

**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:

SPID No. 100007094

Hon. Anita B. Brody

SETTLEMENT IMPLEMENTATION DETERMINATION

Before this Court is an objection by the NFL Parties from a finding by the Special Master that a Retired NFL Football Player ("Claimant") was entitled to a claim award for a Qualifying Diagnosis of Alzheimer's Disease, with a "date of qualifying diagnosis" of October 24, 2012.

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.

In October 2018, the Claimant sought a Qualifying Diagnosis from a Qualified MAF Physician. The Qualified MAF Physician made a diagnosis of Alzheimer's Disease. He also reviewed the Claimant's medical records from 2012 and 2013, which showed symptoms of dementia and cognitive decline, but which did not identify those symptoms as the onset of Alzheimer's Disease. The MAF Physician determined, based on a review of these medical records, that the Claimant first developed Alzheimer's disease in 2012. Accordingly, the MAF Physician found that the date of the diagnosis was October 24, 2012. The NFL parties do not dispute that the Claimant was properly diagnosed with Alzheimer's disease in 2018. Instead,

they object to the Claims Administrator allowing the MAF Physician to determine that the “date of diagnosis” was in 2012.

Specifically, the NFL argues that the Settlement Agreement requires that the date of a Qualifying Diagnosis be the date the diagnosing physician examines the Retired Player. This is incorrect. The Settlement’s injury definitions, including that for Alzheimer’s, do not state that a diagnosing physician can only give the date of diagnosis as the date that the physician personally examines the Retired Player. Rather, the injury definition for Alzheimer’s Disease merely states that living Retired NFL Football Players seeking compensation for a Qualifying Diagnosis of Alzheimer’s Disease must have “a diagnosis while living of the specific disease of Alzheimer’s Disease.” Settlement Agreement Exh. A-1 at 4.

Additionally, the Settlement requires that a Diagnosing Physician Certification contain “the Qualifying Diagnosis being made consistent with the criteria in Exhibit 1 (Injury Definitions)” and “the date of diagnosis.” Settlement Agreement § 2.1(gg). If the date of diagnosis was always to be the date of the examination, the Settlement would say this, and would require a Diagnosing Physician Certification to include only the “date of the examination.” Instead, by requiring the “date of diagnosis,” the Settlement language implies that the “date of diagnosis” is not necessarily the “date of the examination.”

Recognizing this, the Special Masters promulgated a Frequently Asked Question (“FAQ”) which allows a physician, under limited circumstances, to conclude that the date of diagnosis was at some point prior to the date of the examination. Specially FAQ 99 states, in relevant part:

(b) General Rule for the other Qualifying Diagnoses: The date of a Qualifying Diagnosis other than Death with CTE is when the diagnosing physician has enough information and materials, including test results, to be able to render a medically sound and reliable judgment about the Player’s condition, the way a physician

normally does in his or her clinical practice. In some cases, using sound medical judgment, a physician may conclude that a Qualifying Diagnosis existed at some prior point in time.

(c) *Are there other cases when the Qualifying Diagnosis might be before the date the physician personally examines the Player?* Maybe. The unique facts and circumstances of a particular claim may allow the diagnosis date to be before the date the diagnosing physician personally examined the Player. Here are the rules:

...

(5) *Sound clinical medical judgment:* Also, the physician making a diagnosis may conclude, in the exercise of his or her sound medical judgment, that he or she has enough information from personal examination, medical records from other healthcare providers, medical history, corroborating evidence from non-family members and other information that medical specialists rely on in their clinical practices, to form a sound medical judgment that the Player's Qualifying Diagnosis conditions existed at a date earlier than the date of a personal examination of the Player by the physician making the diagnosis and signing the Diagnosing Physician Certification Form. The Settlement Class Member is best served by having the doctor who made an earlier diagnosis sign the Diagnosing Physician Certification Form. But there may be situations where the diagnosing physician can pinpoint an earlier date that is based on sound clinical judgment and best medical practices.

This FAQ is a sensible and reasonable interpretation of the Settlement: it recognizes that there may be infrequent situations in which a Retired NFL Player's past symptoms were not recognized as a Qualifying Diagnosis at the time but now can be identified by a physician as the onset of a Qualifying Diagnosis. In that case, the Retired NFL Player should not be penalized for their previous doctor's failure to identify a Qualifying Diagnosis, or for their early symptoms manifesting in an unusual way. Instead, these Retired Players should be compensated based on the date their diagnosis actually began.¹

¹ The NFL Parties also argue that because the Claimant does not meet the requirements of Settlement Agreement § 8.2(a)(iii), the date of diagnosis can only be the date of the 2018 examination. Settlement Agreement § 8.2(a)(iii) concerns the requirements for when a Retired NFL Player received a Qualifying Diagnosis prior to the Settlement's Effective Date, and the doctor who made that diagnosis is no longer available to submit a Diagnosing Physician Certification. It is not relevant to the claim at issue here, and does not alter the Settlement's Injury Definitions.

Of course, a diagnosing physician may only determine that the date of diagnosis was at some point before the date of the examination when he or she bases that determination on medical records and other information normally relied on by physicians. There must be sufficient evidence from which the diagnosing physician may be confident, based on his or her sound clinical judgment, of the proper date of diagnosis. Because these requirements were satisfied in this case, the Claims Administrator properly accepted the MAF Physician's date of diagnosis.

The NFL Parties also argue that the Special Master abused his discretion in failing to consult with a member of the Appeals Advisory Panel ("AAP") when deciding the NFL Parties' appeal. The Settlement states that when deciding claim appeals, the Special Master "may be assisted, in its discretion by any member of the Appeals Advisory Panel and/or an Appeals Advisory Panel Consultant." Settlement Agreement § 9.8. The Settlement Agreement thus unambiguously states that deciding whether to consult a member of the Appeals Advisory Panel ("AAP") and/or an Appeals Advisory Panel Consultant ("AAPC") is within the complete discretion of the Special Masters. Because the parties left the decision whether to consult a member of the AAP and/or an AAPC within the discretion of the Court and the Special Masters, I may only disturb the Special Master's decision on AAP or AAPC consultation if it was an abuse of discretion. *See* ECF No. 10528.

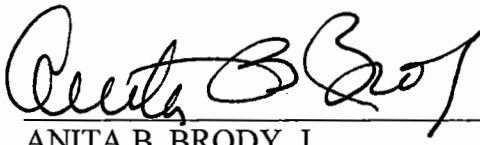
"An abuse of discretion occurs only where the district court's decision is 'arbitrary, fanciful, or clearly unreasonable'—in short, where 'no reasonable person would adopt the district court's view.'" *United States v. Green*, 617 F.3d 233, 239 (3d Cir. 2010) (quoting *United States v. Starnes*, 583 F.3d 196, 214 (3d Cir. 2009)).

I find that the Special Master did not abuse his discretion in declining to consult an AAP member when deciding the appeal subject to this objection. It was well within the range of

reasonable choices available to the Special Master to decide that he was capable of reviewing the claim appeal, including the MAF Physician's determination of the date of the diagnosis, without additional input from an AAP member.

Based on a review of the Special Master's Ruling, a review of the NFL Parties' objection, and a review of NFL's oppositions to the objection filed by the Claimant's attorney and by Class Counsel,² I approve and adopt the conclusions in Special Master Pritchett's Ruling. Accordingly, the NFL Parties' objection is **DENIED**.

August 20, 2019


ANITA B. BRODY, J.

Copies VIA ECF

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

**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

Hon. Anita B. Brody

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

Plaintiffs,

Civ. Action No.: 14-cv-00029-AB

v.

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

Defendants.

THIS DOCUMENT RELATES TO:

Settlement Class Member [REDACTED]
(SPID 100007094)

Hon. Anita B. Brody

**THE NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES LLC
OBJECTION TO THE SPECIAL MASTER'S FEBRUARY 28, 2019
RULING CONCERNING THE MONETARY AWARD CLAIM
DETERMINATION FOR [REDACTED]**

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The National Football League and NFL Properties LLC (collectively, the “NFL Parties”) respectfully submit this Objection to the Special Master’s February 28, 2019 decision denying their appeal of the Monetary Award granted to Settlement Class Member [REDACTED] [REDACTED] (“Claimant”).

Preliminary Statement

Claimant [REDACTED] [REDACTED] submitted a claim based on a Qualifying Diagnosis of Alzheimer’s Disease (“Alzheimer’s”) rendered by Qualified MAF Physician Dr. [REDACTED] [REDACTED] who first evaluated and diagnosed Mr. [REDACTED] on October 11, 2018. The NFL parties do not contest the Alzheimer’s diagnosis as of that date. Instead, the NFL Parties contest the *backdating* of that diagnosis by *nearly six years* based on Dr. [REDACTED] records review of prior examinations by highly qualified physicians who never diagnosed Claimant with Alzheimer’s and, in fact, specifically found that Claimant did *not* merit an Alzheimer’s diagnosis as of the date of their evaluations.

Dr. [REDACTED] backdating of Claimant’s Qualifying Diagnosis is inconsistent with the plain terms of the Settlement Agreement. Under the Agreement, a Qualifying Diagnosis may be backdated only where the claimant’s prior physician provided the same Qualifying Diagnosis but then became unavailable to sign a Diagnosing Physician Certificate due to death or legal incapacity. (Settlement Agreement § 8.2(a)(iii).) But the circumstances here are precisely the opposite: Claimant’s prior physicians did *not* provide an Alzheimer’s diagnosis (indeed, they specifically disclaimed that diagnosis) and they are neither dead nor legally incapacitated.

Claimant defends the backdating of his diagnosis based on Settlement Program FAQ 93, which—contrary to the strict limitations on backdating set forth in the Settlement Agreement—purports to allow a diagnosing physician to use “his or her sound medical judgment” in deciding, based on a review of prior medical records and other information, that “the Player’s Qualifying

Diagnosis conditions existed at a date earlier than the date of [that physician's] personal examination of the Player.” (Ex. 1 at 8–9, Settlement Program FAQ 93 (“FAQ 93”).) The NFL Parties objected to FAQ 93 at the time it was promulgated, and respectfully submit that FAQ 93 impermissibly and materially changes the terms of the Settlement Agreement to the extent it expands the circumstances in which a Qualifying Diagnosis may be backdated beyond those situations specifically agreed to by the Parties.

But even if this Court were to determine that FAQ 93 is valid (and it is not), that FAQ explicitly requires that any backdated diagnosis “be strictly scrutinized in the claims review process,” and strict scrutiny was not applied in this case. (*Id.*) For strict scrutiny to have any meaning in this context, it must involve consultation with an Appeals Advisory Panel (“AAP”) member, who would review the prior medical records and other information purportedly supporting the diagnosing physician’s “sound medical judgment” that the physician can “pinpoint an earlier date” at which the “Player had the conditions amounting to a Qualifying Diagnosis.” (*Id.*) Mere lay review by the Special Master of complex medical records—filled with specialized medical terminology, jargon and shorthand—cannot constitute strict scrutiny in these circumstances. Here, there is no indication that the Special Master consulted with an AAP member on whether the earlier medical records and other information support a “sound medical judgment” that Claimant had Alzheimer’s Disease almost six years earlier. The Special Master’s failure to consult with an AAP member in this case constitutes an abuse of discretion.

In fact, strict scrutiny by an AAP member undoubtedly would result in denial of the backdated diagnosis because the medical records Dr. [REDACTED] reviewed show that the highly qualified medical professionals who examined Claimant in 2012 and 2013—including a neurosurgeon, neuropsychologist, and neurologist specializing in memory disorders—determined

that Claimant had dementia or another form of cognitive disorder but did *not* have Alzheimer's at that time. Indeed, one of those examining doctors was current AAP member Dr. [REDACTED] who evaluated Mr. [REDACTED] three times in 2013 and concluded that "[n]either the neuropsychological testing nor the bedside exam today raise particular suspicions for Alzheimer[s] disease or other progressive degenerative disorders as the cause of the symptoms at this time," but noted that Claimant's risk of developing the disease in the future "is high." (Ex. 2 at 4, Jan. 4, 2013 [REDACTED] Report.) The fact that Claimant ultimately was diagnosed with Alzheimer's in 2018 is not a basis to retroactively conclude that he met the criteria for Alzheimer's Disease six years earlier—particularly when that diagnosis was considered, and rejected, by medical experts at that time.

For these reasons, this Court should overturn the Special Master's decision and direct, consistent with the Settlement Agreement, that Claimant's diagnosis date is October 11, 2018 for purposes of calculating his Monetary Award. Alternatively, to the extent the Court determines that FAQ 93 is valid, the Court should remand the appeal to the Special Master with direction to consult with an AAP member (other than Dr. [REDACTED] on the appeal.

Background

The definition of Qualifying Diagnoses was a key and heavily negotiated component of the Settlement Agreement. For a Qualifying Diagnosis of Alzheimer's, the Settlement Agreement requires that a Qualified MAF Physician, or other neuro-specialist physician (as set forth in Section 6.3), make a diagnosis of:

[T]he specific disease of Alzheimer's Disease as defined by the World Health Organization's International Classification of Diseases, 9th Edition (ICD-9), the World Health Organization's International Classification of Diseases, 10th Edition (ICD-10), or a diagnosis of Major Neurocognitive Disorder due to probable Alzheimer's Disease as defined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5)

(Settlement Agreement Ex. A-1 at 4, § 3(a) (emphasis in original).)

Under the Settlement Agreement, a Qualifying Diagnosis may only be backdated in very limited circumstances not present here—*i.e.*, when the claimant’s prior physician provided the *same* Qualifying Diagnosis on an earlier date but “has died or has been deemed by a court of competent jurisdiction legally incapacitated or incompetent prior to the Effective Date, or otherwise prior to completing a Diagnosing Physician Certification.” (Settlement Agreement § 8.2(a)(iii).) In that specific case, the date of the Qualifying Diagnosis by the prior physician can be used to calculate the Monetary Award.

Here, Claimant had been evaluated by a highly qualified neurosurgeon, neurologist and neuropsychologist in 2012 and 2013 in his home state of Alabama. None of these doctors diagnosed Claimant with Alzheimer’s at that time. On October 24, 2012, neurosurgeon Dr. [REDACTED] examined Claimant, diagnosed him with “[d]ementia” (not Alzheimer’s), and referred him for further evaluation to neurologist Dr. [REDACTED] (currently an AAP) and neuropsychologist Dr. [REDACTED].¹ These doctors also diagnosed Claimant with dementia or other cognitive disorder, and specifically concluded that there was not sufficient evidence to support an Alzheimer’s diagnosis at that time. In his December 19, 2012 report, Dr. [REDACTED] concluded that “the pattern of [Claimant’s neuropsychological testing] results is not indicative of a primary dementia, such as Alzheimer’s disease.”² Dr. [REDACTED] January 4, 2013 report agrees, stating that “[n]either the neuropsychological testing nor the bedside exam today raise particular suspicions for Alzheimer[’s] disease or other progressive degenerative disorders as the cause of the symptoms at this time,” but noted Claimant’s risk of developing the disease in the future “is

¹ Ex. 3 at 2, Oct. 24, 2012 [REDACTED] Report.

² Ex. 4 at 1, Dec. 19, 2012 [REDACTED] Report.

high.”³

Nearly six years later, Claimant traveled over 700 miles to see Qualified MAF Physician Dr. [REDACTED] who evaluated Claimant on October 11, 2018 and concluded that Claimant presented with Alzheimer’s. But instead of providing 2018 as the date of diagnosis for calculating a Monetary Award value, Dr. [REDACTED] backdated the Alzheimer’s diagnosis to October 24, 2012—the date of Claimant’s evaluation by neurosurgeon Dr. [REDACTED] in which Dr. [REDACTED] diagnosed Claimant with “dementia,” not Alzheimer’s. Notably, Dr. [REDACTED] a [REDACTED], was eminently qualified under the Settlement Agreement to have provided Claimant with a pre-Effective Date diagnosis on the basis of his 2012 evaluation.

On November 28, 2018, Claimant received a claim determination for Alzheimer’s based on the October 24, 2012 diagnosis date selected by Dr. [REDACTED].⁴ There is no indication that the Claims Administrator consulted an AAP member in connection with that determination.

The NFL Parties appealed the claim determination, challenging only the backdating of the diagnosis. The NFL Parties argued that backdating was impermissible under the Settlement Agreement and, in all events, wholly unsupported by the medical records from 2012 and 2013, given that all the highly qualified medical professionals who personally examined Claimant determined that he did not evidence Alzheimer’s at that time.⁵ The NFL Parties argued that the mere fact that Claimant’s cognitive impairment eventually progressed to Alzheimer’s provided no

³ Ex. 2 at 4, Jan. 4, 2013 [REDACTED] Report. Indeed, Claimant’s cognitive testing in 2013 supports the conclusion that he did not qualify for an Alzheimer’s diagnosis at that time. Claimant received a *normal* score of 26/30 on the Montreal Cognitive Assessment (“MoCA”) on January 4, 2013, and a *perfect* score of 30/30 on the Alabama Brief Screener test on both January 4, 2013, and April 15, 2013. (Ex. 2 at 3, 6, Jan. 4, 2013 [REDACTED] Report; Ex. 5 at 5, Apr. 15, 2013 [REDACTED] Report; Ex. 6 at 4, MoCA FAQs.)

⁴ Ex. 7, Nov. 28, 2018 Notice of Monetary Award Claim Determination.

⁵ Ex. 8, NFL Parties’ Appeal.

sound basis to backdate the diagnosis by six years.⁶ Claimant opposed the NFL Parties' appeal, arguing that the backdated diagnosis was permissible under FAQ 93, which generally allows backdating based on a physician's "sound medical judgment."⁷ Claimant also argued that the backdating was supported by the 2012–13 medical records because these "identified significant memory disorder, the signature symptom of Alzheimer's" and that "there is no rational reason why significant symptoms of memory disorder in 2012 would ever be unrelated to an advanced Alzheimer's diagnosis six years later."⁸

The Special Master denied the NFL Parties' appeal on February 28, 2019.⁹

ARGUMENT

A. The Special Master's Interpretation Allowing Backdating of Qualifying Diagnoses Violates the Unambiguous Terms of the Settlement Agreement

While the Special Master's decision purports to be "a factual determination" that is "final and binding," the decision, in fact, turns on an interpretation of the Settlement Agreement's terms and thus reflects a conclusion of law that the Court may review *de novo*. See, e.g., *In re Johns-Manville Corp.*, 759 F.3d 206, 214 (2d Cir. 2014) ("The interpretation of unambiguous settlement-agreement terms is a question of law subject to *de novo* review.")¹⁰

The Special Master's decision permitting Dr. [REDACTED] to backdate a Qualifying Diagnosis by almost six years is contrary to the Settlement Agreement's clear terms. Settlement Agreement Section 8.2(a)(iii) identifies the limited circumstances in which a diagnosis may be backdated:

⁶ *Id.*

⁷ Ex. 9, Opposition of [REDACTED] to the NFL Parties' Appeal.

⁸ *Id.* at 2.

⁹ Ex. 10, Feb. 28, 2019 Post-Appeal Notice of Monetary Award Claim Determination.

¹⁰ Moreover, this Court expressly retained "continuing and exclusive jurisdiction to interpret, implement, administer and enforce the Settlement Agreement" in accordance with its terms. (Am. Final Order and J. § 17, ECF No. 6534; see also Settlement Agreement § 20.1(n).) As such, this Court has authority to review and determine the proper interpretation of the Settlement Agreement.

In cases where a [claimant] has received a Qualifying Diagnosis and the diagnosing physician who provided the Qualifying Diagnosis . . . has died or has been deemed by a court of competent jurisdiction legally incapacitated or incompetent prior to the Effective Date, or otherwise prior to completing a Diagnosing Physician Certification, the [claimant] may obtain a Diagnosing Physician Certification from a separate qualified physician for the Qualifying Diagnosis as specified in Exhibit 1 based on an independent examination by the qualified physician and a review of the Retired NFL Football Player's medical records that formed the basis of the Qualifying Diagnosis by the deceased or legally incapacitated or incompetent physician. If the same Qualifying Diagnosis is found by both doctors, the date of Qualifying Diagnosis used to calculate Monetary Awards shall be the date of the earlier Qualifying Diagnosis.

Those circumstances are not remotely present here. In this case, the physicians who evaluated Claimant in 2012 and 2013 did *not* diagnose Alzheimer's (and, indeed, expressly ruled it out at that time). Moreover, Dr. [REDACTED] is clearly qualified under the Settlement Agreement to have provided a Diagnosing Physician Certification for a pre-Effective Date diagnosis.

Because the only portion of the Settlement Agreement that contemplates the backdating of diagnoses states the specific conditions in which it is allowed, backdating is prohibited in all other circumstances. The Special Master's contrary interpretation violates the fundamental canon of contractual interpretation *expressio unius est exclusio alterius*, which instructs that when a contract expressly includes certain powers, others are impliedly excluded.¹¹ The Special Master's ruling materially alters the agreed-upon terms of the Settlement Agreement and is therefore invalid as a matter of law. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010) ("A district court is not a party to the settlement, nor may it modify the terms of a voluntary settlement

¹¹ *See Sony Corp. v. Fujifilm Holdings Corp.*, No. 16 CIV. 5988 (PGG), 2017 WL 4342126, at *7 (S.D.N.Y. Sept. 28, 2017) ("*Expressio unius est exclusio alterius* is a maxim, or canon of construction, providing that 'the expression of one thing is the exclusion of the other.'"); *Realtime Data, LLC v. Malone*, 961 N.Y.S.2d 275, 277–78 (N.Y. App. Div. 2013) (invoking *expressio unius est exclusio alterius* to conclude that contract language conditioning employee bonus "upon" sale of assets implies that bonus does not apply to other distributions); *Bank of N.Y. Mellon Tr. Co. v. Morgan Stanley Mortg. Capital, Inc.*, 821 F.3d 297, 306 (2d Cir. 2016).

agreement between parties.”).

This material alteration is also highly prejudicial to the NFL Parties because it could substantially increase the cost of this un-capped settlement. The parties negotiated the compensation values in the Monetary Award Grid (which grants larger monetary awards to younger players) based on the player’s age at the time the Qualifying Diagnosis actually occurs, not based on the earliest date to which a sympathetic doctor might be willing to backdate a diagnosis. To the contrary, the structure of the Settlement Agreement separately accounts for the progressive nature of these cognitive diseases by providing supplemental awards if a claimant is initially diagnosed with a less severe Qualifying Diagnosis (*e.g.*, Level 1.5 Neurocognitive Impairment), that later progresses to a more severe Qualifying Diagnosis (*e.g.*, Alzheimer’s). *See In re Nat. Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 366–67, 377 (E.D. Pa. 2015) (“[T]he Settlement provides Supplemental Monetary Awards for worsening symptoms. Retired Players who receive more severe Qualifying Diagnoses after receiving initial Monetary Awards are entitled to supplemental payments.”). As such, the progression of a claimant’s condition is not a proper basis to backdate a later, more severe, diagnosis to the date a player may have received an earlier, less severe, diagnosis. Such backdating is contrary to very design of the Injury Grid and Supplemental Monetary Awards negotiated by the Parties.

Notably, the NFL Parties expressly objected to FAQ 93—which incorrectly states that backdating is permissible in the “[s]ound clinical medical judgment” of a diagnosing physician—for this very reason when it was proposed. (Ex. 11, Feb. 2, 2018 Email from B. Birenboim to O. Brown (“The NFL Parties respectfully submit that this provision also impermissibly alters an express term of the Settlement Agreement.”).) As the NFL Parties correctly noted, backdating may not occur in circumstances not expressly provided for in the Settlement Agreement or

otherwise mutually agreed by the parties.¹² This issue is now ripe for this Court's review, and the Special Master's ruling should be overturned.

B. The Special Master Abused His Discretion in Failing to Consult with an AAP Member in Connection with the NFL Parties' Appeal

Even if this Court were to find FAQ 93 to be valid insofar as it permits the backdating of diagnoses in the "sound medical judgment" of the physician, the Special Master's decision should still be reversed. The Special Master's apparent failure to consult with an AAP member constituted a clear abuse of discretion given FAQ 93's requirement that any backdated diagnoses "be strictly scrutinized in the claims review process." (Ex. 1 at 8–9, Settlement Program FAQ 93.)¹³

In reviewing for abuse of discretion, the Court must determine, based on the totality of the circumstances, whether the Special Master's decision not to consult an AAP member was unreasonable.¹⁴ The Special Master's decision is entitled to less deference than an appellate court would give to a trial court's determination.¹⁵ Moreover, this Court expressly retains "continuing and

¹² See *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010); see also *In re Cendant Corp. Prides Litig.*, 233 F.3d 188 (3d Cir. 2000). The parties did agree to one additional situation in which a Qualifying Diagnosis may be backdated: where the same Qualifying Diagnosis had been made earlier by an 88 Plan neutral physician who then refused to sign the Diagnosing Physician Certification. Because the 88 Plan did not permit these physicians to sign the certificates, the parties agreed to consider these physicians "unavailable" in the spirit of the Section 8.2(a)(iii) exception, such that the earlier 88 Plan diagnosis date would govern where a Qualified MAF Physician or Qualified BAP Provider later provided the same Qualifying Diagnosis. Claimant has offered no basis to believe that this exception has any application here.

¹³ See Fed. R. Civ. P. 53(f)(5) ("Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.").

¹⁴ See *Loinaz v. EG & G, Inc.*, 910 F.2d 1, 7 (1st Cir. 1990) ("There is no neat, standardized test for judging abuse of discretion; each case must be judged on its own facts and circumstances."); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 n.6 (2d Cir. 2001) ("Discretion is said to be 'abused' ('exceeded' would be both a more felicitous and correct term) when the decision reached is not within the range of decision-making authority a reviewing court determines is acceptable for a given set of facts.") (internal quotation omitted)); *U.S. v. Cunningham*, 694 F.3d 372, 383 (3d Cir. 2012) (district court's rulings are an abuse of discretion if "clearly unreasonable"); *Ferguson v. Eakle*, 492 F.2d 26, 29 (3d Cir. 1974) (considering "totality of [] circumstances" in determining that district court abused its discretion).

¹⁵ See Fed. R. Civ. P. 53, Special Committee Notes, 2003 Amendment Subdivision (g) ("The subordinate role of the master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.").

exclusive jurisdiction to interpret, implement, administer and enforce the Settlement Agreement,”¹⁶ and thus has the unfettered authority to opine on the proper implementation of strict scrutiny in this context.

Here, there can be no pretense that strict scrutiny was applied in the claim review process since neither the Claims Administrator nor the Special Master consulted with the AAP. A lay person lacks the requisite expertise to assess—much less strictly scrutinize—whether or not the evidence available to the Qualified MAF Physician, primarily in the form of historical medical records full of specialized terminology and medical jargon and shorthand, supports a “sound medical judgment” that Claimant satisfied the strict diagnostic criteria for Alzheimer’s six years earlier. We submit that review by an AAP member would readily reveal the impropriety of the backdating in this case, particularly where, as here, all of the highly qualified medical professionals who examined Claimant at the time failed to diagnose Alzheimer’s and, indeed, expressly found no basis to support an Alzheimer’s diagnosis.

Conclusion

For the reasons set forth herein, the NFL Parties respectfully request that the Court reverse the Special Master’s decision and approve Mr. [REDACTED] claim as of October 11, 2018. Alternatively, the NFL Parties respectfully request that the Court reverse and remand the Special Master’s decision, directing the Special Master to consult an AAP member on the appeal.

¹⁶ Am. Final Order and J. § 17, ECF No. 6534; *see also* Settlement Agreement § 20.1(n).

Dated: March 20, 2019

Respectfully submitted,

/s/ Brad S. Karp

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**RESPONSE OF CLAIMANT [REDACTED]
IN OPPOSITION TO THE OBJECTION OF THE NFL**

[REDACTED] received a monetary award from the Claims Administrator and post-appeal monetary award from the Special Master based on the Special Master's determination that the NFL failed to marshal clear and convincing evidence that the award, diagnosis, or date of diagnosis was incorrect. This was a final factual determination. *See* Post Appeal Notice of Monetary Award, attached as Exhibit 1. For that reason, the Special Master's determination is final and binding, and Mr. [REDACTED] award should be paid. *See* section 9.8 of the Settlement Agreement, attached as Exhibit 2.

Co-Lead Class Counsel addressed the NFL's appeal of Dr. [REDACTED] proper application of FAQ 93(c)(5) to Mr. [REDACTED] claim. Mr. [REDACTED] incorporates and adopts in his own Opposition to the NFL's Objection the entire submission of Co-Lead Counsel as if fully set forth herein.

Contrary to the NFL argument, this diagnosis has nothing to do with section 8.2 of the Settlement Agreement. That section addresses circumstances where a qualifying diagnosis was rendered by a neurologist who is deceased or otherwise unavailable and cannot sign a DPC. Dr. [REDACTED] is a qualified MAF neurologist who is among the leading cognitive and behavioural neurologists in the United States. He fully and independently examined Mr. [REDACTED] gave a diagnosis based, in part, on the contemporaneous neuropsychological report of [REDACTED] and assessed the date of onset as provided by FAQ 93(c)(5). He is entitled to do that under the MAF program based on his own examination, the evaluation provided by Dr. [REDACTED] collateral information available to him, and past medical records, including neurological records from 2012. Under these circumstances, Dr. [REDACTED] was able to determine a likely clinical date-of-onset of Alzheimer's Disease using standard medical practice and his sound judgment. Notwithstanding the NFL's argument, it is medically obvious that Mr. [REDACTED] advanced Alzheimer's Disease did not appear overnight. It developed over many years and likely began as a clinical manifestation of simple dementia diagnosed in 2012. The specialists who diagnosed Mr. [REDACTED] with dementia in 2012 did not have the benefit of the course of the disease Dr. [REDACTED] assessed. Over six years, the advance of the memory disorder was so dramatic that Dr. [REDACTED] (and Dr. [REDACTED]) diagnosed the symptoms as an advanced case of Alzheimer's Disease that began long ago. Dr. [REDACTED] was conservative in placing the date of onset as the date (2012) when a neurosurgeon first formally diagnosed Mr. [REDACTED] with dementia.

Settlement Section 8.2 Does Not Apply

Settlement section 8.2 is irrelevant. It addresses an anticipated problem when a diagnosing physician becomes deceased or unavailable after rendering a qualifying diagnosis but before signing a DPC. It provides a remedy anticipated by the Settlement in the completion of the DPC, but it does not address the present case where a qualifying physician examines a patient and, using all available information, diagnoses an illness and its start date.

Case law cited by the NFL is equally irrelevant. Those cases involve written contracts

that impose an explicit condition to a finite outcome. *See Sony Corp. v. Fujifilm Holdings Corp.*, No. 16 CIV. 5988 (PGG), 2017 WL 4342126 (S.D.N.Y. Sept. 28, 2017) and *Realtime Data, LLC v. Malone*, 961 N.Y.S.2d 275 (N.Y. App. Div. 2013) (an express condition implies a mandatory precedent). *See also Bank of N.Y. Mellon Tr. Co. v. Morgan Stanley Mortg. Capital, Inc.*, 821 F.3d 297, 306 (2d Cir. 2016) (any condition precedent must be specific within the contract and any condition not explicitly stated cannot be a required precedent). The cases do not pertain to the present facts, because section 8.2 does not impose a fixed requirement or preclude the agreement of the Parties and Order of the Court set forth in FAQ 93(c)(5). If the parties had intended that the diagnosis date of a player's disease must always match the MAF examination date, the Settlement would say so. Instead, the Settlement provides one anticipated hypothetical (section 8.2) that authorizes a diagnosing neurologist to determine an earlier date of onset of a diagnosed disease. FAQ 93 adds other examples, but it is not an exhaustive list. *See* FAQ 93(c)(4) and FAQ 93(c)(5). Instead, FAQ 93 acknowledges that the circumstances of Mr. [REDACTED] claim were not addressed by the Settlement, and the existence of FAQ 93(c)(5) is proof that when implemented the Settlement had to account for unanticipated fact patterns.

Standard medical practice requires a physician to make a diagnosis based on current evaluation and past medical history. The verified symptoms and impairments of a patient are revealed by contemporary evaluations, prior medical records, patient history, and reliable informants. These elements combine to permit the diagnosing neurologist to determine what the likely disease is and whether or not the disease is sufficiently advanced and observed in the past to have a date of onset before the date of encounter. This is standard practice in neurological offices every day. It is illogical and contrary to ethical standards to curtail the obligations of the physician and limit the treatment available to the player who has paid for the medical examination. FAQ 93 expressly requires that a physician will determine not only the diagnosis, but also the start date of the disease: "The diagnosing physician uses his or her professional medical judgment in deciding when the Player had the conditions amounting to a Qualifying Diagnosis." *See* FAQ 93(c)(5). This general rule was specifically endorsed by the NFL when the FAQs were first circulated.¹

¹ The NFL objected to other language within FAQ 93 (in particular at FAQ 93(c)(3)), but specifically endorsed the language of FAQ 93(c)(5). *See* Feb. 2, 2018 Email from B. Birenboim to O. Brown: "There is nothing in the Settlement Agreement that permits the Special Masters or the Court to depart from the 'general rule' articulated in FAQ 93 (the date of diagnosis is 'when the diagnosing physician has enough information and materials, including test results, to be able to render a medically sound and reliable judgment about the Player's condition, the way a physician normally does in his or her clinical practice')." This general rule applies to the diagnosis of Mr. [REDACTED] because Dr. [REDACTED] used medically sound and reliable judgment just as he would in his normal clinical practice. Further, the NFL failed to file any formal objection with the Court seeking an adjudication of the issue. More than a year has passed since that time, and the NFL has waived its right to object now.

The 2012 Diagnosis Date is Correct

Alzheimer's Disease by definition has an insidious and often unrecognized start date. The gradual decline in memory means that many cases are preliminarily misdiagnosed and mistreated. Dennis [REDACTED] was 66 in 2012 when he actively sought treatment for memory loss. At that time Mr. [REDACTED]'s symptoms had been ongoing for at least six years.² Dr. [REDACTED] evaluations of Mr. [REDACTED] – three in all – progressed in a manner consistent with the common problems of a making an Alzheimer's diagnosis. Dr. [REDACTED] first treated Mr. [REDACTED] for general dementia and later (after several months) for Alzheimer's in particular. However, Dr. [REDACTED] never had the breadth of patient history and reports possessed by Dr. [REDACTED] who received six more years of the patient's progressive decline in memory, extensive interviews with Mr. [REDACTED]'s wife [REDACTED] and son [REDACTED] (a [REDACTED]), and the neuropsychological test results by [REDACTED] that established that Mr. [REDACTED] memory was nearly non-existent. Mr. [REDACTED] T-scores in 2018 for the cognitive domain of learning and memory were 16, 24, 25, 31, 34, and 39, which show impairment on every single test and a severe level of impairment that signals Alzheimer's. See [REDACTED] Report, attached as Exhibit 3. This is the ultimate red flag for Alzheimer's, yet this information and none of the other foregoing information was available to Dr. [REDACTED] (or Dr. [REDACTED]). It was available to Dr. [REDACTED] and he was able to use the data, including the reports Dr. [REDACTED] and Dr. [REDACTED] provided, to view the patient in a broader context. Both prior evaluations misdiagnosed Mr. [REDACTED] with CTE, a diagnosis popular in 2012, but neither had the full picture provided by six more years that showed the course of the disease.³

The NFL, in its argument, uses emotion rather than facts. It vaguely mischaracterizes Dr. [REDACTED] as "sympathetic" in the diagnosis. Whatever the NFL may mean, it is a baseless statement and designed to question an exemplary professional carefully selected to participate in the MAF program. In his evaluation, Dr. [REDACTED] was, in fact, conservative. He stated that Mr. [REDACTED] may have met the criteria for dementia as early as 2002, when his impairment forced him into early retirement. See Medical Addendum of [REDACTED], MD, attached as Exhibit 4, at 1. The assessed start date of 2012 was, however, ten years later and only after qualified physicians had formally diagnosed serious neurocognitive impairment, including significant memory loss. This is the assessment of a thoughtful and conservative diagnostician who based

² Both neurologists, plus the neurosurgeon and the neuropsychologist, corroborate memory impairment dating back to 2006 or earlier.

³ The NFL's argument against Alzheimer's Disease makes no sense. On the one hand, it agrees that Mr. [REDACTED] does, in fact, have Alzheimer's Disease in 2018. On the other hand, it seeks to convince the Special Masters and Court that this gradual and insidious disease did not exist in 2012 and the impairment diagnosed must have been something else, perhaps CTE, and only later turned into Alzheimer's. This reflects a complete misunderstanding of the medical course of Alzheimer's and the diagnostic process. It is why the Special Masters, Court, and both parties must rely on the sound clinical judgment of outstanding neurologists in accordance with the provisions of FAQ 93.

his assessment on a large volume of medical evidence he and others developed over many years.⁴

The NFL implies that Mr. [REDACTED] should not have sought an MAF evaluation from Dr. [REDACTED]. First, as the NFL points out, Dr. [REDACTED] (as a member of the AAP) is precluded from signing a pre-effective date DPC for Mr. [REDACTED] so Dr. [REDACTED] was [REDACTED]. Further, the advancement of Mr. [REDACTED] disease is such that it would be unreasonable (and possibly legal malpractice) for undersigned counsel to rely on the limited evaluation in 2012 of a neurosurgeon who is not a neurologist and not nearly as well-versed in the clinical assessment of Alzheimer's as a cognitive and behavioral neurologist whose day to day clinical specialty is the evaluation and treatment Alzheimer's Disease. Furthermore, any Class member who is willing to travel and pay for a medical examination from a qualified MAF neurologist has the right under the Agreement to do that. It is disingenuous for the NFL to claim anything untoward against a player for exercising that right. The NFL in its disability benefit plans recognizes that long-distance travel for medical treatment is common. It often sends players 800 to 1500 miles for medical examinations from physicians, including neurologists and neuropsychologists, the NFL unilaterally selects and pays.

Dr. [REDACTED] stated both in his Report, attached as Exhibit 5, and in his Medical Addendum (Exhibit 4), that Mr. [REDACTED] showed a level of moderate dementia in 2018 that progressed over many years and had a date-of-onset of at least 2012 when Mr. [REDACTED] received his first diagnosis of dementia. In his addendum, Dr. [REDACTED] ably deflates the NFL's argument that something else must have existed in 2012 (general dementia and/or CTE), because of the distinguishing features of Mr. [REDACTED] case, in particular the early memory loss. See Exhibit 4. The MRI results also support Alzheimer's. See Exhibit 5 at 6.

There Was No Abuse of Discretion

The NFL filed its objection in this case on March 20, 2019, before the Court's Order of April 12, 2019, attached as Exhibit 6. In its Order, the Court addressed the NFL's abuse-of-discretion allegation against the Special Master for declining to consult the AAP when reviewing claims that allegedly turned on technical and medical grounds. The Court confirmed that Settlement section 9.8 provides the Special Master complete discretion whether or not to consult the AAP. The Court determined that the language of section 9.8 is unambiguous and that if the parties had wanted compulsory review by the AAP in any particular situation, they would have said so in writing. Also, the Court directly referred to the standard the NFL must meet to prove its allegation that the Special abused his discretion. That standard requires that the NFL establish that the Special Master issued a decision that is "arbitrary, fanciful, or clearly unreasonable." That is, one that "no reasonable person would adopt." See *United States v. Green*, 617 F.3d 233, 239 (3d Cir. 2010) (quoting *United States v. Starnes*, 583 F.3d 196, 214 (3d Cir. 2009). See also

⁴ If Mr. [REDACTED] disease started in 2002, then his Monetary Award would be \$576,212 more than what he was awarded for a 2012 diagnosis date.

U.S. v. Cunningham, 694 F.3d 372, 383 (3d Cir. 2012) (the abuse must be “clearly and substantially” unreasonable).

In this case, the Special Master had complete discretion to refer (or not refer) the case to the AAP. The NFL has not even attempted to prove that the Special Master’s decision not to refer the case was “arbitrary, fanciful, or clearly unreasonable” or one that “no reasonable person would adopt.” Based on the plain facts, the Special Master was reasonable to rely on Dr. [REDACTED] evaluation over any other, in part, because it is more thorough and based on a more complete set of facts than the reports provided in 2012. Also, the NFL’s diagnostic argument is fanciful. It makes no sense that the NFL agrees that Mr. [REDACTED] had Alzheimer’s Disease in 2018, yet claims that his dementia in 2012 was some other disease and anything but Alzheimer’s. That argument is unreasonable, and Dr. [REDACTED] explains that the dementia witnessed in 2018 was a progression of the illness that existed in 2012. *See* Exhibit 4.

The Settlement is also unambiguous with respect to “strict scrutiny.” The Agreement grants to the Claims Administrator discretion to seek additional information in the strict scrutiny process: “Any such diagnosis [under FAQ 93] will be strictly scrutinized in the claims review process. The Claims Administrator may request additional information and/or documents to support the claimed diagnosis date and prevent misrepresentations of material fact in connection with the claim.” *See* Settlement Agreement FAQ 93, attached as Exhibit 7. (Emphasis added). The anticipated review, therefore, is within the Claims Administrator’s discretion during the claims review process, and it does not require an extra procedure, either by seeking review by the AAP or requesting additional documentation, if the Claims Administrator does not think that is necessary. There should be no doubt, therefore, that the Claims Administrator and Special Master acted within their discretion in reviewing and approving Mr. [REDACTED] claim, because their respective decisions are clearly reasonable, not fanciful, and not arbitrary. They reasonably relied on Dr. [REDACTED] diagnosis, because it is medically sound and better-supported than the arguments offered by the NFL.

Conclusion

For all of the foregoing reasons, Mr. [REDACTED] respectfully requests that the Court and Special Master overrule the NFL’s Objection and direct the Claims Administrator to pay Mr. [REDACTED]

Respectfully submitted,

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Co-Lead Class Counsel's Response to the NFL's Objection to the Special Master's February 28, 2019 Ruling Concerning the Monetary Award Claim Determination for ██████████ ██████████

The NFL, in its Objection to the Special Master's February 28, 2019 Ruling Concerning the Monetary Award Claim Determination for ██████████ ██████████ argues that Diagnosing Physicians are not permitted to "backdate"¹ their Qualifying Diagnoses. In fact, the NFL argues, incorrectly, that "backdating" is "contrary to the Settlement Agreement's clear terms." (NFL Brief at 6). Importantly, the NFL does not (because it cannot) point to any language from the Settlement Agreement providing that the date of the Qualifying Diagnosis is the date on which the Retired Player was first examined by the Diagnosing Physician. If the NFL's position were correct, surely the NFL would cite to the provision of the Settlement Agreement that so limits the practice of Diagnosing Physicians. It does not because no such provision exists. Rather, FAQ 93, promulgated by the Special Masters, deals with this issue in a common-sense and reasonable manner, and in a way that contravenes no provision of the Settlement Agreement.

FAQ 93 states, in relevant part:

(b) *General Rule for the other Qualifying Diagnoses:* The date of a Qualifying Diagnosis other than Death with CTE is when the diagnosing physician has enough information and materials, including test results, to be able to render a medically sound and reliable judgment about the Player's condition, the way a physician normally does in his or her clinical practice. **In some cases, using sound medical judgment, a physician may conclude that a Qualifying Diagnosis existed at some prior point in time.**

¹ "Backdating" is the pejorative term the NFL uses to describe the situation where the date of Qualifying Diagnosis predates the Diagnosing Physician's examination of the player being diagnosed. FAQ 93, which deals with this issue, does not use that term. As explained in this response, there is nothing pejorative about a Diagnosing Physician using his or her sound medical judgment to conclude that a player suffered from a particular condition prior to the date that he or she examined the player. In fact, medical professionals do that every day. In the clinical setting, it is especially important for treating neurologists to determine, if possible, the date of disease onset since the rate of cognitive and/or functional decline is a factor to be considered for treatment and diagnostic purposes.

(c) *Are there other cases when the Qualifying Diagnosis might be before the date the physician personally examines the Player?* Maybe. **The unique facts and circumstances of a particular claim may allow the diagnosis date to be before the date the diagnosing physician personally examined the Player. Here are the rules:**

(5) Sound clinical medical judgment: Also, the physician making a diagnosis may conclude, in the exercise of his or her sound medical judgment, that he or she has enough information from personal examination, medical records from other healthcare providers, medical history, corroborating evidence from non-family members and other information that medical specialists rely on in their clinical practices, to form a sound medical judgment that the Player's Qualifying Diagnosis conditions existed at a date earlier than the date of a personal examination of the Player by the physician making the diagnosis and signing the Diagnosing Physician Certification Form. The Settlement Class Member is best served by having the doctor who made an earlier diagnosis sign the Diagnosing Physician Certification Form. **But there may be situations where the diagnosing physician can pinpoint an earlier date that is based on sound clinical judgment and best medical practices.**

(emphases added).

Co-Lead Class Counsel recognizes that in most cases, the date of diagnosis will be the date that the Diagnosing Physician examined the player. However, there have been, and will be, instances where the Diagnosing Physician, in the words of FAQ 93, "... can pinpoint an earlier date that is based on sound clinical judgment and best medical practices." The following example shows the unfairness that would occur if the NFL's position is adopted, thereby preventing Diagnosing Physicians from exercising their sound medical judgment in deciding the appropriate date of diagnosis.

A Qualified MAF Physician examines a player in 2019, at which time the player provides the Qualified MAF Physician with records from an earlier 2016 neurological exam which did not result in a Qualifying Diagnosis, but indicated signs of Parkinson's disease. Based on their personal examination of the player, the Qualified MAF Physician diagnoses the player with Parkinson's disease. But Parkinson's disease, like the other Qualifying

Diagnoses, is not contracted overnight. Based on a review of the earlier 2016 records, as well as their personal examination of the Retired Player, the Qualified MAF Physician, with the benefit of having seen the progression of the disease over time, determines that the player actually had Parkinson's disease several years before his 2019 examination of the Retired Player.

Under the NFL's position, the Qualified MAF Physician would not be able to assign a pre-2019 diagnosis date to that player even though the Qualified MAF Physician has no doubt that the player was suffering from Parkinson's disease before 2019. Rather, the NFL would require that the Qualified MAF Physician use the 2019 examination date as the Diagnosis Date, notwithstanding their sound medical judgment to the contrary. That result is unfair to the player, who should be compensated based on the pre-2019 diagnosis date, is at odds with the true medical judgment of the Qualified MAF Physician, and is contrary to the goal of the settlement (i.e., to fairly compensate injured Retired Players for their injuries and conditions they suffer from, based on their age when they developed.)

The unfairness of the NFL's position is compounded by its recent assertion that Retired Players should provide copies of prior neurological/neuropsychological records to their Qualified MAF Physician at the time of an MAF examination. Once in possession of such records, Qualified MAF Physicians must be permitted to utilize those records to determine, in their sound medical judgment, the proper diagnosis date, just as they would do for a patient in a clinical setting outside of the settlement program. Neurologists engage in this practice on a daily basis. The NFL would have the Qualified MAF Physician ignore those earlier records. As stated earlier, it is especially important for treating neurologists to determine, if possible, the date of disease onset since the rate of cognitive and/or functional decline is a factor to be considered for treatment and diagnostic purposes.

It should be noted that FAQ 93 does not permit the Diagnosing Physician to rely solely on his or her review of medical records to establish the date of the Qualifying Diagnosis. Rather, FAQ 93 allows the Diagnosing Physician to use an earlier diagnosis date only if he or she believes that they have sufficient information from “. . . **personal examination**, medical records from other healthcare providers, medical history, corroborating evidence from non-family members and other information that medical specialists rely on in their clinical practices.” (emphasis added).

Lastly, the NFL -- unable to point to any provision in the Settlement Agreement that bans a Diagnosing Physician from doing what they do in their clinical practice -- turns to Section 8.2(a)(iii), which generally concerns the contents of a Claim Package. But that section only concerns those instances where the physician who diagnosed the Retired Player is deceased or incompetent and, therefore, is unable to complete the Diagnosing Physician Certification. In no way does that section prohibit a living Diagnosing Physician from assigning a date of diagnosis that, in his or her sound medical judgment, is earlier than the date of his or her examination of the Retired Player. Importantly, at no point does the Settlement Agreement, particularly in Section 6 where “Monetary Awards for Qualifying Diagnoses” are addressed, discuss a requirement that the date of diagnosis is fixed at the date of the first examination by the Diagnosing Physician. Rather, the Diagnosing Physician is entrusted to make the requisite diagnostic judgments. This is particularly true when the Diagnosing Physician is a Qualified MAF Physician, such as Mr. [REDACTED] Diagnosing Physician, Dr. [REDACTED], who the NFL vetted prior to approving him to serve as a Qualified MAF Physician.

CONCLUSION

Through FAQ 93, the Special Master provides reasonable guidance on the issue of establishing the correct date of diagnosis. It permits Diagnosing Physicians to do what they are trained to do -- i.e., use their clinical training and experience to diagnose players and determine when the diagnosed condition first existed. Nothing in the Settlement Agreement prohibits Diagnosing Physicians from doing so.

Respectfully submitted,

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Dated; April 10, 2019