

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

MDL No. 2323

THIS DOCUMENT RELATES TO:
OBJECTION OF SPID 100006836 TO
AUDIT DECISION

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M. Andrews. Doc. 56778. On September 26, 2017, the Claims Administrator put that Claim into Audit. Doc. 128360. On March 27, 2018, the Claims Administrator issued an adverse Audit Report finding that “Dr. Andrews misrepresented, omitted, or concealed material facts in connection with the 48 Monetary Award Claim Packages submitted with her Qualifying Diagnoses.” Doc. 164331 at 9. The Special Masters, on October 26, 2018, agreed, disqualified Dr. Andrews from the Program, and denied all Claims relying on her diagnoses, including Mr. [REDACTED] Doc. 189134.

[REDACTED] submitted another Claim for Mr. [REDACTED] on February 6, 2019, this time relying on a Qualifying Diagnosis by neuropsychologist Dr. [REDACTED] of Level 2 Neurocognitive Impairment dated October 13, 2015. Doc. 199702. Twenty days later, the Claims Administrator denied the Claim because neuropsychologists like Dr. [REDACTED] do not have “the proper credentials to make a Qualifying Diagnosis under Section 6.3(c) of the Settlement Agreement,” and because “Dr. [REDACTED] does not establish that he performed a new evaluation of the retired player, but instead continued to rely on older testing previously submitted in support of the denied claim that relied on a diagnosis by Dr. Ena Andrews.” Doc. 201774.

Mr. [REDACTED] switched his representation in the Program from [REDACTED] to Byron Cuthbert & Associates on July 16, 2020. Doc. 226611. On January 24, 2023, Mr. [REDACTED] changed representation again, from Byron Cuthbert to his current firm, [REDACTED] Doc. 276215. [REDACTED] submitted a Claim on Mr. [REDACTED] behalf on January 31, 2023 for a Qualifying Diagnosis of Alzheimer’s Disease made by Dr. [REDACTED] on September 16, 2021. Doc. 276599. Dr. [REDACTED] signed the certification for the Diagnosis on January 17, 2023, but the certification form notes that the date the Diagnosis was actually made was September 16, 2021. Doc. 276141.

In his September 2021 report, Dr. [REDACTED] summarized his personal examination of Mr. [REDACTED] and reviewed his medical records before concluding that Mr. [REDACTED] met “BAP/MAF criteria for Major Neurocognitive Disorder” and that the “evidence supports a diagnosis of Alzheimer’s disease as the most likely cause of cognitive decline.” Doc. 276304 at 7. This evidence included “beta amyloid PET imaging from January of 2021, revealing **extensive beta-amyloid protein deposition in the bilateral frontal lobes, parietal lobes, lateral temporal lobes, and in the cingulate gyrus.**” *Id.* at 6 (emphasis added).

The Claim package included the January 7, 2021 amyloid PET scan report to which Dr. [REDACTED] referred. *Id.* at Ex. A. Created under the purview of “3T Radiology & Research” and signed electronically by Dr. Daryl Eber, the report included one representative image of Mr. [REDACTED] brain and the following description:

There is physiologic distribution of the radiotracer activity in the brain. There is decrease contrast of the radiotracer activity between the cortical gray matter and deeper white matter. There is substantial increased cortical radiotracer accumulation in the **bilateral frontal lobes, the parietal lobes, the lateral temporal lobes and in the cingulate gyrus** [...] Positive study. There is **extensive B-amyloid protein deposition** in the cerebral cortex, as described above.

Id. (emphasis added).

Dr. [REDACTED] also relied on a January 21, 2021 neuropsychological evaluation by Dr. [REDACTED] who found:

Altogether, Mr. [REDACTED] meets criteria for Major Neurocognitive Disorder. The evidence supports a diagnosis of Alzheimer’s disease as the most likely cause of the cognitive decline based on: 1) significant decline in learning/memory, which is the hallmark of Alzheimer’s disease, 2) significant decline in four other cognitive domains assessed, 3) gradual progression over years, 4) functional decline consistent with the progression of cognitive decline documented in his medical record eventually resulting in his having had a friend live with him to help him, 5) a decline in emotional control evidenced by mood swings, 6) concern of Mr. [REDACTED] and his girlfriend over the decline in cognitive function, 7) a prior diagnosis of probable Alzheimer’s disease in 2016, and 8) **a positive amyloid PET scan**. The cognitive deficits are not better explained by another mental disorder.

Id. at 26 (emphasis added).

As is apparent from these records, although [REDACTED] submitted Mr. [REDACTED] Claim, the key underlying medical evidence—the PET scan report, the neuropsychological testing, and the neurologist’s Diagnosis—was all gathered during Byron Cuthbert’s tenure as Mr. [REDACTED] counsel.

On March 1, 2023, Mr. [REDACTED] neuropsychological testing results were confirmed under the Norming Agreement, revealing Level 2 Neurocognitive Impairment in all five cognitive domains. Doc. 278293. Signs pointed to Mr. [REDACTED] being granted a Monetary Award.

But meanwhile, the Claims Administrator was investigating Byron Cuthbert for, among other things, persistently relying on PET scan reports from Dr. Eber’s office that he knew were unreliable. After attempting to work with Mr. Cuthbert throughout 2022 to resolve its concerns outside of a formal audit process, the Claims Administrator issued a 225-page Rule 15 Audit Report on February 15, 2023 finding, in relevant part, that “the Amyloid PET scan reports from Dr. Eber are overwhelmingly unreliable” and that although there might not have been a “malicious collaboration or arrangement between Mr. Cuthbert and Dr. Eber related to the Program,” Mr. Cuthbert was “aware that Dr. Eber’s reports may be unreliable as early as 4/19/21” and yet continued to use these reports to support Claims for Qualifying Diagnoses of Alzheimer’s Disease. Doc. 320426 at 8, 12.

Furthermore, Dr. Eber told the Claims Administrator in February 2022 “that someone associated with ‘the lawyer’ told him not to submit to an interview,” leaving him feeling “‘stuck in the middle’” between the Claims Administrator and “the ‘other guys.’” *Id.* at 12–13. The Claims Administrator inferred from context that Mr. Cuthbert was the source of this pressure. *Id.*

Mr. [REDACTED] specific PET scan was wrapped up in all of this. On January 12, 2022, the Claims Administrator spoke with a MAF Physician who said that, on her recommendation, Mr. [REDACTED] PET scan received a second opinion re-read from another doctor. *Id.* at 12 n.24. This re-read came back negative, which perhaps explains why Mr. Cuthbert did not submit a Claim for Mr. [REDACTED] *Id.* at 12. The negative second opinion report, written by Dr. [REDACTED] and dated April 26, 2021, noted:

Per your request, I have reviewed the brain amyloid PET/CT scan on the above-named individual performed with F-18 florbetapir (Amyvid), both qualitatively and quantitatively using Hermes Brass software.

The scan was of acceptable technical quality.

There is normal cortical-white matter contrast in the cerebellum.

There is normal cortical-white matter contrast throughout the cerebrum. There are no foci of increased cortical activity.

Accordingly, this is a negative F-18 florbetapir PET study, indicating no to sparse beta-amyloid neuritic plaques.

Doc. 276304 at 18.

By contrast, another doctor, Dr. [REDACTED] performed a second opinion consultation and came to a different conclusion on May 26, 2021:

The technical quality of the examination is adequate.

There is physiologic radiopharmaceutical distribution throughout the brain. Assessment for the cerebral cortex demonstrates fairly preserved gray to white matter activity contrast characteristics. There are moderately-defined cortical zones of abnormal increased gray matter uptake, mainly the left frontoparietal and left temporoparietal distributions [...]

POSITIVE AMYVID SCAN.

A POSITIVE AMYVID SCAN INDICATES MODERATE TO FREQUENT BETA-AMYLOID NEURITIC PLAQUES CONSISTENT WITH A NEUROPATHOLOGICAL DIAGNOSIS OF ALZHEIMER'S DISEASE.

Id. at 17 (caps in original).

On May 12, 2023, Mr. [REDACTED] received notice that his Claim was being audited. Doc. 282686. The Notice of Audit of Claim did not include the Claims Administrator's Rule 15 Audit

Report and did not provide Mr. [REDACTED] the opportunity to respond to its findings.¹ *Id.* Instead, Mr. [REDACTED] was asked to submit Health Care Provider History, HIPAA Authorization, Employment History, and Disability Plan Authorization forms. *Id.* He did so. Docs. 282954, 282955, 282956, 282957.

Then, on June 28, 2023, we issued a Rule 27 Decision on the Report of Adverse Finding Regarding Byron Cuthbert and Associates.² Mr. [REDACTED] received notice of this Decision one month later, on July 28, 2023. Doc. 286633.

In the Decision, we wrote:

Mr. Cuthbert’s burden in this Audit is to show “that there is no reasonable basis” for the Claims Administrator’s factual findings about his misrepresentations and omissions. This he has plainly failed to do. His briefing was tendentious when it was not evasive: he in no way satisfied the “no reasonable basis” burden he faces in this Audit. We have considered the record and adopt the factual findings of the Claims Administrator. Mr. Cuthbert knowingly used unreliable Amyloid PET scans, attempted to have Diagnosing Physicians change their diagnoses, and drafted both medical records and third-party affidavits. These were material omissions or misrepresentations connected to Claim submissions. We also conclude that Mr. Cuthbert was not truthful in responding to the investigatory process, making it more difficult for the Claims Administrator to carry out its duties.³

As one of the remedies we ordered:

Under Section 10.3 (i)(a), the twelve Claims directly implicated in this Audit are now denied. We emphasize that Mr. Cuthbert, not his clients, is at fault. But the issues described in this Audit are intractable, ranging from unreliable PET scans to undue pressure on doctors. The task of separating out the genuine from the tainted in the medical evidence behind each Qualifying Diagnosis would be difficult, time-consuming, and in our experience unlikely to lead to successful submissions based on the existing medical records. We thus deny the Claims now to expedite the process of Claimants obtaining new medical records unsullied by the issues described in this Audit.⁴

Mr. [REDACTED] Claim was one of these. As we wrote, “A total of twelve claims of Players currently represented by Byron Cuthbert and Associates are implicated in this Audit,” and we

¹ Because the other players with claims directly implicated in the Audit were, unlike Mr. [REDACTED] in fact still represented by Mr. Cuthbert, they received notice and an opportunity to respond through Mr. Cuthbert, who submitted briefing to the Special Masters in advance of our Audit Decision.

² Special Masters’ Rule 27 Decision on the Report of Adverse Finding Regarding Byron Cuthbert and Associates, LLC (June 28, 2023), https://www.nflconcussionsettlement.com/Docs/cuthbert_audit_decision_sm.pdf.

³ *Id.* at 3–4 (footnotes omitted).

⁴ *Id.* at 7.

cited to Mr. █████ settlement ID.⁵ The quoted language was unfortunately inaccurate—at the time of the Rule 27 decision, Mr. █████ was no longer “currently represented” by Byron Cuthbert, but rather by █████

We also wrote that “Mr. Cuthbert knew, or should have known” that the Dr. Eber PET scans reports were defective.⁶ In fact, the Claims Administrator’s Audit Report—unrefuted by Mr. Cuthbert’s briefing in the Audit proceeding—showed that he had actual notice of the unreliability of the reports, and yet continued to use them. This is sufficient to establish “a reasonable basis to support a finding that there has been a misrepresentation, omission or concealment of a material fact made in connection with a Claim.”⁷

Both Mr. Cuthbert and Mr. █████ submitted objections to our Rule 27 Decision. On February 29, 2024, the District Court, denying Mr. Cuthbert’s Objection and Supplemental Objection, “approve[d] and adopt[ed] the conclusion in the Special Masters’ Rule 27 Decision” as to Mr. Cuthbert.⁸ In that opinion, the Court emphasized that it had “previously upheld the legal authority of the Special Masters to deny a group of claims as a result of a shared discrepancy in material evidence.”⁹

But the Court sustained Mr. █████ Objection and remanded for “consideration of the Objection and an individualized decision as to his claim.” Doc. 336531 at 8. In that Objection, Mr. █████ argued, in relevant part, as follows:

Rule 19 of the Rules Governing the Audit of Claims requires notice be provided to Settlement Class Members within ten (10) days after the Special Masters’ acceptance of the referral of an Audit Report. See Rule 19, Rules Governing the Audit of Claims. Further, after such notice, the rules allow a Settlement Class Member with a claim identified in or related to an Audit Proceeding to submit a memorandum addressing the matters raised. See Rule 20, Rules Governing the Audit of Claims[.]

Here, Mr. █████ received no notice on his portal that any audit had been referred to the Special Masters under Rule 19 nor was he given an opportunity to submit a memorandum under Rule 20. Mr. █████ was also never provided a copy of any position statement or other memorandum submitted by the NFL Parties. Put simply, Mr. █████ was not afforded an opportunity to even participate in an audit that directly impacted his monetary award [...]

⁵ *Id.* at 2.

⁶ *Id.* at 6.

⁷ Rules Governing the Audit of Claims, at Rule 12(a) (Mar. 18, 2020), https://www.nflconcussionsettlement.com/Docs/NFL_Rules_Governing_the_Audit_of_Claims.pdf.

⁸ ECF No. 12377, Settlement Implementation Determination (Feb. 29, 2024), at 13.

⁹ *Id.* at 9.

Ultimately, the Special Masters’ Decision unilaterally denies Mr. [REDACTED] previously decided monetary award without any specific reference to Mr. [REDACTED] claim or any individual finding that Mr. [REDACTED] previously awarded claim lacks merit.

Doc. 287554 at 2, 3.

Mr. [REDACTED] also included, as an Exhibit to the Objection, the Notice of Monetary Award he received on April 6, 2023—over a month before he was informed that his Claim had been placed into Audit (May 12, 2023), and several months after the Claims Administrator issued its Audit Report (February 15, 2023). Doc. 287555. Mr. [REDACTED] correctly notes that his “Notice of Monetary Award appears to have since been removed from [his] portal.” Doc. 287554 at 1.

The District Court, sustaining Mr. [REDACTED] Objection and remanding the case back to the Special Masters, wrote:

This delayed and incomplete notice deprived Player of a meaningful opportunity to be heard by the Special Masters concerning the suspension of a claim that had already been approved by the Claims Administrator on April 6, 2023, notwithstanding the Audit Report completed two months earlier. The fact that the audit proceeding concerned a law firm that no longer represented Player and had not filed the claim that was pending and approved in 2023 may well have resulted in a different decision by the Special Masters as to Player’s claim. In these circumstances, the Special Masters should consider whether the claim was properly denied.

Doc. 336531 at 7.

Mr. [REDACTED] and the NFL Parties each submitted additional briefing on these issues. Docs. 336522; 351623. Mr. [REDACTED] chiefly argues that his medical records support a Diagnosis of Alzheimer’s Disease “independently” of the unreliable PET scan report. Doc. 336522 at 2. The NFL Parties counter that Mr. [REDACTED] “diagnosing physician *did rely* on Mr. [REDACTED] unreliable PET scan (later revealed to be negative) and there is no basis to treat Mr. [REDACTED] differently from the dozens of other claimants whose claims were denied by the Special Masters’ Decision.” Doc. 351623 at 3.

RESOLVING THIS OBJECTION

When we denied Mr. [REDACTED] Claim in our Rule 27 Decision, we did so because the “task of separating out the genuine from the tainted in the medical evidence behind each Qualifying Diagnosis would be difficult, time-consuming, and in our experience unlikely to lead to successful submissions based on the existing medical records.”¹⁰ We denied all twelve of the Claims in a

¹⁰ Special Masters’ Rule 27 Decision on the Report of Adverse Finding Regarding Byron Cuthbert and Associates, LLC (June 28, 2023) at 7, https://www.nflconcussionsettlement.com/Docs/cuthbert_audit_decision_sm.pdf.

group as they were all “directly implicated”¹¹ in the Audit, and suffered from a “shared discrepancy in material evidence.”¹²

The Settlement Program allows the Claims Administrator to “place a Claim in Audit at any time, regardless of its processing or payment status, even if previously found payable or paid.”¹³ Therefore, the Claims Administrator was within the scope of its authority to place Mr. ██████ Claim into Audit after he had already received a Notice of Monetary Award. But there was a problem: Mr. ██████ due to the timing of his change in counsel, did not receive proper notice of the Audit and was not afforded the opportunity to respond under Audit Rules 19 and 20.¹⁴

The District Court corrected this error. Doc. 336531. Given Mr. ██████ sustained Objection to our original Audit decision, we are now tasked with “consideration of the Objection and an individualized decision as to his claim.” *Id.* at 8.

Mr. ██████ must prove that “there is *no reasonable basis* to support a finding that there has been a misrepresentation, omission or concealment of a material fact made in connection with” his Claim.¹⁵ For the reasons that follow, he has not met this high burden.

Both Dr. ██████ and Dr. ██████ relied on the PET scan report from Dr. Eber’s office in building their evaluations. Doc. 276304 at 6, 26. Indeed, Dr. ██████ description lifted the interpretation from Dr. Eber’s report nearly verbatim. *Compare id.* at 6 (describing “extensive beta-amyloid protein deposition in the bilateral frontal lobes, parietal lobes, lateral temporal lobes, and in the cingulate gyrus”) *with id.* at Ex. A (describing “extensive B-amyloid protein deposition” in the “bilateral frontal lobes, the parietal lobes, the lateral temporal lobes and in the cingulate gyrus”).

The Claims Administrator, finding that Dr. Eber’s PET scan reports were “overwhelmingly unreliable,” used Mr. ██████ Dr. Eber report as an example to illustrate the general point. Doc. 320426 at 8, 12 n.24. When Mr. ██████ PET scan received second-opinion reads from other doctors, one came back negative and the other positive. Doc. 276304 at 17, 18.

To assist in evaluating the medical evidence from Dr. Eber’s office, the Claims Administrator retained a “Nuclear Medicine Consultant (‘NM Consultant’) who is board certified in both Diagnostic Radiology by the American Board of Radiology and Nuclear Medicine by the American Board of Nuclear Medicine.” Doc. 320426 at 10. The NM Consultant’s findings illustrate why the problems with Dr. Eber’s PET scans were pervasive, infecting both the PET Scan reports and their underlying images:

¹¹ *Id.*

¹² ECF No. 12377, at 9.

¹³ Rules Governing the Audit of Claims, at Rule 8 (Mar. 18, 2020), https://www.nflconcussionsettlement.com/Docs/NFL_Rules_Governing_the_Audit_of_Claims.pdf.

¹⁴ *See id.* at Rule 19, 20.

¹⁵ *Id.* at Rule 28 (emphasis added).

1. The NM Consultant reviewed the [Digital Imaging and Communications in Medicine] DICOM images from each Player's PET scan before reviewing the report from the original reader, Dr. Eber, to avoid any possibility of bias.
2. After performing visual and semiquantitative analyses, the NM Consultant interpreted the studies and disagreed with Dr. Eber on the overall image assessment in most of the cases. Multiple variations and analyses of the DICOM images were tried in an attempt to recreate Dr. Eber's results. However, the NM Consultant was unable to do so even when using different software.
3. The NM Consultant felt that Dr. Eber used a template for his reports. Using a template is not unusual in clinical practice; however, the NM Consultant noted the similarity between findings on multiple reports such as including abnormal tracer deposition in all areas of the brain (bilateral frontal lobes, parietal lobes, lateral temporal lobes, and cingulate gyrus). In most of the cases, the NM Consultant's interpretation found no significant amyloid deposition (negative scan) or only subtle findings.
4. The NM Consultant opined that the single, color PET scan images attached to Dr. Eber's reports are insufficient to provide enough documentation of the interpretation of the study for several reasons:
 - a. The entire brain is not included in this image, making it impossible to evaluate all the required brain regions for an accurate interpretation. Although this may be explained as the report only showing a "representative" picture, with the reader reviewing all images, the NM Consultant noted that the most common clinical practice is to include the whole brain in the report as documentation of the physician's interpretation.
 - b. The representative images are displayed in a color scale. The NM Consultant noted that this is not recommended by the EANM and SNMMI standards/guidelines, which state: "For 18F-florbetaben and 18F-florbetapir, PET images should be displayed in the transaxial orientation."
 - c. At least one image did not include identifying patient information, which the NM Consultant noted is a significant abnormality and a shortcoming in the standard of care.
5. To better understand the number of discrepancies in the overall PET assessment, the NM Consultant explored the possibility of a technical or processing issue to explain the variance. However, they could not arrive at a potential explanation. The NM Consultant evaluated several scenarios, such as

the possibility that Dr. Eber analyzed different time points of the PET scan or changed the grayscale to a color scale to mimic the representative image included by Dr. Eber in the report. In multiple cases, the NM Consultant could not reproduce Dr. Eber's image interpretation.

Id. at 10–11.

The NM Consultant's investigation makes clear that both Dr. Eber's images and his interpretations of those images, memorialized in his reports, are unreliable. It is those scans and reports that purported to find Alzheimer's Disease in a number of Byron Cuthbert's clients. *See id.* at 7 (“[M]onetary Award claims asserting Alzheimer's Qualifying Diagnoses, supported by a positive PET scan, are unique to Mr. Cuthbert's clients.”). Therefore, in relying on (and copying) the Dr. Eber PET scan report in rendering his Diagnosis, Dr. █████ based his opinion on an unreliable source. That's why the Claims Administrator determined (unfortunately after it had approved a Monetary Award)—and we agreed—that Mr. █████ Claim was “directly implicated” in the issues raised by the Audit.¹⁶

As part of this proceeding, Mr. █████ solicited a follow-up letter from Dr. █████ Mr. █████ characterizes Dr. █████ letter as saying that “Mr. █████ met all DSM 5 criteria for dementia of the Alzheimer's type and that this was the basis for making his diagnosis, irrespective of his PET scan.” Doc. 336522 at 6. To the contrary, the letter itself makes clear that the PET scan report, in (purportedly) “finding there was extensive beta-amyloid deposition,” was one of three pieces of information “consistent with the diagnosis.” Doc 336537. Dr. █████ adds that the PET scan was not the “most salient” part of the diagnosis; rather, the DSM 5 criteria was. *Id.* That may be so, but there's no evidence that he would have made the diagnosis had he known that the scan and the read were unreliable (and expressly rejected by another reviewer skilled in the art). *See* Doc. 276304 at 18 (identifying “*no to sparse* beta-amyloid neuritic plaques”) (emphasis added).

Indeed, sorting out what would have happened had Dr. █████ not originally relied on faulty data is precisely the “difficult [and] time-consuming” process—dragging out Mr. █████ Claim—that we sought to avoid in our Audit decision.¹⁷ Overall, the Claims Administrator had enough facts before it to conclude that Dr. █████ evaluated the available evidence in light of his assumption that Mr. █████ had a legitimate, positive Amyloid PET scan. As the Audit proceeding uncovered, that assumption was unwarranted.

Mr. █████ emphasizes that he caused none of this mess. Doc. 336522 at 3. We agree.¹⁸ Even though Mr. █████ himself bears no fault for Dr. Eber's unreliable and biased scans and reports, or

¹⁶ Special Masters' Rule 27 Decision on the Report of Adverse Finding Regarding Byron Cuthbert and Associates, LLC (June 28, 2023) at 7, https://www.nflconcussionsettlement.com/Docs/cuthbert_audit_decision_sm.pdf.

¹⁷ Special Masters' Rule 27 Decision on the Report of Adverse Finding Regarding Byron Cuthbert and Associates, LLC (June 28, 2023) at 7, https://www.nflconcussionsettlement.com/Docs/cuthbert_audit_decision_sm.pdf.

¹⁸ *See* Special Masters' Rule 27 Decision on the Report of Adverse Finding Regarding Byron Cuthbert and Associates, LLC (June 28, 2023) at 7, https://www.nflconcussionsettlement.com/Docs/cuthbert_audit_decision_sm.pdf (“We emphasize that Mr. Cuthbert, not his clients, is at fault.”).

Mr. Cuthbert's practices in gathering them,¹⁹ the Program still cannot accept Claims that rely even in part on disqualified, unreliable evidence.²⁰

Ultimately, Mr. [REDACTED] has not "established that there is no reasonable basis to support a finding that there has been a misrepresentation, omission or concealment of a material fact made in connection with" his Claim.²¹ He acknowledges that the Dr. Eber PET scan reports were "heavily discussed" in the Audit Report, but asserts nonetheless that the Report "contains no findings or allegations that there was any misrepresentation, omission, or concealment of any material fact with respect to Mr. [REDACTED] claim." Doc. 336522 at 3.

This is simply not true. For one, the Audit Report specifically discussed Mr. [REDACTED] PET scan report—obtained from Dr. Eber while Mr. Cuthbert represented Mr. [REDACTED]—as an example of an unreliable report. Doc. 320426 at 12 n. 24. That neither Mr. [REDACTED] nor his current counsel created these bad scans and reads does not mean that there was no misrepresentation in connection with his Claim, even if it is not his or his current counsel's misrepresentation.

As the Audit Report's specific citation to Mr. [REDACTED] PET scan shows, Mr. [REDACTED] individual Claim submission *is* connected to Mr. Cuthbert's material omissions or misrepresentations. Mr. [REDACTED] has not submitted any evidence that the PET scan on which Dr. [REDACTED] relied was not obtained by Mr. Cuthbert from Dr. Eber. Nor has Mr. [REDACTED] submitted any evidence that the Dr. Eber scans and reports were in fact reliable, contrary to the Claims Administrator's findings.

The NFL Parties also point out that "Mr. [REDACTED] Claim Package also contained issues with overlapping affidavit language." Doc. 351623 at 4. The third-party affidavit in the record indeed contains some of the language that the Claims Administrator identified as identical across multiple of Mr. Cuthbert's clients. *Compare* Doc. 275881 at 3 ("Knowing [REDACTED] as long as I have and having an extremely close relationship with him, I was able to see changes in his behavior both physical and mental.") *with* Doc. 320426 at 26 ("Knowing [redacted] as long as I have and having an extremely close relationship with him, I was able to see changes in his behavior both physical and mental."). This overlapping language provides further evidence that the Claims Administrator had a reasonable basis for identifying Mr. [REDACTED] Claim as directly implicated in the Audit.²²

This is neither the first nor the last time that the Program has faced or will face the problem of a Claim relying in part on disqualified evidence. In our Audit Decision, we anticipated the

¹⁹ The reality that the costs of attorney misconduct fall most heavily on their clients is precisely why it is so important for attorneys in the Program to follow the rules and uphold high standards of integrity when gathering evidence in support of a Claim.

²⁰ See Special Masters' Rule 27 Decision on the Report of Adverse Finding Regarding Byron Cuthbert and Associates, LLC (June 28, 2023) at 7, https://www.nflconcussionsettlement.com/Docs/cuthbert_audit_decision_sm.pdf ("Any additional Claims supported by a PET scan from Dr. Eber's office should be Denied.").

²¹ Rules Governing the Audit of Claims, at Rule 28 (Mar. 18, 2020), https://www.nflconcussionsettlement.com/Docs/NFL_Rules_Governing_the_Audit_of_Claims.pdf.

²² We make no adverse findings as to whether Mr. [REDACTED] in fact suffers from Alzheimer's Disease.

“intractab[ility]” of “separating out” truly new evidence from already disqualified evidence when both are intermingled in a single physician’s evaluation and medical reasoning.²³ The purpose of the Settlement’s audit process is to prevent fraud and misrepresentations leading to Awards in the Program.²⁴ For that reason, disqualified evidence simply cannot be used to support a Claim Package: claimants must start anew without the tainted proof.

Consistent with this requirement, clinicians evaluating players who had some piece of evidence disqualified in the past must either be fully screened from viewing the disqualified material, or if the clinician saw any disqualified material, he or she must make it clear to the Claims Administrator that he or she did not rely on it in rendering his or her medical opinions. In all cases, clinicians must exclude the disqualified evidence from consideration.

Here, the Claims Administrator found that Dr. [REDACTED] explicitly relied on the disqualified interpretation. Indeed, he himself, in this Objection, has confirmed that very fact. Mr. [REDACTED] did not receive proper notice about the disqualified information before our original Audit decision; this does not, however, change the fact that now, having had a chance to object to the underlying findings, Mr. [REDACTED] has not shown there was “no reasonable basis” for them.²⁵ Because the Program cannot accept Claims that rely even in part on unreliable and disqualified evidence, along with the Audit Report’s findings regarding overlapping and unreliable affidavits, his Claim was properly denied.

CONCLUSION

We affirm our initial denial of Mr. [REDACTED] Claim.



David A. Hoffman



Jo-Ann M. Verrier

Dated October 23, 2024

²³ Special Masters’ Rule 27 Decision on the Report of Adverse Finding Regarding Byron Cuthbert and Associates, LLC (June 28, 2023) at 7, https://www.nflconcussionsettlement.com/Docs/cuthbert_audit_decision_sm.pdf.

²⁴ See Settlement Agreement, Section 10.3 (“Audit Rights and Detection and Prevention of Fraud”).

²⁵ Rules Governing the Audit of Claims, at Rule 28 (Mar. 18, 2020), https://www.nflconcussionsettlement.com/Docs/NFL_Rules_Governing_the_Audit_of_Claims.pdf.