Nos. 18-2417, 18-2419

United States Court of Appeals
for the Third Circuit

IN RE NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Hon. Anita B. Brody, No. 2:14-md-02323-AB and MDL No. 2323)

BRIEF OF THE FANECA OBJECTORS

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PRELIMINARY STATEMENT

In July 2014, the district court preliminarily approved a settlement that Co-Lead Class Counsel[1] would later claim was "the best overall deal" that the class could get. JA5560(Fairness Hr'g Tr.). It wasn't. The Faneca Objectors could – and did – do better. After over 6,300 hours of work; after hundreds of pages of briefing; and on an evidentiary record, built by the Faneca Objectors, that included over one thousand pages of scientific and other evidence, including expert declarations from nearly a dozen of the world's leading scientists, physicians, and researchers; the NFL agreed to pay the class even more.

Those additional benefits were significant. They guaranteed every eligible class member would receive a medical examination, allowing an assessment of the class member's baseline neurocognitive functioning and thereby permitting early detection of, and medical intervention for, any subsequent decline. They provided eligibility for meaningful monetary awards to over 3,000 class members who played in NFL Europe, whose claims had been bargained away by Co-Lead Class Counsel for essentially nothing in return. And they ensured financial hardship would not preclude class members from taking a meritorious appeal from an

[1] Throughout this brief, the Faneca Objectors use "Co-Lead Class Counsel" to refer specifically to the attorneys at Seeger Weiss. The Faneca Objectors use "Class Counsel" to refer more broadly to the group of plaintiffs' attorneys who worked with Co-Lead Class Counsel to broker the early versions of the settlement agreement.

adverse claim determination. An expert-backed valuation of these changes exceeded $120 million.

The district court agreed that these improvements were "crucial" and credited the Faneca Objectors' advocacy with securing them. But when it came time to compensate the Faneca Objectors for their efforts, the district court ignored the law and failed to value those enhancements. It ignored the expert valuation evidence, and it paid no mind to Co-Lead Class Counsel's concessions concerning the same. The district court also failed to consider the Faneca Objectors' $4.3 million lodestar, or the 6,357.2 hours that the Faneca Objectors' counsel had devoted to improving the settlement for the class.

Instead, with essentially no explanation, the district court awarded the Faneca Objectors $350,000 – less than 1% of the value of the benefit that the Faneca Objectors had delivered to the class and less than 10% of their lodestar. The fee award is an abuse of discretion that must be vacated.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332(d)(2). The issues arise from the district court's April 5, 2018 Memorandum (JA48) and Order (JA68); its April 12, 2018 Order (JA82); and its May 24, 2018 Explanation and Order (JA84). Those rulings together were final and subject to this Court's jurisdiction pursuant to 28 U.S.C. § 1291, because they resolved all fee claims for

the period leading up to the settlement. On June 22, 2018, the Faneca Objectors filed a timely notice of appeal. JA21-JA22.

Pursuant to this Court's February 7, 2019 Order, the Faneca Objectors explain their basis for standing below.

ISSUES

1. Whether the district court abused its discretion in awarding $350,000 in attorneys' fees to the Faneca Objectors, whose efforts brought as much as $122.6 million of additional benefit to the class and whose lodestar exceeded $4.3 million.

2. Whether the Faneca Objectors have standing.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This Court has resolved three related appeals. First, on September 11, 2014, this Court dismissed an interlocutory appeal from the district court's preliminary approval order (reported at 775 F.3d 570). Second, on April 18, 2016, as amended May 2, 2016, this Court affirmed the district court's order certifying the class and approving the class settlement (reported at 821 F.3d 410). Third, on April 26, 2019, this Court resolved a consolidated appeal regarding the district court's order voiding certain agreements between class members and third-party litigation funders (reported at 923 F.3d 96).

Pending before this Court are fifteen other appeals relating to the district court's orders addressing attorneys' fees and costs. Those appeals have been consolidated with this appeal: Nos. 18-2012, 18-2225, 18-2249, 18-2253, 18-2281, 18-2332, 18-2416, 18-2418, 18-2419, 18-2422, 18-2650, 18-2651, 18-2661, 18-2724 and 19-1385. Additional notices of appeal from the district court's proceedings – unrelated to the district court's attorneys' fees award – have been docketed at Nos. 19-1760 and 19-1771 (cross appeals); 19-2085; and 19-2753.

STATEMENT OF THE CASE

At the time the Faneca Objectors entered this case, Class Counsel, the NFL, and the district court were on a clear path to get a deal done. The parties had spent months working with a distinguished, court-appointed mediator and the court's own financial advisor. They engaged in their trade-offs, and the NFL had the releases and certainty it sought. The class would get some benefits and Class Counsel could apply for the $112.5 million in attorneys' fees it had negotiated. With the force of some of the country's leading plaintiffs' lawyers and most distinguished defense counsel united behind it, the settlement had "The Big Mo."

Counsel for the Faneca Objectors overcame enormous odds and through persistent, effective advocacy brought about a critical examination of the settlement's fairness that resulted in substantial improvements for the benefit of the class.

I. SETTLEMENT PROCEEDINGS

A. The Initial Settlement and the Faneca Objectors' Early Identification of Settlement Deficiencies

1. *The Faneca Objectors' Motion To Intervene*

In 2011, retired NFL players and their families began suing the NFL, alleging that the NFL misled them about the risks of repeated multiple traumatic brain injury ("MTBI"), thus breaching its duty to protect players' health and safety. JA1953 (Prelim. Approval Br.). After consolidation in the Eastern District of Pennsylvania, Dkt. 1, the NFL moved to dismiss on preemption grounds, Dkts. 3590, 4737, 4738. With that motion pending, the district court ordered the parties to mediation and appointed retired U.S. District Judge Layn Phillips as mediator.

In August 2013, Class Counsel and the NFL announced a class-action settlement to resolve all MTBI-related claims (the "Initial Settlement"). JA964. On January 6, 2014, they sought preliminary approval of the Initial Settlement. JA966-JA968. That settlement created a Monetary Award Fund ("MAF") – capped at $675 million – to provide compensation for retired players diagnosed with one of five specific Qualifying Diagnoses: ALS, Parkinson's disease, Alzheimer's disease, and sufficiently severe dementia (dubbed "Level 1.5" and "Level 2" neurocognitive impairment). JA1035, JA1078, JA1100-JA1102. The Initial Settlement also compensated – by way of a "Death with CTE" Qualifying Diagnosis – the estates of certain deceased class members whose brains showed

signs of chronic traumatic encephalopathy ("CTE") in a post-mortem autopsy. JA1102. The Death with CTE diagnosis, however, was limited to class members who had died before the date of preliminary approval. JA1102. The Initial Settlement thus did not provide any compensation for CTE in living class members or for class members who died after preliminary approval.

The Initial Settlement specified a maximum award for each Qualifying Diagnosis. JA1114. That award would be reduced, however, depending on the length of the class member's football career, measured by the number of "eligible seasons" as defined in the Initial Settlement. Players with lengthier careers – five eligible seasons or more – would receive the maximum award. JA1036. Players with shorter careers would receive a fraction of the maximum award. JA1036.[2] The Initial Settlement defined "Eligible Season" to "specifically exclude[]" seasons played in NFL Europe (or the NFL's other European leagues), even though it fully released players' claims for injuries suffered during those seasons. JA1037, JA1070-JA1072. Class members could appeal an adverse claim determination but were required to pay a $1,000 appeal fee. JA1047.

The Initial Settlement also created a $75-million Baseline Assessment Program Fund ("BAP Fund"), to provide eligible players an examination to

[2] The Initial Settlement contained similar offsets for other factors, too. For example, players who were younger at the time of the diagnosis would receive larger monetary awards. JA1114.

establish a baseline for each player's neurocognitive functioning. JA1078. Additionally, the BAP provided "Supplemental Benefits" to class members whose baseline examination revealed a diagnosis of "Level 1" neurocognitive impairment. JA1033-JA1034. Not every class member was eligible for the BAP. Only class members with at least half an eligible season received such benefits. JA1025. The Initial Settlement capped the BAP at $75 million. JA1078.

On January 14, 2014, this Court *sua sponte* denied the motion for preliminary approval, stating the parties had not shown the $675-million MAF was sufficient to pay all anticipated claims. JA1480-JA1483.

While the parties went back to the drawing board, seven former NFL players (the "Faneca Objectors") – represented by MoloLamken, Hangley Aronchick Segal Pudlin & Schiller, and Professor Linda Mullenix – recognized that the interests of all class members – particularly those battling CTE – were not adequately represented at the negotiation that led to the Initial Settlement. They thus filed a motion to intervene, JA1572-JA1638, highlighting (among other defects) the Initial Settlement's failure to adequately compensate CTE, *see* JA1625-JA1631. They requested that they be permitted to represent the interests of class members with symptoms of CTE at the negotiating table. JA1611-JA1612.[3]

[3] In early proceedings, this group was known as the "Morey Objectors." After Sean Morey (and two others) opted out, JA6280 (Faneca Fee Pet.), the remaining players became known as the "Faneca Objectors."

2. *The Faneca Objectors' Opposition to Preliminary Approval*

On June 25, 2014 – while the Faneca Objectors' motion to intervene was still pending – Class Counsel moved for preliminary approval of a revised version of the settlement (the "Revised Settlement"). JA1639-JA1643, JA1680-JA1841. Among other changes, the Revised Settlement eliminated the $675-million cap on the MAF. JA2102. However, the Revised Settlement retained the $75-million cap on the BAP, JA1712-JA1713, and continued to deny eligible-season credit for NFL Europe, JA1718.

Just one week later, on July 2, 2014, the Faneca Objectors filed a 47-page opposition to preliminary approval. JA2041-JA2097. They were the first – and only – class members to oppose preliminary approval. They provided detailed scientific evidence regarding CTE, JA2057-JA2061, JA2071-JA2073, JA2077; *see* JA2046-JA2050, and reiterated that the Revised Settlement's failure to compensate CTE in all afflicted class members created an impermissible intra-class conflict that precluded certification of the settlement class under Rule 23(a)(4), JA2069-JA2076.

The Faneca Objectors also objected to the Revised Settlement's failure to credit seasons played in NFL Europe. JA2078. The Revised Settlement failed to provide class members who played in NFL Europe (and its predecessor leagues) any eligible-season credit for seasons played in those leagues. JA1718. Because

the settlement reduced monetary awards to players with fewer eligible seasons, players in NFL Europe would receive reduced monetary awards. JA1717-JA1718. For example, a class member who played ***only*** in NFL Europe would have had zero eligible seasons, triggering a ***97.5% reduction*** in any monetary award. JA1717-JA1718. Such a class member also could not participate in the BAP, which required at least half an eligible season. JA1702. The Faneca Objectors also raised objections to the fee to appeal adverse claim determinations and other unnecessary procedural hurdles that threatened to unfairly impede recovery under the settlement. JA2082-JA2085.

No class member – except the Faneca Objectors themselves in their motion to intervene – had previously raised these deficiencies.

The district court ignored the Faneca Objectors' opposition, describing Class Counsel's motion as "unopposed." JA2100-JA2101. It granted preliminary approval to the Revised Settlement and conditionally certified the class "for settlement purposes only." JA2121-JA2150.[4]

[4] Before filing their objection, the Faneca Objectors sought review of the preliminary-approval order under Rule 23(f). *See In re Nat'l Football League Players Concussion Injury Litig.*, 775 F.3d 570, 578 (3d Cir. 2014). They also sought limited discovery to obtain information necessary to evaluate the fairness of the settlement. JA2960-JA3002. The Faneca Objectors highlighted deficiencies in the Revised Settlement in these filings as well. *E.g.*, JA2964-JA2969.

B. The Faneca Objectors Identify Key Settlement Flaws and Build a Robust Evidentiary Record with Their Objection and at the Fairness Hearing

1. *The Faneca Objection*

On October 6, 2014 – more than a week before the objection deadline set by this Court – the Faneca Objectors objected to final approval of the Revised Settlement. JA3003-JA3103. The objection exceeded 85 pages and was supported by 82 exhibits totaling more than 700 pages. JA3003-JA3922. The objection again addressed the Revised Settlement's defects, including the BAP cap, JA3089-JA3090, the lack of credit for NFL Europe, JA3037-JA3053, the failure to meaningfully compensate CTE, JA3071-JA3101, and the $1,000 fee for appealing adverse claim determinations, JA3093-JA3094. The objection also challenged aspects of the class notice and criticized some of the Revised Settlement's procedural hurdles. JA3055-JA3070.

In support of their objection, the Faneca Objectors submitted extensive scientific evidence, including the expert declarations of two world-renowned neuroscientists: Dr. Robert Stern and Dr. Sam Gandy. *See* JA3858-JA3918 (Stern Decl.); JA3933-JA3970 (Gandy Decl.); JA3161-JA3364, JA3560-JA3758, JA3766-JA3771, JA3849-JA3851 (Faneca Obj. Exs.). Dr. Stern is a Professor of Neurology, Neurosurgery, and Anatomy & Neurobiology at Boston University School of Medicine. He is a co-founder of the BU Center for the Study of

Traumatic Encephalopathy, and a leading expert in the causes of neurodegeneration in athletes. JA3875-JA3918. Dr. Gandy is a Professor of Alzheimer's Research and a Professor of Neurology and Psychiatry at Mt. Sinai School of Medicine. He is also Associate Director of the Mount Sinai Alzheimer's Disease Research Center. JA3939-JA3970.

The Faneca Objectors also submitted factual evidence pertaining to conditions in NFL Europe, including a declaration of Sean Morey, who played three seasons in NFL Europe. JA3919-JA3921.

No other objector submitted such voluminous evidence. Indeed, no other objector submitted even one original expert declaration. The Faneca Objectors thus framed the scientific debate and provided the evidentiary record on which all other objectors would rely.[5]

2. *The Faneca Objectors Lead the Fairness Hearing*

Recognizing the Faneca Objectors as leaders among the objectors, the district court on November 4, 2014, appointed Steven Molo of MoloLamken and William Hangley of Hangley Aronchick Segal Pudlin & Schiller to coordinate arguments on behalf of all objectors at the fairness hearing. JA4111-1. Thus,

[5] Following their objection, the Faneca Objectors sought discovery from Co-Lead Class Counsel and the NFL concerning the fairness of the settlement, *see* JA4073-JA4077, and the opportunity at the fairness hearing to present testimony and cross-examine individuals with information relevant to the settlement and underlying claims, JA4078-JA4086.

counsel for the Faneca Objectors presented the primary argument, emphasizing that they favored a settlement – but only one that was fair. JA5590.[6] The Revised Settlement, as they explained, was not. JA5590. It:

- capped the BAP Fund at $75 million;
- released the claims of NFL Europe players for, essentially, nothing in return;
- failed to adequately compensate CTE; and
- imposed unnecessary and unfair administrative burdens on claimants, such as a $1,000 appeal fee.

JA5604, JA5607-JA5612, JA5633-JA5635 (Fairness H'rg Tr.); JA5806-JA5807 (Faneca slides).

The Faneca Objectors did more than note the deficiencies in the Revised Settlement. They offered concrete suggestions for how the settlement could be made fair. Specifically, they urged the district court to use its influence to secure further improvements to the settlement:

- eliminating the cap on the BAP Fund;
- allowing eligible-season credit for seasons played in NFL Europe;
- extending the benefit for Death with CTE;
- adding a hardship provision for players who cannot afford the appeal fee; and

[6] By contrast, attorneys for other objectors, like those representing the Armstrong Objectors, opted not to appear at the fairness hearing at all. JA4542 (Fairness H'rg Notice).

- others, such as eliminating the requirement that class members opt in to the BAP and changing the neurocognitive testing procedures.

See JA5623-JA5624, JA5629, JA5633-JA5635 (Fairness H'rg Tr.); JA5808, JA5812 (Faneca slides).

On December 2, 2014, the Faneca Objectors, on the district court's invitation, filed a 31-page supplemental objection. JA4551-JA4590. They offered still more scientific evidence regarding CTE and the injuries associated with repetitive head injury. That evidence included additional declarations from Dr. Stern and Dr. Gandy. *See* JA4591-JA4601. It also included the declarations of ***nine additional prominent scientists and researchers*** – all leading experts on brain injury and neurodegenerative disease – who opined that the science of CTE was advancing and that a reliable diagnosis for CTE would be available before the 65-year settlement term expires. *See* JA4565.[7] The Faneca Objectors also

[7] Those experts were: Patrick R. Hof, MD, the Regenstreif Professor of Neuroscience at the Icahn School of Medicine at Mount Sinai, New York, JA4647-JA4768; Jing Zhang, MD, PhD, the Endowed Chair of Neuropathology at the University of Washington School of Medicine, JA4769-JA4791; Martha E. Shenton, PhD, a Professor in the Department of Psychiatry and Radiology at the Brigham and Women's Hospital and Harvard Medical School, JA4792-JA4925; Charles Bernick, MD, MPH, the Associate Director at the Cleveland Clinic Lou Ruvo Center for Brain Health, JA4926-JA4939; Michael Weiner, MD, a Professor of Radiology and Biomedical Engineering, Medicine, Psychiatry, and Neurology at the University of California, San Francisco, JA4940-JA5098; James R. Stone, MD, PhD, an Associate Professor of Radiology and Medical Imaging as well as of Neurological Surgery at the University of Virginia, JA5099-JA5124; Thomas Wisniewski, MD, a Professor of Neurology, Pathology, and Psychiatry at New York University School of Medicine, JA5125-JA5175; Steven T. DeKosky, MD,

provided 27 additional exhibits, including further scientific studies to underscore those points. JA5275-JA5507.

Their supplemental brief further argued the unfairness of the Revised Settlement's treatment of NFL Europe and reiterated the concern that the BAP Fund would be exhausted before every entitled class member received a baseline examination. JA4577-JA4579. Finally, the Faneca Objectors repeated their suggestions for concrete improvements, including (1) uncapping the BAP and/or extending the BAP to the full term of the settlement; (2) affording credit for seasons played in NFL Europe; (3) broadening compensation for CTE, including compensating CTE in the living once reliable tests exist or eliminating CTE from the release; and (4) eliminating the appeal fee for adverse claim determinations. JA4587-JA4588.

C. The District Court Orders Changes in the Settlement Responsive to the Faneca Objectors' Concerns

On February 2, 2015, the district court issued an order acknowledging the Faneca Objectors were right. It directed Class Counsel and the NFL to consider further changes to the Revised Settlement. JA5839-JA5841. Referencing its review of the objectors' submissions and the argument at the fairness hearing, the

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the Dean of the University of Virginia School of Medicine until 2013, and currently the Aerts-Cosper Professor of Alzheimer's Research at the University of Florida College of Medicine, JA5176-JA5229; and Wayne Gordon, PhD, the Jack Nash Professor and Vice Chair of the Department of Rehabilitation Medicine at the Icahn School of Medicine at Mount Sinai in New York, JA5230-JA5269.

Court stated that certain "changes" – all but one of them responsive to deficiencies identified by the Faneca Objectors – "would enhance the fairness, reasonableness, and adequacy" of the settlement. JA5839.

Specifically, the district court suggested: (1) the BAP be uncapped and all eligible class members receive a baseline assessment; (2) the settlement provide some eligible-season credit for NFL Europe and its predecessor leagues; (3) the Qualifying Diagnosis of Death with CTE be extended to include class members who died between preliminary approval and final approval; and (4) the settlement include a financial hardship provision for the appeal fee. JA5840.[8] The district court directed the parties to amend the Revised Settlement to address those issues, or to explain why they were unwilling to do so. JA5840.

On February 13, 2015, the parties filed an amended settlement (the "Final Settlement") that accepted the district court's suggestions. JA5842-JA6123. Thus, while the Revised Settlement afforded no eligible-season credit to NFL Europe, JA1718, the Final Settlement granted class members 0.5 of an eligible season for seasons played in that league, JA5865. While the Revised Settlement capped the BAP at $75 million, JA1761, the Final Settlement uncapped it and required the NFL to fund a baseline assessment for every eligible class member, JA5936.

[8] The order also suggested that the settlement accommodate class members who no longer possess relevant medical records because of *force majeure*-type events. JA5840.

While the Revised Settlement afforded Death with CTE benefits only to class members who died prior to preliminary approval, JA1714, JA1789, the Final Settlement extended that cut-off to the date of final approval, JA5889, JA5962. And, while the Revised Settlement demanded that all class members pay $1,000 to appeal an adverse claim determination, JA1729, the Final Settlement permitted waiver of that fee for financial hardship, JA5904. With these changes, the district court approved the Final Settlement on April 22, 2015. *See* JA6131-JA6262.[9]

II. ATTORNEYS' FEES PROCEEDINGS

The Final Settlement provided that the NFL would pay any award of common-benefit attorneys' fees. JA5933-JA5934. The NFL also agreed not to oppose any request up to $112.5 million. JA5934.

A. The Faneca Objectors Request Attorneys' Fees as Compensation for the Considerable Value Their Advocacy Brought to the Class

On January 11, 2017, the Faneca Objectors submitted a petition for common-benefit attorneys' fees and expenses. They argued that their advocacy

[9] The Faneca Objectors appealed from the district court's final approval, arguing the district court did not go far enough in curing the settlement's deficient treatment of CTE. While this Court commended objectors as "well-intentioned in making thoughtful arguments," it ultimately affirmed. *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 447 (3d Cir. 2016), as amended (May 2, 2016). Other objectors appealed as well. Many relied extensively on the evidentiary record built by the Faneca Objectors. *See, e.g.*, Armstrong Br., No. 15-2272, at 5 n.1, 6-11, 13-14, 18-19, 34-36; Jones Br., No. 15-2291, at 4; Heimburger Br., No. 15-2206, at 5; Carrington Br., No. 15-2234, at 6, 11, 15; Anderson Br., No. 15-2230, at 25. Recognizing the absence of cert-worthy issues in this Court's decision, the Faneca Objectors opted not to pursue further review.

resulted in four improvements to the settlement – specifically: (1) partial elimination of the BAP Fund cap in the form of a guaranteed baseline assessment for all eligible players; (2) NFL Europe players receiving one-half an eligible season credit for time played in NFL Europe; (3) extension of the "Death with CTE" cut-off date from the date of preliminary approval to the date of final approval; and (4) hardship waiver of the $1,000 fee to appeal adverse claim determinations. JA6280, JA6308-JA6309. A leading financial expert, Joseph J. Floyd, CPA, JD, CFE, ABV, provided a detailed analysis, explaining that those four modifications to the settlement were worth as much as $122.6 million. *See* JA7777-JA7784; *see also* JA7189-JA7222, JA7760-JA7761, JA8195.[10]

Uncapping the BAP. The Final Settlement guaranteed each eligible class member a baseline assessment, even if the cost of providing those exams exceeded the $75-million cap on the BAP. JA5936. Based on the estimated number of class members eligible to participate in the BAP, the expert estimated that payments from the BAP Fund could exceed the $75-million cap by as much as ***$29.6 million***,

[10] Floyd is the President of Floyd Advisory. He previously served as the partner-in-charge of Arthur Andersen's financial consulting practice in New England and headed the forensic accounting practice of Huron Consulting. He holds a B.S. in accounting from the University of Massachusetts at Amherst and a J.D. from Suffolk University Law School. He is accredited or certified in business valuation, financial forensics, and more. JA7192, JA7206 (Floyd Decl.).

providing that much value to the class. JA7216, JA7781; *see* JA7172, JA7761-JA7762, JA8195.[11]

The expert arrived at the $29.6-million value by totaling all estimated payments from the BAP and determining the amount by which those payments would exceed $75 million. Specifically:

- The expert estimated that the class as a whole could receive as much as $37.7 million in supplemental benefits. JA7197, JA7216.[12]

- Baseline examinations for all 16,962 living class members could total as much as $59.4 million at $3,500 each. JA7197; *see* JA6309-JA6310. In estimating the value of baseline assessments, the expert did ***not*** include the cost of baseline assessments provided to class members who played only in NFL Europe and who became eligible to participate in the BAP as a result of changes to the Revised Settlement. JA6309-JA6310 & n.25. (The value attributable to that change is described below.)

- Finally, the expert considered the $7.5 million in BAP administrative costs, payable from the BAP Fund. JA7216; *see* JA5886, JA7643.

[11] The Faneca Objectors initially valued this improvement at $11.4 million. JA6309-JA6310. The Faneca Objectors' valuation expert noted, however, that the Faneca Objectors had not taken account of BAP administrative costs that increased the value of this improvement, JA7197 (Floyd Decl.), nor had the Faneca Objectors accounted for increased participation rates in estimating the value of supplemental benefits, JA7199-JA7200. Thus, the Faneca Objectors' valuation expert concluded that the Faneca Objectors' initial valuation had underestimated the value of this improvement.

[12] This calculation assumed an average supplemental benefit award of $35,000, *see* p. 19 n.13, *infra*, which was the level of supplemental benefits estimated by the NFL's actuary, as noted by the district court in approving the settlement. JA6237 (Final Approval Mem.); *see also* JA6313 (Faneca Fee Pet.).

Taken together, those payments would exceed the $75-million cap by $29.6 million. JA7216, JA7781; *see* JA7172, JA7761-JA7762, JA8195.

NFL Europe. Eligible-season credit for players in NFL Europe delivered an estimated ***$36.8 million*** additional benefit – increasing the value of both the BAP and the MAF. JA7194, JA7198-JA7201, JA7780-JA7781; *see* JA6310-JA6314, JA7172, JA7761, JA8195. In calculating the increased BAP value, the expert considered publicly available data to identify 2,300 class members who played ***only*** in NFL Europe. JA7199, JA7780-JA7781; *see* JA6310-JA6314, JA8194-JA8195. Those players would have been ineligible to participate in the BAP under the Revised Settlement. JA1718. Under the Final Settlement, however, they receive eligible-season credit and are eligible for $13.2 million in BAP benefits. JA7199-JA7200, JA7216, JA7780-JA7781.[13]

In calculating the increased value of the MAF, the expert considered the additional compensation paid to class members by virtue of the eligible-season

[13] Class Counsel's expert stated that the baseline assessments would cost approximately $3,500 each. JA4460. Because 2,300 class members would be newly eligible for a baseline assessment, the total value of the assessments to those class members would be $8.1 million. JA6548, JA7199; *see* JA6313, JA8194-JA8195. Using data submitted by Class Counsel and the NFL, the Faneca Objectors estimated that supplemental benefits would be paid to 6.4% of the class members newly eligible for participation in the BAP. JA7200, JA7216; *see* JA6313. Assuming supplemental benefits of $35,000, JA7199, JA7216; *see* JA6237, JA6313, the Faneca Objectors calculated that class members who played in NFL Europe would receive an additional $5.1 million in supplemental benefits, JA7200, JA7216; *see* JA6313-JA6314.

credit they now receive for seasons played in NFL Europe. JA7199-JA7201, JA7780-JA7781; *see* JA6310-JA6312, JA7761. The additional eligible seasons reduce the eligible-season offset, thereby increasing monetary awards. JA7199-JA7201; *see* JA6311-JA6312. Class members who played in NFL Europe would receive an additional $23.6 million in monetary awards. JA7199-JA7201, JA7218, JA7780; *see* JA6310-JA6312.[14]

Expanded Scope of Death with CTE Benefits. While the Revised Settlement limited the Death with CTE qualifying diagnosis to individuals who died before preliminary approval (July 7, 2014), the Final Settlement extended that cut-off to the date of final approval (April 22, 2015) – a nine-month extension. *See* JA6123. The expert estimated that the nine-month extension would make 106 class members eligible for ***$44.6 million*** in additional monetary fund payments. JA7201-JA7202, JA7217, JA7781-JA7782; *see* JA6314-JA6315, JA7172, JA7762-JA7764, JA8194-JA8195. Using publicly available data, the expert identified 111 class members who died between the dates of preliminary and final approval. JA7217; *see* JA6314. Of those class members, 106 were expected to have CTE.

[14] By counting the total number of eligible seasons compensated under the settlement and adopting Co-Lead Class Counsel's estimate of settlement payouts, the Faneca Objectors estimated the average monetary award payment per eligible season. JA7199, JA7218, JA7780-JA7781; *see* JA6312. They then estimated the number of eligible seasons awarded for seasons played in NFL Europe, multiplied that amount by the average payment per eligible season, and subtracted the amount that veterans of NFL Europe would have otherwise received. JA7200-JA7201, JA7218, JA7780-JA7781; *see* JA6312.

JA7217; *see* JA6314. With an average monetary award of $421,000, those 106 class members would have been entitled to $44.6 million in payments from the MAF. JA7201-JA7202, JA7217, JA7781-JA7782; *see* JA6314-JA6315, JA7172, JA7762-JA7764, JA8195.

Appeal Fee Hardship Waiver. The Revised Settlement required all class members to pay a $1,000 fee to appeal an adverse claim determination. JA1729. The Final Settlement, however, permitted waiver of that fee in cases of financial hardship. JA5904. The expert determined an estimated ***$11.6 million*** in additional monetary awards would be paid as a result of that waiver. JA7202-JA7203, JA7217, JA7780, JA7782-JA7783; *see* JA6315-JA6316, JA7172, JA7764-JA7765, JA8195. Drawing on data from the NFL's disability-claims process, he concluded that 16.2% of all approved claims would be paid after a successful appeal and estimated that the $1,000 fee would have deterred approximately 10% of those successful appeals. JA7217; *see* JA6315-JA6316, JA7764. The value paid on those appealed claims, which but for the financial hardship waiver would have paid nothing at all, was estimated to be $11.6 million. JA7780, JA8195.

Thus, the advocacy of the Faneca Objectors, which prompted these four improvements to the settlement, brought as much as $122.6 million in additional benefits to the class, JA7780, *see* JA7760-JA7761, JA8195:

Revised Settlement	The Faneca Objections	Final Settlement	Expert's Valuation
$75-million cap on BAP Fund.	The cap should be eliminated.	Eliminated the cap for baseline assessments.	$29.6 million
No eligible-season credit for NFL Europe.	NFL Europe seasons should be credited.	0.5 eligible season for NFL Europe.	$36.8 million
Death with CTE deadline: Preliminary approval (July 7, 2014).	Extend Death with CTE benefits.	Death with CTE deadline extended to final approval.	$44.6 million
$1,000 appeal fee.	The fee should include a hardship waiver.	Included a hardship waiver.	$11.6 million

Achieving that enormous benefit required an enormous effort: The Faneca Objectors' counsel expended 6,357.2 hours of professional time yielding a lodestar of $4,312,565. JA6356-JA6358; *see* JA6387-JA6388, JA6390, JA6394-JA6399, JA6409-JA6411, JA6415-JA6419, JA6464 (attorney declarations). For the tremendous value they brought to the class, the Faneca Objectors requested $20 million in attorneys' fees and expenses. JA6319. That fee award amounted to 16.3% of the value they conferred on the class, about 17.8% of the available attorneys' fees, and represented a reasonable lodestar multiple of 4.64.

B. Co-Lead Class Counsel Opposes the Faneca Objectors' Request and Seeks $112.5 Million in Fees and Expenses

Co-Lead Class Counsel did not dispute that the post-fairness hearing changes to the settlement were valuable. It did not deny that the changes increased

the amount that the class would receive from the NFL. To the contrary, Co-Lead Class Counsel's actuary calculated the eligible-season credit for NFL Europe to be of even greater value than the value determined by the Faneca Objectors' expert. The actuary concluded that extension of the Death with CTE cut-off would also result in enhanced payouts to the class. Co-Lead Class Counsel thus ***conceded*** that the improvements attributable to the Faneca Objectors increased the value of the settlement by ***$46 million in additional payments to the class***. JA7638.[15]

Nonetheless, Co-Lead Class Counsel opposed the Faneca Objectors' fee request, arguing that the Faneca Objectors' were entitled to nothing. JA7356-JA7374. Notwithstanding the Faneca Objectors' express statements that they favored a fair, reasonable, and adequate settlement, JA5590, Co-Lead Class Counsel maintained that the Faneca Objectors sought to "blow . . . up" the deal entirely. JA9185. Co-Lead Class Counsel argued: the district court, not the Faneca Objectors, had been the genesis of the settlement changes, JA7359; the vast majority of the Faneca Objectors' efforts focused on unsuccessful arguments,

[15] Co-Lead Class Counsel's actuary estimated that providing eligible-season credit for NFL Europe would result in $41 million in additional MAF pay-outs, JA7641-JA7642, and that extension of the Death with CTE deadline would result in $5 million in additional pay-outs, JA7643-JA7644. Co-Lead Class Counsel also conceded that lifting the cap on the BAP Fund would generate additional value for the class: "[G]iven the higher-than-projected Class participation rate, the NFL will likely have to spend ***more than $75 million on the BAP*** because every eligible Retried NFL Football Player is guaranteed an examination, irrespective of the $75 million BAP funding cap." JA8434(Cl. Counsel Resp. to Rubenstein Rpt.) (citation omitted, emphasis added).

JA7362-JA7371; and the Faneca Objectors' request was unfair because it sought a higher lodestar multiple than Co-Lead Class Counsel would receive. JA7371-JA7374.

Co-Lead Class Counsel claimed the Faneca Objectors were entitled to no attorneys' fees and sought payment of the entire $112.5 million in attorneys' fees and expenses for Class Counsel. JA6555-JA6556. Co-Lead Class Counsel also requested authority to allocate that sum among the Class Counsel. JA6555-JA6556.[16]

C. Co-Lead Class Counsel Proposes an Allocation of Attorneys' Fees and the District Court Holds a Hearing

On September 11, 2017, the district court ordered Co-Lead Class Counsel to submit a proposed "allocation of lawyers' fees among class counsel including the precise amounts to be awarded along with a justification of those amounts based on an analysis of the work performed." JA7920.

Co-Lead Class Counsel submitted the required declaration on October 10, 2017. JA7943-JA7966. Co-Lead Class Counsel's allocation (the "Proposed

[16] Others requested a portion of the common-benefit attorneys' fees. After the Faneca Objectors identified the Revised Settlement's deficient treatment of NFL Europe, Objectors Preston and Katherine Jones filed the same objection. Dkt. 6235. For that effort, their attorney sought 1.5% of the value of the benefits attributable to that improvement. Dkt. 7364-1 at 11. Similarly, the Armstrong Objectors had filed an objection that largely parroted criticisms that the Faneca Objectors had raised over a month earlier in their opposition to preliminary approval. JA3971-JA4006. For that copy-cat effort, the Armstrong Objectors requested $599,699.80 in fees. JA6979.

Allocation") would have distributed about $114.2 million. JA7966.[17] Of that amount, Co-Lead Class Counsel proposed that nearly $6.2 million be allocated to pay common-benefit expenses, leaving approximately $108 million for attorneys' fees. JA7947. As detailed in the opening brief of the Locks Law Firm, Locks Br. 10-11, Co-Lead Class Counsel allocated the vast bulk of fees to itself – $70 million, or nearly 65% of all available fees, JA7956.

Co-Lead Class Counsel also allocated fees among objectors. For the Faneca Objectors, it suggested an award of $150,000 in attorneys' fees for "coordinat[ing] the presentation of objections at the November 19, 2014 Fairness Hearing." JA7955. Co-Lead Class Counsel bizarrely claimed that the Faneca Objectors' "efforts did not yield any benefit for the Settlement Class certified by the Court," JA7955 – notwithstanding Co-Lead Class Counsel's earlier concession that the improvements to the Revised Settlement yielded additional payments of at least $46 million to the class. *See* p. 23 & n.15, *supra*.

The Faneca Objectors responded to the proposed allocation on October 27, 2017. *See* JA8192-JA8204. They noted that the four improvements to the settlement brought about by their advocacy were valuable, discussed the previously

[17] That amount included a $112.5-million deposit by the NFL into the Attorneys' Fees Qualified Settlement Fund pursuant to the Final Settlement, approximately $338,000 in interest on that amount, and over $1.3 million remaining from the NFL's deposits into the escrow fund that were initially made to pay class notice costs. JA7947.

submitted valuation opinion of expert Joseph Floyd, and highlighted the dissonance between the value they created and the modest fee award recommended by Co-Lead Class Counsel. *See* JA8194-JA8198.

D. The District Court Awards the Faneca Objectors $350,000, Less than 1% of the Value They Delivered to the Class and Less than 10% of Their Lodestar

1. *The District Court's Order on Co-Lead Class Counsel's Fee Petition*

On April 5, 2018, the district court ruled on Co-Lead Class Counsel's fee petition. JA48-JA67. The district court made clear that it had approved the Final Settlement "after ***crucial*** revisions." JA49 (emphasis added). The court touted the Final Settlement's "***uncapped*** Baseline Assessment Program," JA50 (emphasis added), and its "***unlimited*** fund to compensate retired NFL Players, valued [on April 25, 2015] at close to $1 billion," JA49-50.

The district court awarded the full amount of Co-Lead Class Counsel's original request: $106,817,220.62 in attorneys' fees and $5,682,779.38 in expenses. JA52. Applying the percentage-of-recovery method and assessing the reasonableness of the requested fee under the *Gunter* factors, the district court concluded that the $106.8 million attorneys' fee award was reasonable. JA53. Largely adopting Co-Lead Class Counsel's analysis, the district court concluded that the first *Gunter* factor – the value of the settlement – favored the requested attorneys' fee. The Final Settlement, the court stated, was worth approximately

$1.5 billion, with a net present value of $982.2 million. JA55. The district court did not attempt to value separately – and made no findings concerning the value of – the four improvements to the settlement highlighted by the Faneca Objectors in their fee petition.

The district court also noted that few class members had objected to the requested fee and praised the skill and efficiency of Class Counsel, saying these factors weighed heavily in favor of the requested award. JA55-JA56. And, while the district court recognized that the settlement occurred without formal discovery, it nonetheless concluded that the "'complex scientific and medical issues'" rendered the case a complex "'high-risk, long-odds litigation'" in which Class Counsel had invested over 50,000 hours of time. JA57-JA58. Additionally, the requested fee amounted to 11% of the present value of the overall settlement, a percentage that the district court found comparable to the fees paid in other settlements. JA59. According to the district court, these *Gunter* factors all favored the requested fee.

Turning to the eighth *Gunter* factor – the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups – the district court concluded that the settlement required a "pioneering effort" by Class Counsel. JA59. It acknowledged that congressional hearings "undoubtedly provided some of the foundation for this litigation," but concluded that the impact of those

proceedings was limited. JA60. The district court did not even mention, much less discuss, the Faneca Objectors' contributions.

The district court also concluded that the final two *Gunter* factors favored the requested fee. Reiterating that the $106.8 million attorneys' fee amounted to 11% of the settlement fund, the district court concluded that the fee was reasonable when compared to the percentage that would have been negotiated in a private fee agreement. JA60. The district court also lauded the Final Settlement's "innovative" terms, concluding this factor weighed heavily in favor of the requested fee. JA60-JA61.

Finally, the district court conducted a lodestar cross-check. Noting that billing rates for attorneys of comparable experience varied widely across firms, the district court calculated a blended hourly rate of $623.05 per hour for all partners, associates, and paralegals. Using that blended rate, the district court calculated a lodestar for all Class Counsel of $36,073,348.90 and an overall lodestar multiplier of 2.96, which the district court found to be reasonable. JA63.

The district court declined to allocate the attorneys' fees that it had awarded, stating that the "allocation will be addressed in a separate opinion." JA66. The district court also reserved decision on the fee petitions submitted by the Faneca Objectors, the Armstrong Objectors, the Jones Objectors, and the Alexander Objectors. JA66-JA67.

2. *The District Court's Allocation*

On May 15, 2018, the district court held a hearing, giving each firm seeking fees an opportunity to address the court concerning the allocation of fees. Some firms – like counsel representing the Jones Objectors or the Armstrong Objectors – chose not to appear. *See* JA9077-JA9078. The Faneca Objectors, however, did appear. In their presentation, the Faneca Objectors highlighted their advocacy on behalf of the class and summarized the enhancements to the settlement that resulted from their efforts. JA9179-JA9182.[18] They reiterated that their desire all along was for a settlement that was fair, reasonable, and adequate. JA9181-JA9183. And they pointed out that nothing they did delayed implementation of the settlement. JA9182. Indeed, they noted that their efforts – the motion to intervene, the opposition to preliminary approval – were designed to cure the defects in the settlement early in the process, to ensure that deserving class members received benefits as quickly as possible. JA9182. Had the district court acted sooner,

[18] At one point, the district court appeared to suggest that the Faneca Objectors were not the "impetus" behind the changes to the BAP cap, suggesting instead that the district court may have been responsible for that change. JA9178-JA9179 (Fee Hr'g Tr.). But that clearly was not the case, as the district court gave preliminary approval to the settlement with the BAP capped. The change was made ***only after*** the Faneca Objectors made their objection. Significantly, the district court included no such finding in its fee-allocation order. *See* pp. 30-31, *infra*. As the Faneca Objectors explained in their fee-petition briefing, when an objector raises a defect in the settlement and that defect is later addressed in a way that brings value to the class, the objector is entitled to be compensated for that effort. *See* JA6320 (citing *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 744 (3d Cir. 2001)).

addressing the issues the Faneca Objectors raised first in their motion to intervene and their opposition to preliminary approval, an extensive effort later in the proceeding would have been unnecessary.

On May 24, 2018, the district court issued its allocation decision. For class counsel, the district court employed a lodestar method to allocate a specific sum to each firm. JA90. In calculating the lodestar, the district court first capped hourly rates at the average rate for partners, of counsel, associates, contract attorneys, and paralegals. JA90. The court then applied a lodestar multiplier, ranging from 0.75 for certain firms to a high of 3.5 for Co-Lead Class Counsel, Seeger Weiss. JA91-JA105.

The district court then turned to the fee requests submitted by objectors' counsel. Beginning with the Faneca Objectors, the district court noted the four improvements to the settlement on which the Faneca Objectors based their fee request: "[c]redit for NFL Europe; [t]he [u]ncapping of the BAP Fund; [e]xpansion of the death with CTE qualifying diagnosis; and [e]limination of the appeal fee in cases of hardship." JA105. The district court stated that the Faneca Objectors $20-million fee request was "unreasonable," but nonetheless concluded "they are entitled to compensation for the work they performed for the class." JA106.

The district court awarded the Faneca Objectors $350,000 "[i]n consideration of the service provided as liaison counsel ***and the firms' role in providing***

benefits to the class." JA106 (emphasis added). The district court did not attempt to estimate the value of the benefits that the Faneca Objectors delivered to the class, assess the quality or extent of counsel's work, or conduct any sort of lodestar analysis. *See* JA105-JA106.

The district court denied the fee requests from the other objectors, reaffirming its conclusion that the Faneca Objectors' advocacy prompted the improvements to the settlement.[19] It noted the Armstrong Objectors sought credit for "many of the improvements that were also submitted by the Faneca Objectors." JA106. "The Armstrong Objectors cannot receive credit for parroting the same objections that were made more persuasively by the Faneca Objectors," the court explained. JA106. Likewise, the district court found the Faneca Objectors, not the Jones Objectors, were "entitled to credit for their work in presenting the NFL Europe objection." JA107. "A comparison between the argument presented by the Faneca Objectors and the argument presented by the Jones Objectors speaks for itself," the court continued. JA107 (citation omitted). Finally, the district court rejected the fee request of the Alexander Objectors because they had lodged only "unsuccessful objections." JA106-JA107.

[19] The district court did follow Co-Lead Class Counsel's recommendation and award $250,000 in attorneys' fees to Corboy & Demetrio, counsel for the Duerson Objectors, JA107, although that firm did not independently petition the court for fees.

SUMMARY OF ARGUMENT

I. The district court concluded that the Faneca Objectors were responsible for the "crucial" improvements that resulted in the Final Settlement. To do so, they spent in excess of $4 million in time battling both an army of highly regarded plaintiffs' firms and the NFL's top-flight defense counsel united in their effort to force an inadequate settlement on the class.

The Faneca Objectors took on extraordinary risk, skillfully advanced innovative arguments, and they delivered. Expert evidence demonstrated that their improvements were worth as much as $122.6 million.

The district court's $350,000 fee award amounts to 0.0029 of the value of the benefit conferred to the class.[20] The *Gunter* analysis and precedent of this Court make clear the Faneca Objectors should receive a fee consistent with those awarded objectors in similar cases – no less than 10% of the benefit conferred and as much as 25%.

II. The Faneca Objectors have both Article III and appellate standing to challenge the fee award. Having submitted a petition for attorneys' fees, and having received less than requested, they both have an interest in the outcome of this dispute and have been sufficiently "aggrieved" by the district court's orders.

[20] Even accepting for the sake of argument the benefit were only $46 million, as Class Counsel suggested, the award would amount to 0.0076 of the benefit conferred.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING THE FANECA OBJECTORS LESS THAN 1% OF THE VALUE THEY BROUGHT TO THE CLASS AND NOTHING FOR EXPENSES

Objectors play a critical role in class litigation. Class litigation creates incentives for "'class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers.'" *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014); *see In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 787-88 (3d Cir. 1995) ("*GM Trucks*"). Because judges "expect the clash of adversaries to generate the information [needed] to decide the case," they are "at a disadvantage in evaluating the fairness of the settlement to the class" when class counsel and the defendant both urge approval. *Eubank*, 753 F.3d at 720. Objectors provide the needed "clash of adversaries." *Id.*; *see* 5 *Newberg on Class Actions* §§ 15:58-60, 15:94 (5th ed.). They play "'a valuable and important role . . . in preventing collusive or otherwise unfavorable settlements.'" *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 743 (3d Cir. 2001).

Thus, if objectors improve a settlement's terms, "'they are entitled to an allowance as compensation for attorneys' fees and expenses.'" *Cendant PRIDES*, 243 F.3d at 743; *see also Eubank*, 753 F.3d at 720 (objectors who "persuade the

judge to disapprove" the settlement, resulting in settlement terms "more favorable to the class," are entitled to "a cash award that can be substantial"); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002) (holding that objectors' "lawyers who contribute materially to the proceeding" are entitled to a fee); 7B Charles A. Wright & Arthur Miller, *Federal Practice & Procedure* § 1803 & n.6 (3d ed. 2004) ("To the extent that the court finds a benefit to the class conferred by the work of the attorneys, a fee award will be approved.").

Even when objectors do not spark changes to the settlement agreement, they nonetheless "add value" by "transforming the fairness hearing into a truly adversarial proceeding." *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008). "[T]heir performance of the role of devil's advocate warrants a fee award." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 358 (N.D. Ga. 1993); *accord In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000).

The district court found that the Faneca Objectors had improved the settlement and that they were "entitled to compensation" for their "role in providing benefits to the class." JA106. The district court credited the Faneca Objectors' efforts in bringing about ***the*** four key changes (there were only five total) to the settlement agreement, characterizing their advocacy as "persuasive[]" and noting that the record they built "speaks for itself." JA106-JA107. Its

conclusion that the Faneca Objectors' requested fee was "unreasonable" and award of $350,000 was error. JA106.

Standard of Review: This Court reviews an award of attorneys' fees for an abuse of discretion. *Cendant PRIDES*, 243 F.3d at 727. That occurs when the district court "'fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous.'" *Id.* It is an abuse of discretion to "ignore[]" relevant factors; "pick[] an award figure arbitrarily"; draft an opinion so "terse, vague, or conclusory" that it provides "no basis" for appellate review; or fail to fulfill the "duty to apply the relevant legal precepts to a fee application." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 196 (3d Cir. 2000).

A. The District Court Abused Its Discretion by Failing To Estimate the Value of the Faneca Objectors' Improvements and Conducting No Lodestar Analysis

In awarding attorneys' fees, district courts must apply either the percentage-of-recovery method or the lodestar method. *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 333 (3d Cir. 1998). Although the percentage-of-recovery method is favored in cases involving a common fund, like this one, the lodestar method is appropriate, for example, when the recovery is difficult to value. *Id.* But the district court employed ***neither*** approach. It credited the Faneca Objectors' efforts (and rejected claims by other objectors) for securing eligible-

season credit for NFL Europe, uncapping the BAP Fund, expanding the Death-with-CTE Qualifying Diagnosis, and eliminating the appeal fee in cases of hardship. JA106-JA107; *see* JA5839-JA5840. But it made no attempt to estimate the value of those benefits, much less determine the percentage of that value that would appropriately compensate the Faneca Objectors. And it engaged in no analysis of the Faneca Objectors' lodestar. Instead, the district court simply awarded the Faneca Objectors $350,000, completely untethered from the accepted methods of calculating common-benefit attorneys' fees.

Before a district court "calculate[s] attorneys' fees using the percentage-of-recovery method," it is "***required*** to make a 'reasonable estimate'" of the fund from which the percentage is drawn. *Prudential*, 148 F.3d at 333-34 (emphasis added); *GM Trucks*, 55 F.3d at 822 ("[a]t the very least," district courts must "make some reasonable assessment" of the value contributed, establish "a precise valuation," and specify a "precise percentage represented by the attorneys' fees"); *see also Eubank*, 753 F.3d at 723 (district courts must "quantify the benefits to the class members" and make a "responsible prediction" of the fund's value). The district court never made that assessment as to the benefits contributed by the Faneca Objectors – not in its April 5, 2018 order setting the aggregate amount of common-benefit attorneys' fees, and not in its May 24, 2018 allocation order. Yet the district court – without explanation and without reference to the estimated

value of the enhancements – rejected the Faneca Objectors' requested fee as "unreasonable" and arbitrarily selected $350,000 as the appropriate compensation. That is an abuse of discretion. *See Gunter*, 223 F.3d at 196; *GM Trucks*, 55 F.3d at 822; *Powell v. Pa. R.R. Co.*, 267 F.2d 241, 245 (3d Cir. 1959).

That error is even more striking given the district court's refusal to consider expert evidence submitted in support of the Faneca Objectors' $122.6 million valuation of the class benefits they had secured. *See* pp. 16-22, *supra*. In support of their valuation estimate, the Faneca Objectors submitted the Declaration of Joseph Floyd. *See* p. 17 & n.10, *supra*. Floyd concluded that the Faneca Objectors' estimate "fairly stated and reasonably reflect[ed] the added value arising out of the Final Settlement Terms." JA7194. He further concluded that the Faneca Objectors' efforts yielded as much as $122.6 million in additional benefit for the settlement class. JA7189-JA7222, JA7777-JA7784; *see* JA7760-JA7761, JA8195.

Although a district court is not bound to accept expert opinion, the court "is not free to simply ignore [expert] testimony without explaining why it is rejecting it." *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 493 n.18 (3d Cir. 2015); *accord Knight v. Thompson*, 797 F.3d 934, 942 (11th Cir. 2015); *Allfirst Bank v. Progress Rail Servs. Corp.*, 521 F. App'x 122, 129 (4th Cir. 2013); *United States v. Wohlman*, 651 F.3d 878, 885 (8th Cir. 2011); *In re Wolverton Assocs.*, 909 F.2d

1286, 1296 (9th Cir. 1990); *Pittman v. Gilmore*, 556 F.2d 1259, 1261 (5th Cir. 1977). The district court did just that.

Indeed, even Co-Lead Class Counsel agreed that the improvements to the settlement were valuable and worth ***at least*** $46 million in additional monetary award payments to the class. JA7638. Co-Lead Class Counsel also later conceded that payments from the BAP Fund were likely to exceed the $75 million, further enhancing the value of the benefits that the class received as a result of the Faneca Objectors' efforts. JA8434. The district court gave no reason for ignoring those concessions, which established an ***undisputed floor*** for the value of the Faneca Objectors' contributions.

Having failed to estimate the value of the Faneca Objectors' contributions, the district court could not "determine the precise percentage represented by the attorneys' fees," as it was required to do. *GM Trucks*, 55 F.3d at 822. The district court thus provided no justification or "[]sound methodology" for the meager fees it awarded to the Faneca Objectors. *United States v. Allegheny Ludlum*, 366 F.3d 164, 184 (3d Cir. 2004).

The district court did not even ***mention*** the Faneca Objectors' $4.3 million lodestar, let alone consider that its paltry $350,000 award yielded a lodestar multiplier of 0.08. *See* JA106. That "downward modification" of the Faneca Objectors' lodestar figure is so steep that it amounts to a penalty, for no apparent

reason. *Lynch v. City of Milwaukee*, 747 F.2d 423, 430 (7th Cir. 1984) (holding reduction in lodestar figure should be tied to a "specific defect" in representation). That, too, constitutes an abuse of discretion: "'[C]ourts must take care to explain how the application of a multiplier is justified by the facts of a particular case.'" *Cendant PRIDES*, 243 F.3d at 742; *S.S. Body Armor I., Inc. v. Carter Ledyard & Milburn LLP*, 927 F.3d 763, 773-74 (3d Cir. 2019); *see also Gunter*, 223 F.3d at 199-200 (vacating fee award that "[n]owhere . . . mentioned, much less analyzed" lodestar); *Prudential*, 148 F.3d at 341 (reversing where district court "offer[ed] little explanation as to why a multiplier was necessary or appropriate").

In short, the district court's $350,000 "figure was plucked out of a hat, and a hat with . . . holes in it." *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 746 (7th Cir. 2011) (holding arbitrary ceiling on attorneys' fees was erroneous). The fee award should be vacated on that basis alone.

B. By Any Measure, the $350,000 Attorneys' Fee Award to the Faneca Objectors Was Unreasonable

Proper application of the standards for awarding fees to objectors demonstrates a fee consistent with that requested by the Faneca Objectors is reasonable.

1. *The Percentage-of-the-Fund Method Requires a Fee Award Much Higher Than $350,000*

The $350,000 award is inconsistent with the percentage-of-the-fund method favored in this Circuit. To determine the appropriate percentage, the Court must weigh the *Gunter* factors: (1) the size of the fund created and the number of persons benefited; (2) the skill and efficiency of the attorneys involved; (3) the value of the benefits attributable to the efforts of the Faneca Objectors relative to others; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by counsel; (7) awards in similar cases; (8) the percentage fee negotiated in a private contingent-fee arrangement; and (9) the innovativeness of the settlement terms. *In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009); *see also Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 496 (3d Cir. 2017).[21] Had the district court examined those factors here, it would have recognized the gross inadequacy of its $350,000 fee award.

The size of the settlement fund and fee awards in similar cases. The Faneca Objectors reasonably estimated the value of their contributions to be as much as $122.6 million and supported that valuation with expert testimony. JA106; *see* pp. 16-22, *supra*. The district court's $350,000 award thus represents

[21] *Gunter* also directs the courts to address the number of objections to the fee request, but that factor makes little sense in the context of an objector's request for attorneys' fees.

0.29% of the value that the Faneca Objectors delivered to the class. Even Co-Lead Class Counsel conceded that those benefits were worth at least $46 million. JA7638. The district court's fee award still amounts to only ***0.76%*** of that conceded value.

Courts routinely award much larger fees, and far greater percentages, to objectors who have delivered valuable benefits to the class. In *Trans Union*, for example, the Seventh Circuit concluded that two objectors collectively were entitled to 37% of the available attorneys' fees – about $7 million – for their role in securing a $70 million benefit. 629 F.3d at 747-48. In *Lan v. Ludrof*, No. 1:06-cv-114, 2008 WL 763763 (W.D. Pa. 2008), the objector received an even higher percentage – 25% of the increase in settlement value. *Id.* at *30; *see also Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 396-97 (D.N.J. 2012) (awarding objectors 13.4% of the benefit conferred); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 103 F. App'x 695, 697 (3d Cir. 2004) (affirming objectors' fee award consisting of 2.25% of $56 million benefit conferred).[22] The Faneca Objectors' requested fee of $20 million represents about 16.3% of the $122.6-

[22] To the extent objectors may tend to receive a lower percentage of the benefit conferred than class counsel, that is because "most objections are litigated quickly" and a large percentage "would generate too high a [lodestar] multiplier, or a windfall." 5 *Newberg* § 15:94. However, the Faneca Objectors invested a large amount of time in improving the settlement, preparing their objection, and developing an evidentiary record. Thus, the higher percentages typically awarded to class counsel are the more appropriate measure.

million benefit they delivered to the class. *See* pp. 16-22, *supra*.[23] It therefore falls well within the range of fees that have been awarded to objectors in other cases.[24]

The innovativeness of the settlement terms and the number of beneficiaries. The significance of the enhancements, however, exceeds their mere monetary value. The district court itself described those enhancements as "crucial." JA49. Those creative improvements were designed to deliver the best bang-for-the-buck in terms of improving class members' health outcomes. ***Every*** eligible class member can rest assured he will receive a baseline assessment, regardless of cost – a significant benefit allowing early detection of, and medical intervention for, any neurocognitive illness. JA49-JA50. The Faneca Objectors expanded the scope of BAP eligibility as well. Their efforts permitted over 2,300 class members who played only in NFL Europe to reap the benefits of the BAP. And nearly every NFL Europe veteran will receive increased monetary awards

[23] Even if the district court had accepted Co-Lead Class Counsel's $46 million valuation of the improvements to the settlement and awarded the Faneca Objectors 16.3% of that amount, their fee award would have been approximately $7.5 million – over 20 times what the district court actually awarded.

[24] Similarly, the 16.3% fee that the Faneca Objectors requested falls well within the scope of a contingent fee that would be negotiated in a private fee agreement. Indeed, the district court in this case concluded that a 22% contingency fee was reasonable for private attorneys representing individual class members (the so-called Individually Retained Private Attorneys, or "IRPAs"). JA60. The Faneca Objectors' counsel seek an even smaller percentage, despite providing an arguably greater service to the court and the class.

from the eligible-season credit for NFL Europe that Co-Lead Class Counsel failed to secure from the NFL. *See* pp. 19-20, *supra*.

The district court, though, did not even consider these factors in its analysis.

The value of the benefits attributable to the Faneca Objectors relative to the efforts of others and the risk of non-payment. Comparing the value of the benefits that the Faneca Objectors achieved relative to the efforts of others further indicates that the district court's fee award was unreasonably low. The district court merely attributed the value of the entire settlement to Class Counsel's efforts, without even mentioning the Faneca Objectors. JA58-JA60. That was error. Indeed, ***Class Counsel fought against providing the class with the benefits obtained by the Faneca Objectors.***

In fact, the $122.6-million value of the Faneca Objectors' enhancements constituted 8% of the total $1.5-billion settlement value. *See* JA55. Yet the $350,000 award amounts to less than 0.33% of $112.5 million attorneys' fees. The district court's fee award thus undercompensates the Faneca Objectors by a factor of 24 – a curious result for attorneys who secured "crucial" enhancements to the settlement. JA49.

Any comparison of the benefits attained by the Faneca Objectors relative to the benefits achieved by Class Counsel must also take account of the relative risk that the Faneca Objectors bore as compared to Class Counsel. Objecting to a class

settlement on a 100% contingency-fee basis – as the Faneca Objectors did, JA6341 – is a high-risk endeavor. It was particularly risky here, given Co-Lead Class Counsel had ***already*** negotiated a settlement requiring nearly $1 billion in payouts from the NFL. *Cf.* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1535-36 (1998). Inducing the NFL to add to that significant sum would be difficult. But that is precisely what the Faneca Objectors did.

In other words, while Class Counsel focused on the low-hanging fruit at a relatively low risk of non-payment, the Faneca Objectors achieved what Co-Lead Class Counsel, despite months of mediator-assisted negotiations, could not: fair treatment for NFL Europe, a guaranteed baseline assessment for every eligible class member, additional compensation for Death with CTE, and a hardship waiver for the $1,000 appeal fee. *See* pp. 16-22, *supra*.

Not only does the district court's fee award undervalue the contributions of the Faneca Objectors relative to those of Class Counsel, it fails to account for the enhanced difficulty of securing those marginal improvements and the corresponding risk of non-payment borne by the Faneca Objectors. *See Eubank v. Pella Corp.*, No. 06-cv-4481, 2019 WL 1227832, at *8 (N.D. Ill. Mar. 15, 2019) (noting "need to reward [successful] objectors . . . to incentivize future representations of objectors despite financial disincentives to do so").

The skill and efficiency of the Faneca Objectors' counsel, the amount of time devoted to the case, and the complexity of the issues. By the time the Faneca Objectors entered the fray, there was pronounced momentum to get the negotiated deal approved. Class Counsel and the NFL had reached their compromise and were locked arm-in-arm to fight off any challenges. At that point, the NFL would have the certainty and releases it sought, and Class Counsel would have a clear path to attorneys' fees negotiated as part of the deal. It took extraordinary effort for the Faneca Objectors to overcome the ***opposition of Class Counsel***, not to mention the NFL, to win substantial additional benefits for the class.

All highly credentialed lawyers, JA6362-JA6376, JA6401-JA6407, JA6421-6462, the abilities of the Faneca Objectors' counsel were recognized by this Court, which complemented objectors' "thoughtful" and "well-intentioned" arguments. *See In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 447 (3d Cir. 2016). The district court recognized their "persuasive[]" advocacy, adding that a comparison of their arguments with those of other objectors "speaks for itself." JA106-JA107. And even the media recognized them as them as "lead counsel for those objecting to the settlement." Rick Maese, *Judge Orders Further Revisions in NFL Concussion Lawsuit Settlement*, The Wash. Post (Feb. 2, 2015), https://www.washingtonpost.com/sports/redskins/judge-orders-further-revisions-in

-nfl-concussion-lawsuit-settlement/2015/02/02/3b44b18e-ab22-11e4-8876-460b1144cbcl_story.html.

Moreover, the Faneca Objectors' counsel devoted over 6,000 hours of professional time, amassing a lodestar exceeding $4.3 million. JA6356-JA6358. That significant investment of resources reflected the tremendous effort needed to achieve the significant gains. No other objector built the extensive evidentiary record that the Faneca Objectors submitted – declarations from nearly a dozen of the nation's leading experts in neurology, psychiatry, and pathology, thousands of pages of scientific articles and other evidence, and a declaration and other evidence demonstrating the conditions experienced by players in NFL Europe.

The nature of the scientific evidence that the Faneca Objectors submitted, and the issues discussed by their experts, underscores the complexity of the issues they confronted. *See, e.g.*, *In re Schering-Plough Corp. Enhance Sec. Litig.*, Nos. 08-cv-397, 08-cv-2177, 2013 WL 5505744, at *13-16, *27 (D.N.J. Oct. 1, 2013) (noting "complex scientific and statistical data"). The Faneca Objectors also confronted complex legal questions, frequently pursuing novel and creative strategies in an effort to address the Revised Settlement's deficiencies earlier in the process to more quickly deliver much needed benefits to the class.

* * * * *

The *Gunter* analysis confirms that the Faneca Objectors, for their role in securing "crucial" enhancements to the settlement, are entitled to an attorneys' fee commensurate with that paid to other successful objectors – no less than 10% of the benefit conferred and as much as 25%.

2. *The District Court's Effective Lodestar Multiplier of Less Than 0.1 Is Unjustified and Unreasonable*

Although the district court's allocation order purported to allocate attorneys' fees among Class Counsel according to the lodestar method, *see* JA88-JA105, the district court's determination of the Faneca Objectors' fee contained no lodestar analysis whatsoever, JA105-JA106. Nor could any reasoned analysis along those lines have supported the district court's award.

The Faneca Objectors' counsel invested 6,357.2 hours of professional time in pursuit of fairness for the class. JA6356-JA6358. At the Faneca Objectors' counsel's 2017 market rates – rates actually paid by clients – that effort yields a $4,312,565 lodestar, JA6356-JA6358; *see* JA6387-JA6388, JA6390, JA6394-JA6399, JA6409-JA6411, JA6415-JA6419, JA6464 (attorney declarations), and a fractional multiplier of 0.08. Even adopting the district court's capped hourly

rates, *see* JA90, the Faneca Objectors' lodestar still amounts to $3,704,982.61 and a fractional multiplier of 0.09.[25]

The "common fund fee award, as a contingent fee award, should often (if not always) be higher than counsel's lodestar itself." 5 *Newberg* §15:73; *see id.* §15:87 ("Indeed, it is arguable that successful class counsel should necessarily get a multiplier above 1 in most cases."). In this Circuit, "[t]he [lodestar] multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305-06 (3d Cir. 2005), as amended (Feb. 25, 2005) (footnote omitted); *see also Diet Drugs*, 582 F.3d at 540 n.33. Multipliers thus "may reflect the risks of nonrecovery facing counsel, may serve as an incentive for counsel to undertake socially beneficial litigation, or may reward counsel for an extraordinary result." *Prudential*, 148 F.3d at 340. "[A]ny downward modification" (*i.e.*, the award of a negative or fractional multiplier), meanwhile, constitutes a "penalty" and should align with some "defect" in counsel's performance. *Lynch*, 747 F.2d at 430.

Judged against those standards, the district court's fractional multiplier – paying the Faneca Objectors less than ten cents for every dollar of professional

[25] The capped rates are $758.35 per hour for partners, $486.67 per hour for associates, and $260 per hour for paralegals. JA90; *see* JA6387-JA6388, JA6409, JA6464 (identifying hours per attorney).

time their counsel invested – is wholly irrational. The result obtained by the Faneca Objectors was nothing short of extraordinary. The value of the benefits that they delivered would be a significant settlement in its own right. But the Faneca Objectors attained those benefits as marginal improvements on top of an already generous settlement from a sophisticated defendant represented by highly skilled defense attorneys. Moreover, they faithfully served the "socially beneficial" purpose of "'preventing collusive or otherwise unfavorable settlements,'" *Cendant PRIDES*, 243 F.3d at 743, and "enabling [the] adversarial consideration of [the] proposed settlement[ ]," 5 *Newberg* § 15:60.

Nothing better demonstrates the unreasonableness of the Faneca Objectors' lodestar multiplier than a comparison of the Faneca Objectors' achievements to those of other Class Counsel. For example, the Dugan Law Firm received its full lodestar for one lawyer's service on the Discovery and Preemption Committees of the Plaintiffs' Steering Committee. JA93. But no discovery occurred, JA84, and Dugan's achievements with respect to preemption are completely unspecified, JA93. Likewise, in awarding fees to Pope McGlamry, the district court relied upon work that the firm did not even perform. JA102. McGlamry, the court explained, "***would certainly have*** provided important services to the Class had this litigation taken a different path to resolution." JA102 (emphasis added). The Faneca Objectors, by contrast, ***did*** provide important services to the class – "crucial"

services, in fact, JA49. Yet Dugan Law and Pope McGlamry received their full lodestars. JA93, JA102.

The Faneca Objectors' contributions certainly match, if not exceed, those of firms that held more significant leadership roles and who received lodestar multipliers ranging from 1.25 to 3.5. *See* JA91-JA105.

C. The District Court Abused Its Discretion in Failing To Award Expenses

As this Court has explained, objectors who prove that they improved the settlement are "'***entitled to*** an allowance as compensation for . . . expenses.'" *Cendant PRIDES*, 243 F.3d at 743 (emphasis added).

The district court agreed that the Faneca Objectors "are entitled to compensation" and that they "provid[ed] benefits to the class," including improvements to the settlement. JA105-JA106. In pursuit of that effort, the Faneca Objectors incurred, and requested reimbursement for, $46,341.52. JA7260. But the district court failed to even acknowledge that request, much less explain why it was unreasonable. JA105-JA106; *see also* JA52, JA83. That was error. *See Halley*, 861 F.3d at 500 (reversing where district court failed to "provide sufficient reasoning" for award of costs).

D. This Court Should Award Fees and Expenses Now

"If the appellate court determines that the trial judge erred in setting the amount of the award, it may fix the fee itself." 7B Wright & Miller, Fed. Prac. &

Proc. Civ. §1803.2 & n.11 (3d ed.); *see Trans Union*, 629 F.3d at 748 (deciding amount of fees due successful objector); *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 980 (7th Cir. 2003) (deciding to "set the fees ourselves"); *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 35 (3d Cir. 1971) (opting to "decide rather than remand" amount of attorneys' fees due); *Powell*, 267 F.2d at 246 (calculating reasonable attorneys' fee).

Rather than remand, this Court should simply set the Faneca Objectors' fee. In representing the Faneca Objectors on a 100%-contingency basis, counsel took on enormous risk. *See* pp. 43-44, *supra*. They faced long odds in extracting additional concessions beyond the $1 billion that the NFL had already agreed to pay. The critical improvements they secured will yield better health outcomes and brought as much as $122.6 million in additional benefit to the class. They invested over $4 million in attorney time and did so ***over five years ago***. Nearly ***three years*** have elapsed since they submitted their fee petition.

The highly developed record is sufficient for this Court to make a determination of a proper fee for the Faneca Objectors. Further delay will only discourage others from coming forth and playing the valuable role that the Faneca Objectors played here. This Court should decide what fee is reasonable and remand for no more than entry of judgment consistent with that decision. To the extent this Court believes further proceedings are necessary, the Faneca Objectors

respectfully request that this Court remand with instruction concerning the appropriate floor for a reasonable award to the Faneca Objectors that is consistent with the law cited herein.

II. THE FANECA OBJECTORS HAVE STANDING

Co-Lead Class Counsel does not deny that the Faneca Objectors have standing to challenge the district court's May 24, 2018 allocation order awarding the Faneca Objectors $350,000 in attorneys' fees. Appellee Mot. 18 (July 24, 2018). They nonetheless insist that the Faneca Objectors lack both Article III and appellate standing to challenge the district court's April 5, 2018 order awarding the aggregate attorneys' fees. *Id.* The argument is meritless.

Article III standing requires "'a personal stake in the outcome of the controversy.'" *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Having submitted a petition requesting $20 million in attorneys' fees, and receiving only $350,000, the Faneca Objectors undeniably have a personal stake in the controversy – both the amount of the aggregate common-benefit fees and the allocation of those fees among counsel.

Likewise, the Faneca Objectors satisfy the requirements of appellate standing. Under the doctrine of appellate standing, "a 'party normally may not appeal [a] decision in its favor.'" *Forney v. Apfel*, 524 U.S. 266, 271 (1998). The April 5, 2017 aggregate fee award, however, was not a decision in the Faneca

Objectors' favor; it awarded them nothing and gave no consideration to the value of their improvements to the settlement. *See Hodge v. Bluebeard's Castle, Inc.*, 392 F. App'x 965, 977 (3d Cir. 2010) ("'party may be aggrieved by a district court decision that adversely affects its legal rights or position vis-à-vis other parties in the case or other potential litigants'").

CONCLUSION

The Court should vacate the district court's fee award and award the Faneca Objectors fees.

RESPONSE IN NO. 18-2419

ISSUE

Whether the district court abused its discretion in concluding that only the Faneca Objectors – who submitted well over 1,000 pages of briefing, exhibits, and documentary evidence – were responsible for changes made to the settlement that resulted in increased payouts to the class.

SUMMARY OF ARGUMENT

The district court correctly concluded that the Faneca Objectors, not the Armstrong Objectors, were responsible for the improvements to the settlement. The Armstrong Objectors claim they first raised the settlement's defects. But the record demonstrates otherwise: The Faneca Objectors identified those defects in their motion to intervene and opposition to preliminary approval, months before the Armstrong Objectors' objection. Regardless, the district court found the Faneca Objectors' advocacy more persuasive, and the Armstrong Objectors identify nothing on appeal to undermine that conclusion.

ARGUMENT

Standard of Review: The determination that a particular objector created benefit for the class is a factual determination reviewed for clear error. *See Rite Aid*, 396 F.3d at 299.

I. THE DISTRICT COURT CORRECTLY CREDITED THE FANECA OBJECTORS WITH IMPROVING THE SETTLEMENT

As explained above, the district court credited the Faneca Objectors with four key improvements to the settlement. *See* pp. 30-31, *supra*. Another objector group, the Armstrong Objectors, challenges that finding. Armstrong Br. 12-15. But the district court rejected that argument, declining to give "[t]he Armstrong Objectors . . . credit for parroting the same objections that were made more persuasively by the Faneca Objectors." JA106.

The Armstrong Objectors identify only one reason why they believe that conclusion was clearly erroneous – they claim to have been ***first***.[26] That's wrong. Well before the Armstrong Objectors mailed their objection on September 3, 2014, the Faneca Objectors had identified and raised with the district court each issue for which the Armstrong Objectors now claim credit:

- The Armstrong Objectors say they caused elimination of the BAP cap, Armstrong Br. 7, but the Faneca Objectors raised that argument in July 2014, JA2065 (complaining that the "Revised Settlement . . . retains the $75 million cap on the BAP Fund.").
- The Armstrong Objectors claim to have sought the extension of "Death with CTE benefits," Armstrong Br. 7, but the Faneca Objectors first highlighted the inequitable treatment of CTE in May 2014 and expanded on that argument in July 2014, JA1592-JA1593 (arguing that "the settlement provided ***no compensation*** to players with CTE who die after

[26] The Armstrong Objectors erroneously state that the Faneca Objectors filed their objection on October 14, 2014. Armstrong Br. 6. That is incorrect. The Faneca Objectors filed their objection on October 6, 2014. JA3003-JA3127.

preliminary approval of the settlement" (emphasis added)); *see also* JA2059-JA2061, JA2070-JA2076.

- And, finally, the Armstrong Objectors say they secured inclusion of the appeal-fee waiver, Armstrong Br. 7, but the Faneca Objectors raised that argument in July 2014, too. JA2083 (noting that many former NFL players suffer financial hardship in retirement and arguing that the "appeal fee will discourage many retired players from challenging adverse claim determinations").

In short, the Armstrong Objectors were not "first" in anything at all.

Even if they had been first, that is not the standard. To the contrary, objectors earn attorneys' fees when the "'settlement was improved as a result of their efforts.'" *Cendant PRIDES*, 243 F.3d at 743. The district court concluded that the Armstrong Objectors had submitted underdeveloped, unpersuasive versions of Faneca Objectors' arguments. JA106. That sort of advocacy – whether first or not – does not lead to improved settlement results. *See, e.g.*, *Rodriguez v. Disner*, 688 F.3d 645, 659 (9th Cir. 2012) (affirming denial of fees to objectors who merely "filed briefs capitalizing on arguments already made by" other objectors); *Reynolds*, 288 F.3d at 288-89 (similar).

The record fully supports the district court's findings. Where the Faneca Objectors submitted dozens of pages of argument on CTE rooted in extensive scientific evidence, *see, e.g.*, JA1589-JA1594 (Faneca Interv. Mot.); JA2070-JA2076 (Faneca Prelim. Obj.); JA3038-JA3049, JA3079-3081, JA3119-JA3126 (Faneca Obj. & App.); JA4559-JA4577 (Faneca Supp. Obj.), the Armstrong Ob-

jectors addressed CTE in three pages, citing no new scientific authority, *see* JA4119-JA4121. The Faneca Objectors' discussion of the cap on the BAP Fund as well as the $1,000 appeal fee was also extensive, citing relevant statistical evidence. *See* JA2063, JA2065, JA2083, JA3090-JA3091, JA3093, JA4579-JA4580. The Armstrong Objectors, by contrast, discussed each issue in a cursory manner without evidentiary support. JA4121-JA4124. Indeed, while the Armstrong Objectors sought to extend the term of the BAP, they never requested removal of the cap. *Compare* JA4121-JA4122 *with* JA5629. Only the Faneca Objectors did that.

In fact, while the Faneca Objectors organized and led the argument at the fairness hearing, the Armstrong objectors did not even show up. *Compare* JA4111-1 (appointing Faneca Objectors' counsel to "coordinate the arguments of the objectors" at the fairness hearing), *with* JA4542-JA4543 (schedule of speakers at fairness hearing). It was the Faneca Objectors who improved the settlement, and the district court did not abuse its discretion or commit clear error in so finding.

CONCLUSION

This Court should not overturn the district court's conclusion that the Faneca Objectors' advocacy resulted in the changes found in the Final Settlement.

October 11, 2019

Respectfully submitted,

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