BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	MDL Docket No. 2323
This Document Relates to *Finn, et al. v. National Football League,* No. 2-11-cv-07067-JLL-MAH (D.N.J.)	

INTERESTED PARTY RESPONSE OF PLAINTIFFS IN *FINN* IN PARTIAL OPPOSITION TO MOTION FOR TRANSFER OF ACTIONS TO THE EASTERN DISTRICT OF PENNSYLVANIA AND IN SUPPORT OF TRANSFER AND COORDINATION OR CONSOLIDATIONS PURSUANT TO 28 U.S.C. § 1407

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INTRODUCTION

Pursuant to J.P.M.L. R. 6.2(e) and 28 U.S.C. § 1407, the undersigned interested parties – Jim Finn, Scott Dragos, Joe Horn, Jerome Pathon, Isaiah Kacyvenski, Brad Scioli, Matt Joyce, Paul Zukauskas, Sean Berton, Sean Ryan, and Chris Walsh (collectively, "Respondents") – who are all former National Football League players and Plaintiffs in *Finn, et al. v. Nat. Football League*, No. 2:11-cv-07067-JLL-MAH (D.N.J.) (Linares, J.)[1] respectfully submit this Interested Party Response in partial opposition to Movant National Football League's Motion for Transfer of Actions to the Eastern District of Pennsylvania Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings (the "Motion"). As detailed below, all of the related actions state claims against the National Football League ("NFL"), arising from injuries sustained while playing professional football, including damages resulting from the permanent and/or long term effects of concussions sustained while in the NFL.

Like the NFL, the Respondents fully support transfer and consolidation or coordination. As more fully explained herein, Respondents believe that transfer of these cases to the District of New Jersey is much more appropriate than any other district, and respectfully submit that Judge Jose L. Linares in the District of New Jersey is ideally suited to preside over this matter. Given this Panel's interest in choosing a forum to promote the just and efficient conduct of the litigation while reducing litigation costs and saving time and effort on the part of the parties, the attorneys, the witnesses and the judiciary, Respondents respectfully submit that the District of New Jersey is the district best suited to manage this litigation as transferee district and that Judge Linares has the experience and skill to successfully manage this MDL as transferee judge.[2]

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[1] Attached as Exhibit A is a copy of the amended complaint filed in the *Finn* matter.

[2] Of the cases involving NFL concussion injuries currently under consideration for MDL Docket No. 2323, *Easterling, et al. v. Nat'l Football League*, No. 11-cv-05209-AB (E.D. Pa),

AN MDL IS APPROPRIATE WHERE
THERE ARE COMMON QUESTIONS OF FACT

The transfer of actions to a single forum under § 1407 is appropriate where, as here, it will prevent duplication of discovery and eliminate the possibility of overlapping or inconsistent pleading determinations by courts of coordinate jurisdiction. *See In re Sony Corp. SXRD Rear Projection TV Mktg. Sales Practices & Prod. Liab. Litig.*, 655 F. Supp. 2d. 1367 (J.P.M.L. 2009). Under 28 U.S.C. § 1407(a), the Panel may centralize and transfer civil actions involving one or more common questions of fact if it determines that such a transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. Section 1407 centralization "ensures that pretrial proceedings will be conducted in a streamlined manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties." *In re Lehman Brothers*, 598 F.Supp.2d 1362, 1364 (J.P.M.L. 2009); *see also In re Zyprexa Prods. Liab. Litig.*, 314 F.Supp.2d 1380, 1382 (J.P.M.L. 2004). "The basic purpose of assigning (multiple litigation) to a single judge is to provide for uninterrupted judicial supervision and careful, consistent planning and conduct of pretrial and trial proceedings that will eliminate or reduce conflict and duplication of effort." *In re Library Editions of Children's Books*, 297 F. Supp. 385, 386 (J.P.M.L. 1968) (citing Manual for Complex and Multidistrict Litigation (1968), p. 10).

Moreover, "[t]he purpose of Section 1407 as shown independently by its clear language, corroborated by the legislative history, including the reports of the Congressional Committees and of the Judicial Conference, and by testimony before Congress of its authors, makes it clear

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was filed in the Eastern District of Pennsylvania and is before Judge Anita Brody. Three other actions concerning these injuries are in the Central District of California: *Pear, et al. v. Nat'l Football League, et al.*, No. 2:11-cv-08395; *Maxwell v. Nat'l Football League, et al.*, No. 2:11-cv-08394; and *Barnes, et al. v. Nat'l Football League, et al.*, No. 2:11-cv-08396. These California cases are before Judge Manuel Real.

that its remedial aim is to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 470-92 (J.P.M.L. 1968). "The objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions. The committee believes that the possibility for conflict and duplication in discovery and other pretrial procedures in related cases can be avoided or minimized by such centralized management." *In re Library Editions*, 297 F. Supp. at 386. (citations omitted)

Finally, "[t]ransfer under Section 1407 will have the salutary effect of assigning the present actions to a single judge who can formulate a pretrial program that ensures that pretrial proceedings will be conducted in a manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties and the courts." *In re Brimonidine Patent Litig.*, 507 F. Supp. 2d 1381, 1382 (J.P.M.L. 2007). Furthermore, there is an "obvious need for a transferee judge with the ability and temperament to manage this large and growing litigation in an efficient and expeditious manner." *In re Diet Drugs Prod. Liab. Litig.*, 990 F. Supp. 834, 836 (J.P.M.L. 1998). Section 1407's goal of just and expeditious resolution favors "assignment to a distinguished jurist well versed in the intricacies of centralized pretrial proceedings." *Id.*; *see also In re Zyprexa*, 314 F. Supp. 2d at 1382. ("[W]e note that centralization in this district permits the Panel to effect the Section 1407 assignment to an experienced transferee judge who can steer this litigation on a steady and expeditious course").

The litmus test of transferability and coordination under § 1407 is the presence of common questions of fact. *In re Fed. Election Campaign Act Litig.*, 511 F. Supp. 821, 823 (J.P.M.L. 1979). Common questions are presumed "when two or more complaints assert

comparable allegations against identical defendants based upon similar transactions and events." *In re Air W. Sec. Litig.*, 384 F. Supp. 609, 611 (J.P.M.L. 1974). Respondents' claims share common questions of fact with the actions currently under consideration by the Panel for consolidation, primarily premised upon tort claims for negligence and fraud. *See Maxwell* Am. Compl., ¶¶ 524-61; 587-89 (tort claim for negligence, "negligence-monopolist", fraud and loss of consortium); *Pear* Am. Compl., ¶¶ 384-400; 483-85 (same); *Barnes* Am. Compl., ¶¶ 170-207 (same); *id.* ¶¶ 235-40 (tort claim for wrongful death); *Easterling* Am. Compl., ¶¶ 36-63 (tort claims for negligence, concealment, civil conspiracy, medical monitoring and loss of consortium); and *Finn* Am. Complaint; ¶¶ 148-187 (negligence, fraud, fraudulent concealment and negligent misrepresentation).

First, all complaints allege that the NFL owed a duty to the players regarding their health and safety. *See Maxwell* Am. Compl., ¶¶ 543, 545 ("duty to invoke rules that protect the health and safety of its players"); *Pear* Am. Compl., ¶ 385 (same); *Barnes* Am. Compl., ¶ 180 (same); *Easterling* Am. Compl., ¶ 45 (NFL had a "duty …..to minimize the risk of injury to the players"); and *Finn* Am. Complaint; ¶ 149 ("duty to use reasonable care in researching, studying and/or examining the dangers and risks of head injuries and/or concussions to NFL players, to inform and warn their players of such risks and to effectuate reasonable league policies and/or take other reasonable action to minimize the risk of head injuries").

Second, the complaints allege that the NFL breached its duty by:

> Failing to monitor games and practices so as to detect and minimize concussive injuries in players. *See Maxwell* Am. Compl., ¶¶ 546-47, 552("failing to enact, rules, policies and regulations to best protect its players"; ". . . failing to enact rules to decrease concussions"); *Pear* Am. Compl., ¶¶ 388-89 (same); *Barnes* Am. Compl., ¶ 194 (same); *Easterling* Am. Compl., ¶ 47 ("failing to promulgate rules and regulations to adequately address the dangers of repeated concussions and a return to play policy to minimize

> long-term chronic cognitive problems"); and *Finn* Am. Complaint; ¶ 154 ("in failing to use reasonable care in overseeing, controlling, and/or regulating policies and procedures of the league so as to minimize the risk of head injuries and/or concussions").
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> Failing to ensure the proper diagnosis and treatment of concussive injuries in players. *See Maxwell* Am. Compl., ¶ 552 ("failing to ensure accurate diagnosis and recording of concussive brain injury so the condition can be treated in an adequate and timely manner); *Pear* Am. Compl., ¶ 394 (same); *Barnes* Am. Compl., ¶ 194 (same); *Easterling* Am. Compl., ¶ 47 ("failing to adopt rules . . . to minimize the risks of players suffering debilitating concussions"); and *Finn* Complaint; ¶ 154 ("in failing to provide competent information to its teams, players, coaches, trainers and medical personnel with respect to the significance of head injuries and/or concussions, their symptoms and necessary and/or proper treatment of same").
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> .
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> Failing to enact adequate return-to-play rules or guidelines. *See Maxwell* Am. Compl., ¶ 120 (failing to enact "strict return-to-play guidelines to prevent CTE and/or concussion injury"); *Pear* Am. Compl., ¶ 94 (same); *Barnes* Am. Compl., ¶ 56 (same); *Easterling* Am. Compl., ¶ 17 (failing "to take reasonable steps to develop appropriate and necessary guidelines for return to play following concussions"); and *Finn* Am. Complaint, ¶149 (failing "to effectuate reasonable league policies and/or take other reasonable action to minimize the risks of head injuries).

Third, all of the complaints allege that the NFL knew or should have known of a link between head injuries and long-term cognitive deficits:

> The *Maxwell*, *Pear* and *Barnes* complaints allege that "for decades, Defendants have known that multiple blows to the head can lead to long-term brain injury, including memory loss, dementia, depression and CTE and its related symptoms." *See Maxwell* Am. Compl., ¶ 123; *Pear* Am. Compl., ¶ 97; and *Barnes* Am. Compl., ¶ 54.
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> The *Easterling* Complaint states that, since the early 1970s, "the defendant has been well aware . . . that a history of multiple concussions has been associated with players' greater risk of future brain deficits[,]" and "that the NFL players suffering repeated concussions were more likely to experience evolving symptoms of

> post-traumatic brain injury including headaches, dizziness, loss of memory, etc." *Easterling* Am. Compl., ¶¶ 8-9.
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> Consistent with the foregoing, the *Finn* Complaint alleges that "Clinical and neuropathological studies by some of the nation's foremost experts demonstrate that multiple concussions sustained during an NFL player's career cause severe cognitive problems such as depression and early-onset dementia." Moreover, "The University of North Carolina's Center for the Study of Retired Athletes published survey-based papers in 2005 through 2007 that found a clear correlation between NFL football and depression, dementia and other cognitive impairment." *Finn* Am. Complaint, ¶¶ 34, 37.

Fourth, all the complaints allege that the NFL concealed a link by disputing academic studies purporting to establish that concussions sustained in football cause cognitive problems:

> The *Maxwell*, *Pear* and *Barnes* complaints allege that, in response to "a series of clinical and neuropathological studies performed by independent scientists and physicians demonstrate[ing] that multiple NFL induced-concussions cause cognitive problems," "the NFL, to further a scheme of fraud and deceit, had members of the NFL's Brain Injury Committee deny knowledge of a link between concussion and cognitive decline and claim that more time was needed to reach a definitive conclusion on the issue." *Maxwell* Am. Compl., ¶ 138-39; *Pear* Am. Compl., ¶ 112-13; and *Barnes* Am. Compl., ¶ 65-66.
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> The *Easterling* Complaint alleges that "during the decades of the 1990s and 2000s, the defendant through its authorized agents dispute and actively sought to suppress the findings of others that there is a connection between on-field head injury and post career mental illness." *Easterling* Am. Compl., ¶ 15.
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> Consistent with the foregoing, the *Finn* Complaint alleges that "Defendant NFL and its MTBI Committee also failed to use reasonable care in researching, studying and/or examining the risks of head injuries and/or concussions in professional football and in downplaying and in many cases denying both the severity of such injuries and the clear link between concussions and brain damage, thereby breaching its duty to their players, including the plaintiffs. *Finn* Complaint, ¶ 152. Moreover, the *Finn* Complaint alleges that Dr. Casson provided oral and written testimony at the January 2010 hearings. He continued to deny the validity of other studies,

> stating that "[t]here is not enough valid, reliable or objective scientific evidence at present to determine whether or not repeat head impacts in professional football result in long term brain damage." *Finn* Am. Complaint, ¶ 80.

In sum, the allegations against the NFL central to these Complaints are the uniform in substance, if not identical. Further, all the Complaints involve complex common questions of fact, rendering transfer to a single forum for consolidated pretrial proceedings appropriate.

These actions are especially amenable for MDL treatment because of the substantial commonality of factual and legal questions presented in the individual cases at issue and the strong potential for the preservation of judicial resources that MDL treatment will afford. *In re S. Pac. Transp. Co. Emp't. Practices Litig.*, 429 F. Supp. 529, 531 (J.P.M.L. 1977). The plaintiffs and proposed classes in all of these cases assert many of the same legal claims based upon virtually identical facts. They share the same core, operative factual allegations. In addition, the actions share the same legal claims presented on the same or substantially similar legal theories. These similarities demonstrate the importance of coordinated handling, and highlight the necessity of this Panel transferring this litigation to a single transferee judge. Here, as in those prior cases, centralization will undoubtedly prevent the duplication of discovery and inconsistent pre-trial rulings. *See In re Ryder Truck Lines, Inc.*, 405 F. Supp. 308, 309 (J.P.M.L. 1975).

As in all litigations with which this Panel must contend, this litigation presents important and pressing issues. Each case needs the special handling of a transferee court. These complex cases require the attention and energy of a district court blessed with a judge who has the energy and expertise to manage this important litigation.

THE TRANSFEREE COURT SELECTION

The selection of an appropriate transferee forum depends greatly on the specific facts and circumstances of the litigation being considered for transfer and consolidation and involves a "balancing test" of several factors "based on the nuances of a particular litigation." *See* Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 214 (1977). Among the factors for the selection of the transferee court are the backlog or efficiency of the district's docket, as well as its suitability as a trial venue. *See In re Yarn Processing Patent Validity Litig.*, 341 F. Supp. 376 381-82 (J.P.M.L. 1972). These factors further support the selection of the District of New Jersey (where the *Finn* case was filed). As demonstrated by the attached caseload statistics, the District of New Jersey has a well-managed docket capable of ensuring timely and expeditious resolution of these consolidated actions and is far less burdened than the Eastern District of Pennsylvania. Simply put, the District of New Jersey is the more appropriate transferee forum based on caseload alone.

A litigation of this scope will also benefit from centralization in a major metropolitan center like Newark, New Jersey, which is well served by major airlines, provides ample hotel and office accommodations, and offers a well developed support system for legal services. Furthermore, New Jersey is likely to have a concentration of relevant documents and witnesses.

The Eastern District of Pennsylvania, where the Defendants have proposed to transfer the NFL concussion injury cases, has both the highest number of actions in total, and civil actions only, per judgeship in the United States, and a much higher percentage of cases that are more than 3 years old. *See* Ex. B, U.S. District Court, Judicial Caseload Profiles. New Jersey has far fewer cases assigned to its well-qualified judges. According to the latest statistics available, from 2011, New Jersey judges handle an average of 506 actions, whereas judges in the Eastern

District of Pennsylvania handle an average of 2,208 filings. Thus, statistically, Judge Linares should have more time to devote to management of these actions. This is an important consideration. This multidistrict litigation will involve multiple plaintiffs with injuries spanning several decades, and will therefore require extensive management by the transferee court.

There is an additional factor that renders transfer of these Actions to the District of New Jersey particularly appropriate: Judges in the District of New Jersey – including Judge Linares – have substantial experience presiding over complex litigation. This is a pivotal factor in the Panel's transfer analysis. *See, e.g., In re Janus Mut. Funds Inv. Litig.,* 310 F. Supp. 2d 1359, 1361 (J.P.M.L. 2004) ("we have searched for a transferee district with the capacity and experience to steer this litigation on a prudent course."). The Panel has repeatedly recognized that the District of New Jersey has sufficient resources to handle complex cases and is geographically convenient. *In re Ins. Brokerage Antitrust Litig.*, 360 F.Supp.2d 1371, 1373 (J.P.M.L. 2005); *In re Hypodermic Prod. Antitrust Litig.*, 408 F.Supp.2d 1356, 1357 (J.P.M.L. 2005).

Respondents are confident that Judge Linares will promote the goal of a "just resolution" of this MDL "as speedily, inexpensively, and fairly as possible." Judge Linares was appointed to be a federal judge for the District of New Jersey in 2002. During the past nine years, Judge Linares has successfully overseen several large and complicated litigations. *See, e.g., In re Hypodermic Prod. Antitrust Litig.* (MDL No. 1730); *Larson v. Sprint Nextel Corp*., Civ. No. 07-5325, 2010 WL 234934 (D.N.J. Jan. 15, 2010); *Bayshore Ford Truck v. Ford Motor Co*., Civ. No. 99-741, 2010 WL 415329 (D.N.J. Jan. 29, 2010); *United States v. Beldini*, No. 2:09-cr-00637 (D.N.J. filed Aug. 20, 2009). In light of his experience handling complex litigation,

Respondents believe that Judge Linares is well-equipped for this challenging nationwide litigation.

As matters progress, other districts and additional judges may come to the Panel's attention. Cases against Defendants for damages caused by the Defendant's actions come from around the country, and the incidents in which their injuries occurred are likewise scattered across the nation. The NFL has its primary place of business in New York, New York, but the Respondents live in various states and played for teams throughout the country. As such, there is no self-evident geographical center for these cases.

In addition, the District of New Jersey is an appropriate transferee forum for coordinated and consolidated pretrial proceedings. The district is conveniently located for many parties and witnesses, including defendant NFL, which is headquartered nearby, and documents and witnesses will likely be found within the district, as the NFL has two member clubs which play in New Jersey. *See In re Express Scripts, Inc., Pharmacy Benefits Mgmt. Litig.*, 368 F. Supp. 2d 1356 (J.P.M.L. 2005); *In re USF Red Star Inc. Workers Notification Litig.*, 360 F. Supp. 2d 1365 (J.P.M.L. 2005). Newark, New Jersey is also easily accessible by several major airports, including those in Philadelphia, Newark, and New York, and offers numerous flight options. Newark is also conveniently located on Amtrak's Northeast Corridor train line that runs from Boston to Washington, D.C. *See In re Ins. Brokerage Antitrust Litig.*, 360 F. Supp. 2d 1371, 1373 (J.P.M.L. 2005) ("In concluding that the District of New Jersey is an appropriate forum for this docket, we note that i) the district offers an accessible metropolitan location that is geographically convenient for many of this docket's litigants and counsel; and ii) the district is equipped with the resources that this complex antitrust docket is likely to require.").

Most, if not all, of the potentially relevant documents, as well as NFL officers and employees likely to be deposed, will be near the Newark area. *Cf. In re Am. Home Mortg. Sec. Litig.*, 528 F. Supp. 2d 1376, 1377-78 (J.P.M.L. 2007) (transferring to district where corporate defendant was "headquarter[ed]" since "relevant documents and witnesses may be found there"); *In re SFBC Int'l, Inc. Sec. & Derivative Litig.*, 435 F. Supp. 2d 1355, 1356 (J.P.M.L. 2006) (same). These factors all weigh in favor of the cases being transferred to New Jersey.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Panel enter an Order pursuant to 28 U.S.C. § 1407 consolidating or coordinating for pretrial proceedings the individual and putative class actions already filed, as well as any other related actions that are subsequently filed, to the District of New Jersey, and respectfully request that this Panel assign this MDL to the Honorable Jose L. Linares in the Newark Division of the District of New Jersey.

Dated: December 21, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Cecchi, hereby certify that a true and correct copy of the foregoing Interested Party Response was served via the Judicial Panel on Multidistrict Litigation's Electronic Filing System to all counsel of record.

Dated: December 21, 2011

/s/James E. Cecchi
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