Brady et al v. National Football League et al Doc. 132

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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Tom Brady, Drew Brees, Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Von Miller, Brian Robison, Osi Umenyiora, and Mike Vrabel, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

No. 11-cv-00639-SRN-JJG

***BRADY* PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO EXTEND THE TIME TO RESPOND TO FIRST AMENDED CLASS ACTION COMPLAINT**

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INTRODUCTION

The *Brady* Plaintiffs, nine professional football players and one newly drafted professional football player, oppose the motion of the NFL Defendants to obtain a third extension of the time in which to respond to the *Brady* action. On March 11, 2011, the *Brady* Plaintiffs filed their Complaint. (Docket No. 1). On March 12, 2011, the NFL Defendants locked all of the players out.[1]

The *Brady* Plaintiffs have already agreed to *two* extensions of time totaling fifty-two days (one of twenty-six days, i.e., until April 27, 2011, and a second of another twenty-six days, i.e., until May 23, 2011), for the NFL Defendants to answer or otherwise respond to the *Brady* action. The *Brady* Plaintiffs agreed to these two extensions during

[1] A "lockout" in antitrust terms, the subject matter of this case, is shorthand for the NFL Defendants' concerted refusal to deal with the players.

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the pendency of their motion for preliminary injunction relief, but that motion has now been granted.

The NFL Defendants now move for a third extension of time (of an additional forty-four days, i.e., until July 6, 2011), in which to answer or otherwise respond, to the *Brady* Plaintiffs' First Amended Complaint (Docket No. 119), which does not differ materially from the initial *Brady* Complaint. *Compare* Docket No. 1 *with* Docket No. 119.

The NFL Defendants offer various reasons in support of their motion, all of which fail to justify the grant of yet a third extension. First, the NFL Defendants argue that they should not be required to answer or otherwise respond to the *Brady* action until after the Eighth Circuit rules on their appeal of Judge Nelson's grant of a preliminary injunction barring the lockout. *See* Defs.' Mem. in Supp. of Mot. to Extend Time at 4 (hereinafter "Defs.' Mem."). The pendency of the appeal is simply a red herring, not justifying relief.

But this case will go forward on the merits of the *Brady* Plaintiffs' other claims whether or not Judge Nelson's preliminary injunction of the lockout is upheld or reversed, and thus there is no reason to grant yet another extension, thereby prolonging the bar on discovery.

This is particularly true where Judge Nelson has already found that the *Brady* plaintiffs are suffering irreparable harm *every day* that the NFL Defendants' lockout continues, a finding which guts the NFL Defendants' second justification for yet another extension (i.e., that an additional extension will not prejudice the *Brady* Plaintiffs, *see id.*).

The NFL Defendants' third justification for another extension, that it will divert resources from preparing for the Eighth Circuit hearing, *see id.*, is incredible where the NFL Defendants have already had nine attorneys from four law firms make an appearance in this matter (here and/or in the Eighth Circuit) and they are unable to credibly claim that they do not have a battalion of additional attorneys at their disposal.

The *Eller* Plaintiffs' agreement to this extension is also irrelevant where Judge Nelson found that it is the *Brady* Plaintiffs who are suffering irreparable daily harm from the lockout, and not the *Eller* Plaintiffs or other retired players (who are not subject to the lockout).

The *Brady* Plaintiffs also intend to move in the near future for summary judgment to challenge, *inter alia*, the NFL Defendants' illegal lockout. If discovery continues to be barred, a necessary consequence of the requested extension, it is predictable that the NFL Defendants would invoke Rule 56(d) in response to a motion for summary judgment, that is, another delay would ensue. The *Brady* Plaintiffs do not want to be faced with a Rule 56(d) response to their motion, particularly where the holdup results from the NFL Defendants' delaying tactics.

Most importantly, the NFL Defendants have locked out the players intending to bring the players to their knees and force them to accept a deal that is unjust. *Brady v. NFL, et al.,* Order Granting Injunction (hereinafter "Inj. Order") at 13 (D. Minn. Apr. 25, 2011) (Docket No. 99) (noting that the League had warned players that a lockout would be imposed to force a deal more favorable to the NFL's interests) (citation omitted). The NFL Defendants' motion for an extension is thus much more than a routine request for

more time in which to respond to a complaint, it is yet another deliberate step in their campaign to crush the players by extending the lockout for as long as they can. The Court should not put its imprimatur on this improper conduct, particularly where Judge Nelson has already found that the "the NFL does 'not contest that their 'lockout' is a *per se* unlawful group boycott and price-fixing agreement in violation of antitrust law.'" *Id.* at 83 (quoting *Brady* Plaintiffs' Mem. at 1) (Docket No. 41)).

Accordingly, the *Brady* Plaintiffs oppose the motion for a third extension and ask this Court to deny the motion and permit this action, and discovery in this action, to proceed at this point in time.

BACKGROUND

On March 11, 2011, the *Brady* Plaintiffs filed their Complaint in anticipation of the NFL Defendants' imposition of a lockout, which was imposed the next day, on March 12, 2011. On March 11, 2011, the *Brady* Plaintiffs also moved for a preliminary injunction to lift the lockout. (Docket No. 2).

The NFL Defendants' answer or other responsive pleading was due on April 1, 2011. They first asked for a twenty-six day extension (i.e., until April 27, 2011), in which to respond to the *Brady* Complaint. The *Brady* Plaintiffs agreed to that twenty-six day extension via stipulation dated March 25, 2011 (Docket No. 38). This Court granted that extension until April 27, 2011 by Order dated March 28, 2011 (Docket No. 40).

The NFL Defendants then requested a second extension (of another twenty-six days, or until May 23, 2011) to respond to the *Brady* action. The *Brady* Plaintiffs agreed to that second extension, via stipulation dated April 22, 2011. (Docket No. 97). This

Court granted the second extension until May 23, 2011, via Order dated April 22, 2011. (Docket No. 98).

On April 6, 2011, Judge Nelson conducted a hearing on the *Brady* and *Eller* Plaintiffs' respective motions for injunctive relief to bar the NFL Defendants' lockout. On April 25, 2011, Judge Nelson issued an 89-page opinion granting the *Brady* Plaintiffs' motion for preliminary injunction and denying the *Eller* Plaintiffs' motion as moot. Inj. Order at 89 (Docket No. 99).

In granting the *Brady* Plaintiffs' motion for an injunction, Judge Nelson expressly found that the "Brady Plaintiffs have shown not only that they likely would suffer irreparable harm absent the preliminary injunction, but that *they are in fact suffering such harm now*." *See* Inj. Order at 71 (emphasis added); *see also id.* at 71-79 (setting forth in detail the factual and legal bases for the Court's finding of irreparable harm).[2]

Judge Nelson also concluded that every day that the lockout remains in effect exacerbates the players' irreparable harm. *See, e.g., id.* at 43, 74-79.

In addition, Judge Nelson rejected the NFL Defendants' argument that they would suffer irreparable harm if the district court were to enjoin the lockout because "the League cannot predicate harm on the results of its illegal conduct." *Id.* at 80.

[2] The Eighth Circuit also noted that the *Brady* Plaintiffs raised valid points on the issue of irreparable harm while observing that both sides "likely will suffer some degree of irreparable harm no matter how this court resolves the motion for a stay pending appeal." *Brady v. NFL*, No. 11-1898, 2011 WL 1843832, at *7, ___ F.3d ___ (8th Cir. May 16, 2011).

Judge Nelson also made clear several times that she was *not* ruling on the merits of the underlying dispute but solely on whether to grant the *Brady* Plaintiffs' motion for injunctive relief: "the requested injunction at issue is confined solely to the NFL's lockout. This Court is not addressing the merits of the Players' other antitrust claims – those regarding Player restraints." *Id.* at 80; *see also id.* at 68-69 ("the injunctive relief requested here is limited and does not extend to the majority of the underlying claims ... "[t]he Brady Plaintiffs only ask this Court to enjoin the League's lockout"); *id.* at 80 (the requested "injunction is not an adjudication that the NFL is liable for any antitrust violation"); *id.* at 81 (the Court "is not presently addressing the merits of the antitrust claims regarding Player restrictions and is not ruling on whether the non-statutory labor exemption shields the League from such claims").

Two days later, Judge Nelson reaffirmed the finding of the players' irreparable harm when denying the NFL Defendants' request for a stay of the preliminary injunction, concluding that "[a] stay would re-impose on the Players precisely the irreparable harm that this Court found the NFL's lockout to be likely inflicting on them since March 12." *See Brady v. NFL, et al.,* Order Denying Stay at 13 (D. Minn. Apr. 27, 2011) (hereinafter "Stay Order") (Docket No. 117).

When denying the stay, Judge Nelson confirmed yet again that her Order granting injunctive relief did *not* rule on the underlying merits of the case, but only whether to enjoin the lockout. *Id.* at 7 (finding that "the NFL has shown no … injury resulting from or in any way related to this Court's Order, which, importantly, *only* enjoins the lockout") (emphasis in original).

The NFL Defendants subsequently appealed Judge Nelson's grant of a preliminary injunction on several legal basis, including that the NLRB has primary jurisdiction, that the Norris LaGuardia Act bars the requested injunctive relief, and the non-statutory labor exemption's alleged impact on the lockout. *See* Appellants' Form A (Docket No. 100-1). All of the issues on which the NFL Defendants' appealed deal solely with the propriety of Judge Nelson's preliminary injunction precluding the lockout. Thus, even if *all* of those issues are resolved in favor of the NFL Defendants, the reversal will not dispose of this case, but only the challenged injunction of the lockout.

The NFL Defendants' response to the *Brady* First Amended Complaint is currently due on May 23, 2011. On May 19, 2011, the NFL Defendants moved for another forty-four days, i.e., until July 6, 2011, to put in a response. The Court should deny that motion for the reasons set forth herein.

ARGUMENT

I. Standard

Pursuant to Federal Rule of Civil Procedure 6(b)(1)(A), the Court may, for good cause, enlarge a period of time (for example, the time in which to answer a complaint), "with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires." Although courts have discretion to grant such enlargements, courts should nonetheless "be mindful that the rules are intended to force parties and their attorneys to be diligent in prosecuting their causes of action." *Spears v. City of Indianapolis*, 74 F.3d 153, 157 (7th Cir. 1996) (affirming district court's denial of

a motion to extend time to respond to summary judgment by one day where the court had previously granted two extensions in which to respond) (quotation omitted).

Moreover, an extension under Rule 6(b)(1)(A) will not be granted if there is evidence of bad faith by the movant or prejudice to the party opposing the requested extension. *See, e.g., Mickalis Pawn Shop, LLC v. Bloomberg*, 465 F. Supp. 2d 543, 545 (D.S.C. 2006) (although noting that an extension of time "normally will be granted in the absence of bad faith or prejudice to the adverse party," denying motion to extend time to respond to motion to remand where plaintiffs were already suffering irreparable harm to their reputations) (quotations omitted).

II. There Is No Good Cause for the Requested Extension.

Here, there is no good cause for a third extension. *First*, the *Brady* Plaintiffs have already agreed to two extensions of time, thereby already affording the NFL Defendants an additional fifty-two additional days in which to answer or otherwise respond.

Second, any additional delay should not be countenanced in light of Judge Nelson's finding that the *Brady* Plaintiffs and other players are suffering irreparable harm *every day*. Inj. Op. at 71; *see Mickalis Pawn Shop*, 465 F. Supp. 2d at 546 (when denying defendants' motion for an extension, finding prejudice where plaintiffs' alleged irreparably injury would only continue if the extension were to be granted). Moreover, if the Eighth Circuit were to reverse Judge Nelson's grant of injunctive relief, such a reversal would only provide additional impetus to push the rest of the case forward where the *Brady* Plaintiffs' treble damages claims arising from the lockout would continue to

mount in the absence of an injunction. *Cf.* Inj. Op. at 72 (discussing the NFL Defendants' arguments regarding treble damages).

And the *Eller* Plaintiffs' agreement to a third extension is irrelevant where Judge Nelson found that it is the *Brady* Plaintiffs who are suffering irreparable daily harm from the lockout, and not the *Eller* Plaintiffs or other retired players (who are not subject to the lockout).

Third, the NFL Defendants rely solely on conclusory statements, such as the *Brady* Plaintiffs "will not be prejudiced by this extension," *see* Defs.' Mem. at 4, to support their motion. However, "[g]eneralizations and conclusory allegations will not suffice" to demonstrate good cause for an extension. *Burgess v. Bell*, 555 F. Supp. 2d 855, 857 (E.D. Mich. 2008) (denying request to file late answer because movant failed to demonstrate good cause) (citation omitted).

Fourth, the pendency of the NFL Defendants' Eighth Circuit appeal fails to provide good cause for the requested extension. The rest of this case will continue no matter what the Eighth Circuit rules as to Judge Nelson's preliminary injunction of the lockout. *See supra* (discussing the issues on appeal, all of which focus on Judge Nelson's injunction of the lockout). As a result, there is no reason to delay discovery in the remainder of this case awaiting the Eighth Circuit's ruling. *See Spears*, 74 F.3d at 157 (rules are designed to encourage diligent prosecution of cases).

The NFL Defendants also argue that the Eighth Circuit's ruling "will likely inform [their] decision whether to file motions to dismiss (and, if so, on which grounds) or to answer [the] Complaints." *See* Defs.' Mem. at 4. The appeal, however, addresses a very

narrow order, and not the merits of the underlying *Brady* case, as Judge Nelson made clear in her rulings. *See supra*. Moreover, courts, including appellate courts, are careful to rule on the precise issues before them, and do not wander about, opining at will, as the NFL Defendants' argument suggests.

This argument of convenience also pales in comparison to the irreparable harm that the *Brady* Plaintiffs and other players are suffering each day this case is delayed. There is also no reason to believe that this Court may join the *Brady* and *Eller* pleadings post-appeal as the NFL Defendants contend, *see* Defs.' Mem. at 4, nor do the NFL Defendants offer one. *See generally* Defs.' Mem.

Finally, the NFL Defendants' suggestion that there may be insufficient resources to prepare for oral argument before the Eighth Circuit while proceeding in this matter, *see* Defs.' Mem at 4, is specious on its face, and hardly reflects good cause for an extension. In fact, it would be astonishing if the NFL Defendants did not already have their responsive pleading finished, or nearly finished, and ready to go if their motion is denied.

Based on the foregoing, the Court should find that there is no good cause for the requested extension.

III. There Is Evidence of Bad Faith.

There is evidence, on which this Court relied, to recently find that the NFL Defendants acted in bad faith when preparing for the lockout. Just two months ago, in *White v. NFL,* Judge Doty found that the NFL had failed to act in good faith towards the players by engaging in conduct to gain "an unconscionable advantage" over the players by "renegotiat [ing] broadcast contracts to ensure revenue for itself in the event of a

lockout." *See White*, Civil No. 4-92-906 (DSD), 2011 WL 706319, at *8, ___ F. Supp. 2d ___ (D. Minn. March 1, 2011) (finding that the NFL's conduct "constitutes 'a design … to seek an unconscionable advantage' [over players] and is inconsistent with good faith") (citing *Ashokan Water Servs., Inc. v. New Start, LLC*, 807 N.Y.S.2d 550, 554 (N.Y. Civ. Ct. 2006)). Judge Doty specifically found that the "NFL sought to renegotiate [various] broadcast contracts to ensure revenue for itself in the event of a lockout." *Id.* In concluding that the NFL "did not act in good faith" towards the players, *id.* at *12 n.6, Judge Doty further found that "[t]he facts underlying this proceeding illustrate another abuse of [the NFL's] market power wherein various broadcasters of NFL games were 'convinced' to grant lucrative work-stoppage payments to the NFL if the NFL decides to institute a lockout." *Id.*

The NFL Defendants' request for an extension here is tainted by its bad faith conduct against the players in preparation for the lockout, and strongly suggests that the NFL Defendants are not seeking an extension here for good cause (which they fail to demonstrate in any event) but instead to crush the players into submission by prolonging the lockout.

CONCLUSION

Based on the foregoing, the *Brady* Plaintiffs ask the Court to deny the NFL Defendants' motion to extend the time to respond to the First Amended Complaint.

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Respectfully Submitted,

s/Barbara P. Berens

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