

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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Tom Brady, Drew Brees, Vincent Jackson, Ben : No: 11-cv-00639-SRN-JJG

Leber, Logan Mankins, Peyton Manning, Von :

Miller, Brian Robison, Osi Umenyiora, and :

Mike Vrabel, individually, and on behalf of all :

others similarly situated : Declaration of Richard A.

: Berthelsen in Opposition to

Plaintiffs, : Defendants' Motion For a Stay

:

vs. :

:

NATIONAL FOOTBALL LEAGUE, et al., :

:

Defendants. :

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Richard A. Berthelsen, being duly sworn, deposes and states as follows:

1. I am General Counsel of the National Football League Players Association (“NFLPA”), and have served in that capacity since 1983. In addition, from August 21, 2008 to March 15, 2009, I served as Interim Executive Director after the death of Executive Director Gene Upshaw. I have been an attorney for the NFLPA since 1972. I make this declaration in opposition to the Defendants’ motion for a stay of this Court’s decision to enjoin the NFL’s “lockout.” See *Brady v. NFL*, No. 11-639 (SRN/JJG) (D. Minn. filed on April 25, 2011); see also Exhibit A (Lockout Letter).

2. As one who has experienced the opening of free agent negotiations every off-season in the past 18 years, I believe there will be no detriment to any NFL club by the Court's lifting of the current lockout. I also believe that lifting the lockout immediately is the only way to preserve the 2011 season announced by the NFL, given the need to sign free agents, to complete the NFL draft and sign drafted players, to plan and to hold training camp, and to plan for the season itself.

3. In fact, any stay of the injunction and continuation of the lockout would actually be a detriment to NFL clubs, as the league has stated that it will lose money during the lockout totaling \$1 billion before a single game is even cancelled. *See NFL: Staggering Financial Losses would Follow Lockout*, USA Today, January 28, 2011, attached as Ex. B. With the lockout enjoined, the clubs can go back to operating their multi-billion dollar business and making enormous amounts of money, as they did previously. If the lockout is lifted and then this Court's ruling were to be overturned, the NFL presumably would reinstitute the lockout, and some players who were previously locked-out free agents or unsigned rookies would possibly then be locked-out players with contracts. This would simply move these players from one sub-class in this action to another. *See* Compl. at ¶ 25 (defining "Under-Contract Subclass," "Free Agent Subclass," and "Rookie Subclass").

4. The NFL's argument that lifting the lockout, even temporarily, will have a purported effect on "competitive balance," because allegedly a small number of teams will sign all of the top free agents, is unfounded and contrary to all NFL historical evidence. There is absolutely no evidence suggesting that this would come to pass. In fact, the two most recent seasons that were played without a salary cap in place (where a limited number of teams could theoretically dominate the free agent market) suggest just the opposite. In 2010, the last season covered by the expired Collective Bargaining Agreement ("CBA") and White Stipulation and Settlement Agreement ("SSA"), the league operated without a salary cap and there was no harm to competitive balance. Indeed, the teams in the Super Bowl were the Green Bay Packers and the Pittsburgh Steelers, two small market teams. There was also no salary cap in 1993, the first year of the recently expired White SSA and CBA, without any discernable harm to competitive balance. For example, in that year, Hall of Fame defensive end Reggie White, at that time the most high profile free agent in NFL history, chose to sign with the small market Green Bay Packers.

5. The NFL's arguments that without a stay the NFL would be thrown into a state of chaos are also wrong. First, the NFL dramatically overstates the complexity of implementing a new system. All that is required is for the NFL to inform its teams of the rules it intends to implement, as it has done in the past. Indeed, as described below, it appears that the NFL has already decided what

player system it intends to implement if the lockout is lifted, including at least some of the aspects of the system that was in place in 2010. The NFL also has a history of smoothly adopting new player systems, including implementing “Plan B” in 1989, the White uncapped system in 2003, the imposition of a cap in 2004, the changes to the system in 2006, and the removal of the cap and new free agency rules in 2010.

6. Prior to the scheduled end of the 2010 league year on March 3 of this year, all 32 clubs sent contract tenders for the 2011 season to free agent players, treating them as if the NFL intends to keep in place 2010 rules relating to so-called Restricted Free Agents, Franchise Players, and Transition Players. They did so by following the free agent rules which were in effect during the last year of the CBA and SSA. Under the 2010 system, players who were not under contract and had less than six accrued seasons in the league were considered to be “restricted free agents” and were subject to certain rules that limited their ability to sign with clubs other than their immediately preceding club. Before March 3 of this year, the clubs sent Restricted Free Agent Tenders to players with expiring contracts who had less than six accrued seasons. Also under the 2010 system, each club had the right to designate one player with an expiring contract as a so-called “Franchise Player” and one player as a so-called “Transition Player.” Before March 3 of this year, those designations were again made by various clubs, with an example being the Philadelphia Eagles, who designated Michael Vick as a

Franchise Player and David Akers as a Transition player. In addition, Plaintiffs Jackson, Mankins, and Manning all have been designated as Franchise Players.

7. By making the Restricted Free Agent tenders and the Franchise Player and Transition Player tenders described in the preceding paragraph, the 32 Clubs appeared to be acting as if they have already been told by the NFL that the league intends to continue, at least in part, the 2010 player system if the lockout is lifted. Also, talent evaluators and coaches for all 32 NFL Clubs have no doubt spent considerable time evaluating their rosters since the end of the 2010 season, and decided which free agents they would be interested in pursuing once the 2011 League Year begins and the free agent signing period opens. Indeed, they have had even more time to do so in 2011 as compared to prior years because of the lockout. It will thus be easy for the 32 Clubs to immediately proceed with the free agent signing period and other business if the lockout ends.

8. The NFL clubs and the league have taken other significant steps to prepare for the upcoming season. For example, the NFL announced the complete pre-season schedule for 2011 on April 13 of this year, and the regular season schedule was released one week later. (*See* articles from NFL website, attached as Exs. C-E). The league is also conducting the annual college draft beginning on April 28, 2011 and running through April 30, 2011. Approximately 254 college players will be selected in that draft by the 32 NFL clubs, and the draftees will eventually be signed to NFL player contracts. Although the clubs

have historically been allowed to begin negotiations with a drafted player immediately after the draft, most of the signings of drafted players occur in July of each year, shortly before pre-season training camps typically begin. This would likely be the case in 2011 as well, giving the clubs several months in which to sign their drafted players.

9. It is therefore simply not credible for the NFL to claim that they are unprepared to resume operations and to conduct their normal off-season activities. In fact, the league has announced that it expects to play a full season in 2011. *See Exclusive: Roger Goodell criticizes NFL players' legal strategy*, USA Today, April 22, 2011 (hereinafter “*Roger Goodell Exclusive*”) (quoting NFL Commissioner Roger Goodell as stating “we're planning to play a full 16-game regular season and playoffs”), attached as Ex. F. In order to accomplish this, unsigned players must be given the opportunity to sign with teams and teams must hold training camps. In order for the NFL to meet its just announced schedule (under which the first pre-season game will be played on August 7, 2011 and the first regular season game on September 8, 2011), it is necessary to permit the signing of free agent and rookie players very soon. No one knows when the 8th Circuit would rule in the NFL’s appeal, and free agency can not be delayed while waiting for that ruling. Given the steps that need to be taken for the season to begin, the risk that the 2011 season will be adversely affected is much greater if the lockout continues than if the lockout remains enjoined.

10. The NFL's assertion that this case raises "novel" issues regarding this Court's jurisdiction and the applicability of the nonstatutory labor exemption is also without merit. These issues have been decided previously by this Court, and in a manner consistent with the Court's current decision. *See Powell/McNeil v. NFL*, 764 F. Supp. 1351, 1357-58 (D. Minn. 1991) (rejecting the NFL's arguments that the Court must defer to the jurisdiction of NLRB and determining that the nonstatutory labor exemption ended when the players renounced the NFLPA's status as their collective bargaining representative); *Jackson v. NFL*, 802 F. Supp. 226, 232-34 (D. Minn. 1992) (finding that the Norris LaGuardia Act did not bar injunctive relief where "the non-statutory labor exemption terminated after the players abandoned their union").

11. Moreover, any purported harm claimed by the NFL is entirely self-inflicted. The 32 Club owners chose on their own to terminate the CBA early and lockout the players, and they can not possibly claim any surprise at the NFLPA's abandonment of bargaining rights and the present lawsuit. They have known for months, if not years, that implementing a lockout could put them in the very situation they are in now. Indeed, the fact that NFL players might choose to withdraw the NFLPA's authorization to collectively bargain at the end of the most recent agreements was expressly contemplated in those agreements.

12. As the Court found, the NFL players are being irreparably harmed by the lockout. The NFL has already delayed the beginning of free

agency for over a month, and is now seeking a stay to further delay NFL players from having the opportunity to sign contracts and/or get back to work. The NFL has taken numerous steps to prepare for the resumption of league operations, and the players should not be prevented from working for even one day longer.

13. A stay allowing the “lockout” to continue would also cause severe harm to fans, communities, and a myriad of businesses that rely on the NFL for their viability. Indeed, the Commissioner of the NFL has acknowledged that the longer the uncertainty around the 2011 season continues unresolved the worse it is for everybody: “That’s why we think that the longer it goes, it's bad for players, the clubs, our partners, and the fans.” *See Roger Goodell Exclusive*, attached as Ex. F.

14. If the Court, however, were inclined to grant a stay, the Defendants would need to post a significant bond in order to protect the players’ rights, which would need to total at least \$1 billion. We simply don’t know how long any stay would last, and it could cause the cancellation of NFL games. Given that league-wide payroll for the 2010 season exceeded \$3.93 billion in salary alone, a \$1 billion bond would represent only about twenty-five percent of payroll. Even at this amount, the bond would be significantly less than the treble damages that the NFL could be liable for at the end of this antitrust suit.

Dated: April 27, 2011

s/Richard A. Berthelsen

Richard A. Berthelsen