phases of the litigation).

¹³ *Id.* at 26 (emphasis in original).

¹⁴ ECF No. 12328, at 12 (emphasis in original).

¹⁵ *Id.* (emphasis in original).

¹⁶ *Id.* at 13.

¹⁷ ECF No. 9526, at 26.

¹⁸ ECF No. 12328, at 13.

¹⁹ *McKenzie II* at 45.

²⁰ *McKenzie I* at 101.

²¹ ECF No. 12328, at 14-15.

Taking the undisputed facts in the Firm's Statement of Dispute as true, in combination with the record from the Claim Portal, I recognize that the Firm preserved the Player's legal rights in a number of ways: it ensured the Player was included in the multidistrict litigation, registered the Player for the Settlement, arranged for two rounds of medical appointments to afford the Player the earliest possible diagnosis opportunities, and filed Claims promptly after each round of evaluations. The Firm also responded to the Claims Administrator in an audit proceeding and advised the client on whether to accept, reject, or appeal the Settlement Agreement.

Over their ten-year relationship, the Firm states that it engaged in about 130 written communications with the Player. It is unclear from the Firm's Statement of Dispute how many of these communications with the Player were individualized and how many were mass communications to all of the Firm's NFL Player clientele, but the Firm does document at least 17 separate instances of communication directly with the Player, including a 40-minute telephone call. Firm Stmt. of Dispute at Ex. B.

The Firm's undisputed narrative indicates that it performed high-quality work for the Player.

3. Factor 4: "the results obtained."²²

This factor first requires attributing a particular result to a given firm. As only one firm represented the Player from Phase 2 of this litigation through the Notice of the Monetary Award, the Award is easily attributable to the Firm as the result obtained. The Player has not disputed that "aside from a signature on an SWS form," the Firm "completed all tasks for [the Player] confirming his monetary award." Firm Stmt. of Dispute at 2.

Second, the result obtained must be "the appropriate award based on the evidence presented."²³ Once the offset for eligible seasons under Section 6.7(b)(i) of the Settlement Agreement was applied, the Player became entitled to a \$296,377.00 Award for a Qualifying Diagnosis of Level 2.0 Neurocognitive Impairment. Doc. 243084. But given a substantial child support lien of \$289,148.40, in combination with medical liens, Liens and Holdbacks exceeded the Award amount. *Id.* When the Player terminated his relationship with the Firm, the Firm, in turn, asserted its own lien on the Award. Doc. 265553.

The pre-lien result obtained—\$296,377.00—was an appropriate Award based on the evidence presented and the Settlement's criteria.

²² *McKenzie II* at 45.

²³ ECF No. 11229, Report and Recommendation, (Nov. 13, 2020), at 8.

4. Factor 5: “whether the attorney’s efforts substantially contributed to the result.”²⁴

This factor gets at the causal connection between a given firm’s efforts and the result obtained. Individually retained plaintiffs attorneys typically engage in at least one of several categories of work that contribute to the ultimate Award:

- (1) review of medical records and necessary actions taken to ensure medical conditions were identified and diagnosed at the earliest possible date;
- (2) support of their individual clients to ensure their lawsuit would have evidentiary support should the matter proceed to trial;
- (3) review of other litigation that was related to ensure claims in this litigation would not be negatively impacted;
- (4) support of their individual clients in understanding the ongoing settlement negotiations and risks, and in ultimately making the determination of whether to opt out of the class;
- (5) shepherding the individual client through a claims process from registration to receipt of a Monetary Award;
- (6) support of clients who were seeking loans and were exposed to predatory lending practices; and
- (7) providing necessary support in other personal matters collaterally related to this litigation.²⁵

Here, the Firm’s work fell into Categories (1), (2), (3), (4), and (5). In Category (1), the Firm states that it reviewed the Player’s medical records in 2015 and arranged for medical evaluations in 2017, as soon as the Settlement became effective, in order to attempt to secure a prompt diagnosis. Firm Stmt. of Dispute at Ex. B. The Firm states that it arranged for another round of medical evaluations and conducted further medical record review in 2021 to obtain the Qualifying Diagnosis that entitled the Player to the Monetary Award. *Id.*

The Firm engaged in Category (2) work when, it states, it reviewed threshold issues relevant to the Player in May of 2012 when the litigation was still in Phase 2. *Id.* This included consideration of “potential appropriate experts” in an effort to boost evidentiary support if the matter proceeded to trial. *Id.*

The Firm asserts that it advised the Player on pending litigation relating to a co-defendant alongside the NFL, Riddell, which falls within Category (3). *Id.* In Category (4), the Firm states that it advised the Player on the progress of the NFL litigation, the preliminary Settlement Agreement, whether to stay in the Settlement or opt out, and the meaning of Settlement criteria. *Id.*

²⁴ *McKenzie II* at 45.

²⁵ ECF No. 12328, at 16-17.

Category (5) is where the Firm engaged in work that is easiest to assess from the record, and possibly most significant. The Claims Administrator raised concerns that the Player may have been driving and working, despite having reported to his doctors that he was doing neither. Doc. 240370. This would have materially reduced the Player's likelihood of obtaining an Award. The Player responded to the Claims Administrator with a handwritten letter expressing his indignation with the audit and asserting that the "Litigation 'game' has started and things such as this and the ability to work should not be added as stipulations for former Players to have their claims disqualified." Doc. 240792.

Unsurprisingly not satisfied with this response, the Claims Administrator followed up with the Firm. Doc. 241587. After speaking with the Player's father, with whom the Player was living, the Firm confirmed that the Player was neither working nor driving, and had recently been released from a three-month stay at "an institution with a padded room." *Id.* This correspondence sufficiently answered the concerns raised in the audit, for the Notice of Monetary Award resulted a few months later. Doc. 243084. The Firm thus played an important role in shepherding the Player through the Claims process from registration to determination of eligibility for a Monetary Award.

5. Overall Fairness

McKenzie I reserved a Court's power to assess whether a fee would result "in such an enrichment at the expense of the client that it offends a court's sense of fundamental fairness and equity."²⁶ The fee cap applies here in ensuring that the fees are not too excessive. While there may be a situation under the *McKenzie* framework where a further fee reduction would be warranted, this is not that case.

Excepting the missing retainer agreement,²⁷ the record supports a finding that the Firm exercised diligence over the course of its representation of the Player. There is no evidence to suggest unprofessional conduct or a violation of the lien rules. Over ten years, the Firm worked with the Player to protect his interests, keep him informed, and ultimately secure a Monetary Award. That the child support lien nearly eclipses the Award does not render the attorney fee fundamentally unfair. Indeed, even were I to conclude that a reduction in the attorney fee was warranted, that money would likely go towards satisfying the child support creditor, rather than to the Player.

6. Costs Asserted

The Firm seeks \$4,020.32 in expenses incurred related to the Player's individual case, including two medical evaluations, postage, and other administrative expenses. Firm Stmt. of Dispute at Ex. C. These costs are reimbursable under the contingency agreement between the Player and the Firm. *Id.* at Ex. A.

²⁶ *McKenzie I* at 101.

²⁷ The Claims Administrator has already affirmed that the Firm is entitled to assert this lien, despite having lost the physical retainer. Doc. 265553.

Under the Rules issued and approved on September 21, 2023, the Special Masters have empowered the Claims Administrator to develop a process by which costs will be reimbursed.²⁸ Attorneys seeking reimbursement for their costs must now submit proof of payment for expenses above \$50.²⁹ To that end, the Firm will submit receipts or equivalent proofs justifying any expense exceeding \$50 to the Claims Administrator. When it does, it may recover those costs.

RECOMMENDATION

The Firm represented the Player for over ten years, beginning in Phase 2 of this litigation and extending into Phase 3. During that time, it engaged in substantial work on the Player's behalf that ultimately led to a Monetary Award. No other firms were involved, and the Player only terminated his relationship with the Firm after receiving the Notice of Monetary Award. I find the 22% contingent fee sought to be reasonable. In addition, the Firm should be reimbursed for costs above \$50 for which it has paid receipts or the like.

I therefore recommend that the Claims Administrator be ordered to designate the funds withheld for attorney's fees and costs as follows:

1. The Firm is authorized to deposit into its operating account the 17% portion of the Player's Monetary Award as attorney's fees;
2. The Firm will submit receipts for each item of cost exceeding \$50. For all items so supported, the Claims Administrator will deposit funds withheld from the Player's Monetary Award for their reimbursement. All costs below \$50 are immediately reimbursable.
3. The 5% holdback funds will be released by the Claims Administrator to the Firm in accordance with future orders of the Court.

The Parties may file objections to this Report and Recommendation.³⁰

Date: October 31, 2023



David A. Hoffman, Special Master

²⁸ See ECF No. 12348-1, Rules Governing Attorneys' Liens, at Rule 10 (Sept. 21, 2023) ("The Claims Administrator has discretion to develop and maintain internal policies and procedures it deems necessary to implement these Rules.").

²⁹ *Attorneys' Lien Assertion Form: Section IV* (Additional Documentation), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com> ("For all costs exceeding \$50 in value, attorneys must submit proof that the asserted costs have been paid on behalf of the SCM (*i.e.*, paid receipts, invoices, etc.).").

³⁰ See ECF No. 12348-1, Rules Governing Attorneys' Liens, at Rule 7 (Sept. 21, 2023).

**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

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:

Goldberg, Persky & White, PC

v.

SPID No. 950001953 ([REDACTED])

Attorney's Lien Dispute

Case No. 2002

ORDER

AND NOW, this 11th day of December, 2023, upon consideration of the Attorney Lien identified above and the Report and Recommendation of Special Master David A. Hoffman dated October 31, 2023 (Doc. ID No. 296118), to which no objection has been filed, it is **ORDERED** that:

1. The Report and Recommendation is **ADOPTED**;

2. Goldberg, Persky & White (the “Firm”) is **AUTHORIZED** to deposit into its operating account the 17% portion of the Player’s Monetary Award;
3. The Claims Administrator is **AUTHORIZED** to release to the Firm funds withheld from the Player’s Monetary Award for reimbursement of costs as follows:
 - a. All costs below \$50;
 - b. For each item of cost exceeding \$50 for which the Firm submits a receipt within 30 days of this Order; and
4. The Claims Administrator will release to the Firm the 5% portion of the Monetary Award that is currently withheld in the Attorneys’ Fees Qualified Settlement Fund pursuant to the Court’s June 27, 2018 Order Regarding Withholdings for Common Benefit Fund (Doc. No. 10104) in accordance with future orders of the Court.

s/ANITA B. BRODY, J

ANITA B. BRODY, J.