# IN THE UNITED STATES DISTRICT COURT
# FOR THE DISTRICT OF MINNESOTA

Carl Eller, Franco Harris, Marcus Allen, Paul Krause, Lemuel Barney, Joseph DeLamielleure, Elvin Bethea, Michael Haynes, Obafemi Ayanbadejo, and Ryan Collins, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

National Football League, Arizona Cardinals, Inc., Atlanta Falcons Football Club LLC, Baltimore Ravens Limited Partnership, Buffalo Bills, Inc., Panthers Football LLC, Chicago Bears Football Club, Inc., Cincinnati Bengals, Inc., Cleveland Browns LLC, Dallas Cowboys Football Club, Ltd., Denver Broncos Football Club, Detroit Lions, Inc., Green Bay Packers, Inc., Houston NFL Holdings LP, Indianapolis Colts, Inc., Jacksonville Jaguars Ltd., Kansas City Chiefs Football Club, Inc., Miami Dolphins, Ltd., Minnesota Vikings Football Club LLC, New England Patriots, LP, New Orleans Louisiana Saints, LLC, New York Football Giants, Inc., New York Jets Football Club, Inc., Oakland Raiders LP, Philadelphia Eagles Football Club, Inc., Pittsburgh Steelers Sports, Inc., San Diego Chargers Football Co., San Francisco Forty Niners Ltd., Football Northwest LLC, The Rams Football Co. LLC, Buccaneers Limited Partnership, Tennessee Football, Inc., Washington Football Inc.. and National Football League Players Association, Tom Brady, Drew Brees, Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Von Miller, Brian Robison, Osi

Civil Action No: 11-cv-00639 SRN/JJG

**<u>SECOND AMENDED CLASS ACTION COMPLAINT AND CROSSCLAIMS</u>**

Umenyiora, Mike Vrabel and DeMaurice Smith.

Defendants.

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## INTRODUCTION

1. This class action is brought to seek monetary redress for violations by each defendant of the federal antitrust laws, for injunctive relief and for a declaration of rights. Plaintiffs are former professional football players who played with the National Football League ("NFL" or "League"). The NFL and its member clubs are asserted to be violating the antitrust laws by engaging in an improper lockout, for which Plaintiffs seek monetary relief. The NFL, the individual plaintiffs in the case of *Brady v. NFL*, No. 0:11-cv-00639 SRN JGG (D. Minn.) ("the *Brady* Plaintiffs")[1], the National Football League Players Association ("NFLPA"), and its Executive Director, DeMaurice Smith ("Smith") are asserted to be violating antitrust laws by unlawfully negotiating settlement terms with the NFL in a manner that improperly encompasses the rights of Plaintiffs and members of the proposed class in the period since the NFLPA has renounced its union status. For this improper conduct, Plaintiffs seek declaratory and injunctive relief.

2. The NFL Defendants include the NFL and its 32 member teams. Although the NFL might be viewed as a type of joint venture, The United States Supreme Court held last year in *American Needle, Inc. v. NFL*, 130 S.Ct. 2201, 2212-13 (2010) that each member team is legally capable of conspiring with other member teams in violation of the antitrust laws:

> The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams

[1] Because the Plaintiffs here have had their claims consolidated with those of the *Brady* plaintiffs, the claims against the Brady plaintiffs in Count I of this amended complaint are raised as crossclaims under Fed. R. Civ. P. 13(g).

> is a substantial, independently owned, and independently managed business. "[T]heir general corporate actions are guided or determined" by "separate corporate consciousnesses," and "[t]heir objectives are" not "common." ... The teams compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel.

3. The NFL is also an adjudicated monopolist that acquired its monopoly power in the market for professional football in violation of Section 2 of the Sherman Act (15 U.S.C. §2). Thus, in *United States Football League v. NFL*, 644 F. Supp. 1040, 1057-58 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988) ("*USFL*"), the court upheld jury determinations that (a) the NFL held monopoly power in the professional football market, receiving 95% of the revenues from major league professional football and (b) it had acquired that power through "predatory conduct." These findings have been given collateral estoppel effect in subsequent antitrust cases against the NFL. *E.g.*, *McNeil v. NFL*, 790 F. Supp. 871, 889-96 (D. Minn. 1992) ("*McNeil II*"). Those findings are entitled to similar effect in this case.

4. The NFL has also been determined to have abused its dominant position in the market for professional football services, which is the relevant market at issue in this case. For example, in *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) ("*Mackey*"), the issue was the validity of the "Rozelle Rule," which decreed that when a football player's contract with an NFL club expired and he moved to a different club, his present employer had to provide compensation to his former employer, with the NFL Commissioner resolving any dispute. The United States Court of Appeals for the Eighth Circuit upheld the district court's determination of

liability after a 55-day trial. The appellate court found that the relevant market was one for professional football services (*id.* at 617-18) and that the "Rozelle Rule, as enforced, unreasonably restrains trade in violation of §1 of the Sherman Act" (*id.* at 622).

5. Likewise, it has been determined that the NFL's College Draft "cannot be regarded as 'reasonable' under the antitrust laws." *Smith v. Pro-Football*, 420 F. Supp. 738, 747 (D.D.C. 1976), *aff'd in part and rev'd in part on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978) ("*Smith*"). This determination as well is entitled to collateral estoppels effect here.

6. Similarly, after a ten-week trial, a jury in another case held that the NFL's conspiratorial Right of First Refusal/Compensation rules (known as "Plan B" Rules) that limited the mobility of professional football players after their contracts expired and they became "free agents" had a "a substantially harmful effect on competition in the relevant market for the services of professional football players." *McNeil v. NFL*, No. 4-90-476, 1992 WL 315292 at *1 (D. Minn. Sept. 10, 1992) (*"McNeil III"*).

7. In 1992, a group of players brought suit seeking relief for injuries they suffered as a result of the very same anticompetitive restraints that the jury in *McNeil III* found violated Section 1 of the Sherman Act. In *Jackson v. NFL*, 802 F.Supp. 226 (D. Minn. 1992) ("*Jackson*"), the district court gave collateral estoppel effect to the jury's findings. *Id.* at 229-30. It then issued a temporary restraining order against the enforcement of the Plan B Rules, stating that "the four players who remain restricted by the Plan B rules make a sufficient showing of irreparable harm because they suffer

irreparable injury each week they are restricted under an illegal system of player restraints." *Id.* at 230-31.

8. The Defendants also include the NFLPA, which is headed by its Smith . As explained below, after the NFLPA renounced its status as a union with respect to NFL players on March 11, 2011, it filed an antitrust lawsuit against the NFL and its member clubs. In negotiations to settle that lawsuit, the NFLPA has been unlawfully bargaining for the rights and benefits of the proposed class of retirees here even though it does not represent them. The *Brady* plaintiffs and the NFLPA, in conjunction with the NFL, are conspiring to depress the amounts of pension and disability benefits to be paid to former NFL players in order to maximize the salaries and benefits to current NFL players. They are doing so even though Smith has asserted that the NFLPA owes a fiduciary duty to former NFL players and even though the NFL has conceded that it needs to increase materially the benefits to, and improve the programs for, former NFL players. These negotiations between the League and NFLPA are not protected by any labor exemption against antitrust claims for damages. They constitute a conspiracy to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

**JURISDICTION AND VENUE**

9. These claims arise and are brought under Section 16 of the Clayton Act, (15 U.S.C. § 26), and Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1).

10. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331and 1337.

11. Venue in this action is proper pursuant to 15 U.S.C. § 22. Each of the Defendants can be found, resides, has an agent, or transacts business in the District of

Minnesota, and the unlawful activities were or will be carried on in part by one or more of the Defendants within this district.

## **THE PARTIES**

12. Plaintiff Carl Eller ("Eller") was a defensive end in the NFL who played for the Minnesota Vikings from 1964-78 and for the Seattle Seahawks in 1979. He was selected to the Pro Bowl six times (1968-71, 1973-74), was selected as First-team All Pro five times (1968-71, 1973), was First-team All Conference seven times (1968-73, 1975), was the Newspaper Enterprise Association's NFL Defensive Player of the Year in 1971, and was selected to the 1970s All Decade Team. In 2004, he was elected to the Pro Football Hall of Fame. Eller is the President of the Retired Players Association ("RPA"), a non-profit organization dedicated to providing powerful national advocacy and collegial support for retired professional football players, their families and the community at large.

13. Plaintiff Marcus Allen ("Allen") was a running back who played for the Los Angeles Raiders (1982-92) and Kansas City Chiefs (1993-87). He was voted MVP in Super Bowl XVII, NFL Offensive Rookie of the Year in 1982, NFL Offensive Player of the Year in 1984, NFL MVP in 1985, and NFL Comeback Player of the Year in 1993. He was selected to the NFL's Pro Bowl six times (1982, 1984-87, 1993). He was a First Team All Pro selection in 1984. In 1999, he was included in the *Sporting News*' list of the 100 greatest football players. At the collegiate level, he was a Heisman Trophy winner. He was elected to the Pro Football Hall of Fame in 2003.

14. Plaintiff Franco Harris ("Harris") was a fullback who played for the Pittsburgh Steelers (1972-83) and Seattle Seahawks (1984). He played on four Super Bowl championship teams (Super Bowls IX, X, XIII, XIV) and was the MVP in Super Bowl IX. His Super Bowl career totals of 101 carries for 354 yards are records and his four career rushing touchdowns are tied for the second most in Super Bowl history. He was selected as the NFL Rookie of the Year and the UPI/American Football Conference ("AFC") Rookie of the Year in 1972. He won the Walter Payton Man of the Year Award in 1976. He was selected as a member of the NFL 1970s All Decade Team. He was selected to the NFL Pro Bowl nine times (1972-80) and was an NFL All-Pro selection seven times (1972-80) and was inducted into the Pro Football Hall of Fame in 1990. In 1999, he was included in the *Sporting News*' list of the 100 greatest football players.

15. Plaintiff Paul Krause ("Krause") was a safety in the NFL who played for the Washington Redskins (1964-67) and the Minnesota Vikings (1968-79). He holds the NFL record for interceptions (81). He was selected to the NFL Pro Bowl eight times (1964-65, 1969, 1971-75) and was an NFL All-Pro selection eight times (1964-65, 1969, 1970-73, 1975) and was inducted into the Pro Football Hall of Fame in 1998.

16. Plaintiff Lemuel Barney ("Barney") was a cornerback in the NFL who played with the Detroit Lions from 1966 to 1977. He was voted NFL Defensive Rookie of the Year in 1967 and was selected to the NFL's 1960s All Decade Team. He was selected to the NFL's Pro Bowl seven times (1967-69, 1972-73, 1975-76) and was an NFL All Pro selection seven times (1967-70, 1972-73, 1975). He was elected to the Pro

Football Hall of Fame in 1992. In 1999, he was included in the *Sporting News*' list of the 100 greatest football players.

17. Plaintiff Joseph DeLamielleure ("DeLamielleure") was an offensive guard who played for the Buffalo Bills (1973-79, 1985) and the Cleveland Browns (1980-84). He was selected to be included in the Wall of Fame for both teams. He was voted as Co-Offensive Lineman of the Year in 1973 and the NFLPA/American Football Conference ("AFC") Offensive Lineman of the Year in 1975. In 1977, he received the Forrest Gregg Award as the NFL Offensive Lineman of the Year. He was selected six times to the Pro Bowl (1975-80) and as All Pro (1975-80). DeLamielleure was elected to the Pro Football Hall of Fame in 2003.

18. Plaintiff Michael Haynes ("Haynes") was a cornerback who played for the New England Patriots (1976-82) and Los Angeles Raiders (1983-89). He was voted as NFL Rookie of the Year and UPI/AFC Rookie of the Year in 1976. He was selected as a member of the NFL 75th Anniversary All-Time Team and 1980s All Decade Team. He won the George S. Halas Trophy in 1984. He was selected nine times to the Pro Bowl (1976-80, 1982, 1984-86) and six times as All Pro (1975-80). DeLamielleure was elected to the Pro Football Hall of Fame in 1997.

19. Plaintiff Elvin Bethea ("Bethea") was a defensive end who played for the Houston Oilers (1968-83). He was selected to the Pro Bowl eight times (1969, 1971-75, 1978-79). He was a First Team All AFC Selection in 1969, 1971, 1972 and 1974 and a First Team All Pro selection in 1975. He was elected to the Pro Football Hall of Fame in 2003.

20. Plaintiff Obafemi Ayanbadejo ("Ayanbadejo") was a fullback in the NFL who played for the Minnesota Vikings (1997-98), Baltimore Ravens (1999-2001), Miami Dolphins (2002-03), Arizona Cardinals (2004-06), and Chicago Bears (2007). Ayanbadejo earned a Super Bowl ring with the Baltimore Ravens in Super Bowl XXXV. Ayanbadejo was released by the Chicago Bears in 2007 and joined the California Redwoods of the United Football League in 2009.

21. Plaintiff Ryan Collins ("Collins") was a tight end in the NFL who played for the Baltimore Ravens and Cleveland Browns.

22. The foregoing persons identified as plaintiffs are referred to collectively as "Plaintiffs" or "*Eller* plaintiffs".

23. Defendant NFL, which maintains its offices at 280 Park Avenue, New York, New York, is an unincorporated association consisting of the 32 separately-owned and independently-operated professional football teams that are listed below. The NFL is engaged in interstate commerce in the business of, among other things, operating the sole major professional football league in the United States.

24. Additional Defendants are the 32 NFL member teams, each of which, upon information and belief, is a corporation, except where noted below. The NFL and its member teams are referred to collectively herein as the "NFL Defendants." Upon information and belief, each of the Defendant teams is a separately-owned and independent entity which operates a professional football franchise for profit under the team name and in the cities set forth below:

| NFL Defendant Team Owner | State of Organization | Team Name (City) |
|---|---|---|
| Arizona Cardinals, Inc. | Arizona | Arizona Cardinals |
| Atlanta Falcons Football Club LLC | Georgia | Atlanta Falcons |
| Baltimore Ravens Limited Partnership | Maryland | Baltimore Ravens |
| Buffalo Bills, Inc. | New York | Buffalo Bills |
| Panthers Football LLC | North Carolina | Carolina Panthers |
| Chicago Bears Football Club, Inc. | Delaware | Chicago Bears |
| Cincinnati Bengals, Inc. | Ohio | Cincinnati Bengals |
| Cleveland Browns LLC | Delaware | Cleveland Browns |
| Dallas Cowboys Football Club, Ltd. | Texas | Dallas Cowboys |
| Denver Broncos Football Club | Colorado | Denver Broncos |
| Detroit Lions, Inc. | Michigan | Detroit Lions |
| Green Bay Packers, Inc. | Wisconsin | Green Bay Packers |
| Houston NFL Holdings LP | Delaware | Houston Texans |
| Indianapolis Colts, Inc. | Delaware | Indianapolis Colts |
| Jacksonville Jaguars Ltd. | Florida | Jacksonville Jaguars |
| Kansas City Chiefs Football Club, Inc. | Texas | Kansas City Chiefs |
| Miami Dolphins, Ltd. | Florida | Miami Dolphins |
| Minnesota Vikings Football Club LLC | Minnesota | Minnesota Vikings |
| New England Patriots, LP | Delaware | New England Patriots |

| | | |
|---|---|---|
| New Orleans Louisiana Saints LLC | Texas | New Orleans Saints |
| New York Football Giants, Inc. | New York | New York Giants |
| New York Jets Football Club, Inc. | Delaware | New York Jets |
| Oakland Raiders LP | California | Oakland Raiders |
| Philadelphia Eagles Football Club, Inc. | Delaware | Philadelphia Eagles |
| Pittsburgh Steelers Sports, Inc. | Pennsylvania | Pittsburgh Steelers |
| San Diego Chargers Football Co. | California | San Diego Chargers |
| San Francisco Forty Niners Ltd. | California | San Francisco 49ers |
| Football Northwest LLC | Washington | Seattle Seahawks |
| The Rams Football Company LLC | Delaware | St. Louis Rams |
| Buccaneers Limited Partnership | Delaware | Tampa Bay Buccaneers |
| Tennessee Football, Inc. | Delaware | Tennessee Titans |
| Washington Football Inc. | Maryland | Washington Redskins |

25. Defendants NFL and its 32 member clubs are referred to as the "NFL Defendants".

26. Defendants Tom Brady ("Brady"), Drew Brees ("Brees"), Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Von Miller, Brian Robison, Osi Umenyiora, and Mike Vrabel ("Vrabel") are all current NFL players and are the named plaintiffs in the *Brady* case referenced above.

27. Defendant NFLPA is a professional association based in Washington, D.C. Since March 11, 2011, it represents no NFL players. Prior to that date, it was a labor union the constituents of which are described in greater detail below.

28. Defendant DeMaurice Smith became the Executive Director of the NFLPA in 2008 and is one of the counsel for the *Brady* plaintiffs.

## CLASS ACTION

29. Plaintiffs are representatives of a class, as defined by Rule 23(b)(1), Rule 23(b)(2) and/or Rule 23(b)(3) of the Federal Rules of Civil Procedure, and bring this action on behalf of themselves and a class with respect to which the NFL and NFLPA have acted or refused to act on grounds that apply generally to the class.

30. The class is composed of all retired or former professional football players who were employed by any NFL member club but are not now salaried employees of the NFL or any member club or of the NFLPA and who receive health, retirement or other benefits from the NFL pursuant to the "Bert Bell/Pete Rozelle NFL Player Retirement Plan" (the "Plan") or other benefit plans subsidized by the NFL, as described below.

31. The class consists of persons who do not fall within the definition of the Collective Bargaining Unit ("CBU") contained in the 2006-12 Collective Bargaining Agreement ("CBA") between the NFL Management Council and the NFLPA. The "Preamble" to that CBA described the CBU as follows:

> This Agreement, which is the product of bona fide, arm's length collective bargaining, is made and entered into as of the 8th day of March, 2006, in accordance with the provisions

> of the National Labor Relations Act, as amended, by and between the National Football League Management Council ("Management Council" or "NFLMC"), which is recognized as the sole and exclusive bargaining representative of present and future employer member Clubs of the National Football League ("NFL" or "League"), and the National Football League Players Association ("NFLPA"), which is recognized as the sole and exclusive bargaining representative of present and future employee players in the NFL in a bargaining unit described as follows:
>
> 1. All professional football players employed by a member club of the National Football League;
>
> 2. All professional football players who have been previously employed by a member club of the National Football League who are seeking employment with an NFL Club;
>
> 3. All rookie players once they are selected in the current year's NFL College Draft; and
>
> 4. All undrafted rookie players once they commence negotiation with an NFL Club concerning employment as a player.

32. As this definition reflects, former NFL players were not part of the CBU described in the 2006 CBA.

33. The class is so numerous and geographically so widely dispersed that joinder of all members is impracticable. There are questions of law and fact common to the class. Plaintiffs' claims are typical of the claims of the class that they represent, and the Plaintiffs will fairly and adequately protect the interests of the proposed class.

34. Each person in the class is, has been, and/or will be injured by the unlawful agreements reached among the NFL, its member clubs, the *Brady* plaintiffs, Smith and the NFLPA.

35. Questions of law and fact common to class members predominate over any questions affecting only individual class members. These include the following:

(a) Whether Defendants violated Section 1 of the Sherman Act;

(b) Whether Defendants breached any fiduciary duties owed to the class;

(c) Whether Defendants have any affirmative defenses that can be litigated on a classwide basis; and

(d) Whether defendants' conduct caused injury and damage to members of the class.

36. A class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

## NATURE OF INTERSTATE TRADE AND COMMERCE

37. The primary business in which the NFL and its member clubs are engaged is the operation of major league professional football teams and the sale of tickets and telecast rights to the public for the exhibition of the individual and collective football talents of players such as Plaintiffs. To conduct this business, the member clubs of the NFL must compete with each other for and retain the professional services of

players, such as Plaintiffs, who were or will be signed to contracts to play football for the various NFL defendant teams.

38. The business of major league professional football is distinct from other professional sports businesses, as well as from college and minor league professional football. Its distinguishing features include: the rules of the sport and the season during which it is played; the talents of and rates of compensation for the players, for which playing football is their full-time profession; the nature and amounts of trade and commerce involved; and the unique demand for the NFL Defendants' games by the consuming public, both as ticket purchasers and as home viewers of and listeners to television and radio.

39. The NFL's and its member clubs' operation of and engagement in the business of major league professional football involves a substantial volume of interstate trade and commerce, including, *inter alia*, the following interstate activities: travel; communications; purchases and movement of equipment; broadcasts and telecasts of league games; advertisements; promotions; sales of tickets and concession items; sales of merchandise and apparel; employment of players and referees; and negotiations for all of the above.

40. The NFL Defendants' aforementioned interstate transactions involve collective annual expenditures and receipts in excess of $9.3 billion. But, as Dan Greeley, CEO of Network Insights, has noted:

> The NFL is like Procter & Gamble. There's the holding company, the core operation, but then each brand has its own team and world of revenue. Like Tide: That's a P&G product

> but within that there are different types of Tide and a number of people that make money from it. So the $9.3 billion pie just scratches the surface and doesn't get into how much is spent around stadiums, merchandise, agents, all the way down to mom-and-pop shops.

41. Annually, the NFL redistributes upwards of $4 billion in radio, television and digital earnings across its 32 teams—$125 million apiece, plus an equal share for the league—and that number shows no sign of declining. The 19 highest-rated fall television programs (and 28 of the top 30) were NFL games, and this year's Super Bowl was the most-watched program ever. The NFL earns huge amounts annually from its telecasting deals with, *inter alia,* ESPN ($1.1 billion), DirecTV ($1 billion), NBC ($650 million), Fox ($712.5 million), and CBS ($622.5 million).

42. Companies pour money into the league's coffers for the right to associate their brands with the NFL. Among those making such contributions are Pepsi ($560 million over eight years, starting in 2004) and Gatorade ($45 million a year, plus marketing costs and free Gatorade for teams). Verizon is paying $720 million over four years to be the league's wireless service provider. Nike paid $1.1 billion to acquire the NFL's apparel sponsorship. Previous partner Reebok had been selling $350 million annually in NFL-themed gear. The league has a $1.2 billion, six-year deal with beer sponsor Anheuser-Busch, but teams still cut their own deals when it comes to pouring rights at stadiums.

43. Teams can collect $25-$30 million for stadium naming rights, usually on 10-year deals. The largest is Reliant Energy's $10 million per year contract

with the Houston Texans. In Los Angeles, Farmers Insurance has promised $700 million over 30 years to name a stadium for a team that doesn't exist yet.

44. Many NFL clubs own in whole or in part the stadiums in which they play, which can be a source of major commercial value, as reflected in the following chart:

| STADIUM, TEAM | OPENED | PRICE (2010 DOLLARS) | % PRIVATE |
|---|---|---|---|
| New Meadowlands, NY | 2010 | $1.6B | 100 |
| Cowboys Stadium, DAL | 2009 | $1.15B | 56 |
| Lucas Oil Field, IND | 2008 | $780M | 13 |
| U. of Phoenix Stadium, ARI | 2006 | $493M | 32 |
| Lincoln Financial, PHI | 2003 | $588M | 65 |
| Ford Field, DET | 2002 | $504M | 49 |
| Gillette Stadium, NE | 2002 | $373M | 100 |
| Reliant Stadium, HOU | 2002 | $526M | 39 |
| Qwest Field, SEA | 2002 | $422M | 29 |
| Invesco Field, DEN | 2001 | $683M | 39 |
| Heinz Field, PIT | 2001 | $312M | 16 |

45. In 2010, more than 17 million fans passed through NFL turnstiles, paying anywhere from $54.51 (Cleveland Browns) to $117.84 (New England Patriots)

for the average game ticket. Though the league won't open its books, numbers for the publicly-held Green Bay Packers ("Packers") offer some insight into what teams reap at the ticket office and concession stands. In 2010, the Packers cleared $60,059,646 from home and away game tickets plus private boxes. Projected over 32 teams, that's nearly $2 billion annually. The Packers reaped $13 million from concessions, parking and local media in 2010, which translates to $416 million on a league-wide basis.

46. The class members have been employed by one or more of the defendant teams in interstate commerce as professional football players.

## FACTUAL ALLEGATIONS

### The NFL's Monopoly Power

47. As noted above, the NFL Defendants possess monopoly power in the market for major league professional football in the United States, and have willfully acquired or maintained that monopoly power in violation of Section 2 of the Sherman Act. The relevant market for assessing the restraint of trade at issue is the market for the services of major league professional football players in the United States. As noted above, Defendants have monopoly power within that market and have repeatedly been found to have abused that power in violation of the federal antitrust laws.

48. The NFL comprises the only major professional football league in the United States. The NFL and its member clubs are the only United States market participants for the services of major league professional football players. Together, they monopolize and/or restrain trade in the United States market for the services of major league professional football players. The only actual or potential competition that exists

in this market is among the separately-owned and independently-operated NFL teams. Rather than engaging in competition for the players' services, however, the NFL Defendants have combined and conspired to eliminate such competition among themselves for NFL players through group boycotts, price-fixing arrangements, and concerted refusals to deal. This is being accomplished by the NFL Defendants jointly adopting and imposing "rules" and "policies", including the lockout, that have the purpose and effect of preventing players from offering their services to NFL teams in a competitive market and limiting the benefits that retired players would have otherwise received in a competitive market.

**<u>The SSA And Successive CBAs</u>**

49. The NFL is a recidivist violator of the antitrust laws as reflected in *USFL*, *Mackey*, *McNeil II* and *III*, *Smith* and *Jackson*.

50. After the jury verdict in *McNeil III*, the NFL and players entered into a Stipulation & Settlement Agreement ("SSA") on February 26, 1993. A month later, the NFLPA advised the NFL that it had received authorization from a majority of players to serve as their collective bargaining agent. The district court approved the settlement agreement in *White v. NFL*, 822 F.Supp. 1389 (D. Minn. 1993).

51. Also in 1993, the NFL and NFLPA entered into a CBA that mirrored the SSA. The parties amended and extended the CBA in 1996, 1998, and 2002. In 2006, the parties renegotiated the CBA for 2006-12, creating the CBU described above. On May 20, 2008, the NFL opted out of the final two years of the then-current versions of the CBA. As a consequence, the CBA was due to expire as of March 4, 2011. *See White*

*v. NFL*, No. 4-92-906 (DSD), 2011 WL 706319 at *1 (D. Minn. March 1, 2011) ("*White II*"). The opinion in *White II* is attached as Exhibit A and incorporated by reference herein.

52. The 2006 CBA contained provisions that directly affect the benefits accorded to retired NFL players, even though they are not members of the CBU pursuant to that agreement. Article XLVII thereof discusses the Plan described above, the benefit credits relevant to the Plan and disability benefits under the Plan. Article XLVIII-D discusses the "88 Plan" described below.

**The Plan And Other Benefit Plans For Retired NFL Players**

53. The Plan is a merger of two prior plans in 1993. The most recent version was amended and restated on April 1, 2007. It is attached as Appendix P. The Plan provides for retirement benefits, total and permanent ("T&P") disability benefits, line of duty disability benefits and death benefits. The Plan is subsidized by NFL member clubs. Pursuant to Paragraph 3.1 of the Plan, the NFL clubs make contributions according to various actuarial assumptions and methods set forth in Appendix A to the Plan. Pursuant to Paragraph 3.2 of the Plan, the NFL clubs are obligated to contribute to the Plan to the extent required by Paragraph 3.1, ERISA and the operative CBA.

54. As of December of 2010, only 3,154 former NFL players receive pension benefits under the Plan, for an annual outlay of $63.7 million.

55. The Plan is run by a Retirement Board consisting of three persons selected by the NFLPA, three persons selected by the NFL Management Council and, in an *ex officio* capacity, the NFL Commissioner. Pursuant to paragraph 10.1 of the Plan, it

may be terminated if no CBA has been in effect for more than one year. The actuary for the Plan is Aon Corporation, executives of which, on information and belief, have ownership interests in the Chicago Bears, one of the NFL's member clubs.

56. Obtaining disability benefits under the Plan has been notoriously difficult. In 2010, only 289 of 464 eligible players who applied for disability payments were awarded any. On June 23, 2007, hearings on the NFL's compensation of retired players were held before the Commercial and Administrative Law Subcommittee of the Judiciary Committee of the United States House of Representatives. Numerous retired players suffering severe disabilities as a result of their careers playing for the NFL told their stories of being denied T&P and other benefits. Representative Linda Sanchez summarized the evidence as follows:

> The fundamental question then becomes whether this disability process is fair for the retired employees of the NFL. The evidence suggests that the vast majority of former players needing benefits do not receive them. What is even more troubling is that through projects such as the NFL films, the NFL continues to profit off those very same players who are denied benefits. Essentially, is the NFL, a multibillion dollar organization, fairly treating the employees who helped build it?

57. On September 18, 2007, a hearing on oversight of the NFL retirement system was held before the United States Senate Committee on Commerce Science and Transportation. Similar testimony about denials of benefits was presented by NFL retired players.

58. On April 8, 2008, the Congressional Research Service ("CRS") issued a report on "Former NFL Players: Disabilities, Benefits And Related Issues." A copy of this report is attached as Exhibit Q. It concluded:

> The subject of players' injuries, disabilities, and benefits is a complex one, and, accordingly, there are a host of issues surrounding this subject. Although the number and type of benefits have grown over the years, older retirees, particularly those who played prior to 1982, have fewer benefits available to them than their successors have. Yet, this subset of former players might have the greatest financial and medical needs.

59. As the CRS report also explained, there were substantial obstacles in obtaining T&P disability benefits under the Plan:

> Overall, from July 1, 1993, through June 26, 2007, 1,052 individuals applied for LOD or T&P disability benefits: 428 applications were approved; 576 were denied;and 48 are pending. The approval rate, which does not include the cases that are pending, is 42%. The following series of statements shows the status of applications at each step of the process.
>
> --1,052 applications submitted for disability benefits.
> --358 (34%) applications approved.
> --675 (64%) applications denied.
> --19 (2%) applications are pending.
>
> --223 (33% of 675) applications denied at the initial stage were appealed.
> --69 (31%) approved on appeal.
> --132 (60%) denied on appeal.
> --22 (10%) appeals are pending.
>
> --32 (24% of 132) applicants whose appeals were denied filed a lawsuit.
>
> --1 (3%) lawsuit resulted in a reversal of the Retirement Board's decision.

60. As the CRS report also noted, as of October 27, 2007, only 154 NFL retired players were receiving T&P disability benefits.

61. There also exists a separate health benefit plan for retired or former NFL players known as the "88 Plan." A copy of the last iteration of the 88 Plan is attached as Exhibit S. The 88 Plan was created in August of 2007. It is designed to assist players who are vested under the Plan and who are determined to have dementia (including Alzheimer's Disease), as this condition is defined in the 88 Plan. The 88 Plan will pay the cost of medical and custodial care for eligible players, including institutional custodial care, institutional charges, home custodial care provided by an unrelated third party, physician services, durable medical equipment, and prescription medicine. For eligible players who are institutionalized as an in-patient, the maximum annual benefit is $88,000. For eligible players who are not institutionalized as an in-patient, the maximum annual benefit is $50,000. 88 Plan benefits may be paid on behalf of an eligible player even if that player is also receiving T&P disability benefits from the Plan, but only if he is in the "Inactive" category. As of December 2010, only 151 NFL players were receiving benefits under the 88 Plan.

62. There also exists an "NFL Player Care Plan" subsidized by the NFL. The NFL Player Care Plan provides a uniform administrative framework for a range of programs that benefit eligible former NFL players. Currently, these benefits are: (a) joint replacement benefits; (b) assisted living benefits; (c) discount prescription drug benefits;

(d) Medicare supplement insurance benefits; (e) spine treatment benefits; (f) neurological care benefits; and (g) life insurance benefits.

63. There also exist other miscellaneous benefit plans that provide benefits to former players and are subsidized by the NFL. These include, but are not limited to, an annuity program (a type of deferred compensation program) and, a Joint Replacement Benefit Plan (assisting retired players who need joint replacement surgery).

**How The NFL Lockout Jeopardizes The Plan And Other Benefits For Retired NFL Players.**

64. Former NFL players who receive retirement and health benefits are not suffering under the threat of mere collateral damage from the NFL's lockout.

65. In August of 2010, the United States Department of Labor ("DoL") put the Plan on "endangered" status because the Plan's funded percentage was only 75%.[2] The DoL's letter to the Plan (available from its website at http://www.dol.gov/ebsa/pdf/e-notice092210001.pdf) noted that the Plan needed to devise a "funding improvement

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[2] As the DoL explains at its website, http://www.dol.gov/ebsa/criticalstatusnotices.html : "[u]nder Federal pension law, if a multiemployer pension plan is determined to be in critical or endangered status, the plan must provide notice of this status to participants, beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation and the Department of Labor. This requirement applies when a plan has funding or liquidity problems, or both, as described in the Federal law. If a plan is in critical status, adjustable benefits may be reduced and no lump sum distributions can be made. Pension plans in critical and endangered status are required to adopt a plan aimed at restoring the financial health of the pension plan."

plan." A copy of this letter is attached as Exhibit R. On information and belief, the ability of the Plan to maintain needed funding levels is jeopardized by the potential loss of revenue caused by any cancellation of the 2011 NFL season.

66. The average career of NFL players is short and they can suffer devastating injuries or long term effects (such as the "dementia" that the NFL's Plan 88 is directed against) that shorten their lives and greatly impact the quality of those lives. Often, their only hope of survival is through benefits received from the league. Any cessation or reduction of those benefits caused by a lockout is an injury that is life-threatening.

67. Many of the programs described above will be put in jeopardy because they are funded in part by money received if the 2011 NFL season goes forward. The lockout means these sources of revenue will no longer support these programs. This could result in the removal of vital services for the retirees – which particularly affects those who would otherwise not be able to afford them, *e.g.*, the high percentage of retired NFL players who live off of less than $200 per month in pensions. If these programs are not provided in a timely way, it could result in a player not finding an illness in time, not obtaining vital prescription drugs, and/or medical treatment. Former or retired players are injured by the lockout in other ways as well. They may be denied access to their medical records which could prevent a timely diagnosis.

68. Testing and treatment for dementia under the NFL's 88 Plan will not be allowed for those retired players who were not enrolled prior to the expiration of the 2006 CBA. These are not speculative concerns. Stories of the hardships wreaked upon

former NFL players by the League's conduct have surfaced in recent weeks. One involves Bruce Schwager, who played at various NFL training camps and now suffers from dementia, and was told by the NFLPA on March 14, 2011 that his bills for treatment at a dementia-care facility in Sugarland, Texas will no longer be paid.

69. Tuition assistance programs for retired players will be jeopardized and a retired player may be unable to finish his education.

70. The presence of the lockout and the absence of a new CBA mean that there will not be needed revenue that might permit medical monitoring for retired players. With the high rate of retired players being diagnosed with dementia and deceased retired players being diagnosed with CTE (Chronic Traumatic Encephalopathy), a trauma-based injury linked to the playing of professional football, the faster such monitoring procedures are instituted, the faster players will be able to receive treatment.

**The Treatment Of Former NFL Players By The NFLPA.**

71. During recent years especially, the relationship between the NFLPA and retired NFL players has become increasingly adversarial.

72. Up until his death in 2008, Eugene Upshaw ("Upshaw") was the Executive Director of the NFLPA. His relationship with retired NFL players was not good. As early as August of 2006, sportscaster Bryant Gumbel said of Upshaw:

> Before he cleans out his office have [outgoing NFL Commissioner] Paul Tagliabue show you where he keeps Gene Upshaw's leash. By making the docile head of the players union his personal pet, your predecessor has kept the peace without giving players the kind of guarantees other pros take for granted. Try to make sure no one competent ever replaces Upshaw on your watch.

73. In February of 2007, the *Los Angeles Times* reported:

> "It's just disgusting," said [Jerry] Kramer, a former Green Bay Packers star who receives a $358 monthly football pension. "The physical and economic hardships many guys are forced to live with are due to the lack of an adequate pension and disability package."
>
> Old-timers have been especially harsh in their criticism of Gene Upshaw, a former player who is the union's executive director. The NFL Players Assn. repeatedly declined requests in recent months to discuss pension and retiree medical benefit plans.

74. In June of 2007, while the Congressional inquiries into the League's treatment of its former players were at their zenith, Upshaw attacked one of his staunchest critics among the ranks of NFL retirees: DeLamielleure. Upshaw was quoted as saying in a newspaper interview: "[a] guy like DeLamielleure says the things he said about me, you think I'm going to invite him to dinner? No. I'm going to break his... damn neck."

75. In July of 2007, Upshaw and NFL Commissioner Roger Goodell ("Goodell") announced the formation of an "alliance" to deal with the problems of NFL retirees. Mike Ditka ("Ditka"), a former NFL player and a former coach of the Chicago Bears who created the organization known as Gridiron Greats to assist fellow NFL retired players, had this to say about the "alliance":

> In response to the "meeting," Mike Ditka, other board members of the Gridiron Greats Assistance Fund, and a variety of long-time advocates for retired player's reacted viscerally.
>
> "I don't believe any of the stakeholders were there. The

> meeting had no substance. If Gene Upshaw and Roger Goodell wanted the meeting to have substance, members of the Gridiron Greats Assistance Fund board would have been invited to attend. Not one member of our board was asked to attend that meeting," said Mike Ditka, GGAF Board Member. "If they wanted the meetings to have substance, NFL Players who have been long-time advocates of retired players rights such as former Baltimore Colt Bruce Laird, GGAF board members Joe DeLamielleure or Harry Carson would have been there. Most importantly, players and their families who have had to fight an inadequate disability system and bad pensions would have been there such as Brent Boyd, Mike Webster's son Garrett, Mike Mosley, Brian Demarco, Conrad Dobler, and Herb Adderley. I could name countless others. Were any of them there? Judging by the attendees invited to this meeting it was clear that the NFL and the NFLPA are not that interested in conducting meetings with substance that will bring about the major changes that are needed. Where were the owners?"

76. Also in 2007, a class action lawsuit was commenced in federal district court in the Northern District of California, in which it was alleged that the licensing arm of the NFLPA had breached its duty to market the names and likenesses of retired NFL players who had entered into a group licensing agreement with that entity. *Adderley v. National Football League Players, Inc.*, No. 3:07-cv-00943-WHA (N.D. Cal.) ("*Adderley*"). A jury found a breach of fiduciary duty and awarded the plaintiff class $7.1 million in compensatory damages and $21 million in punitive damages. The district court denied the defendants' post-trial motions (in an order attached as Exhibit T), saying:

> The punitive damages award will not be set aside. The jury could reasonably have found an intentional and calculated breach of a fiduciary duty by defendants, for the reason stated. The amount was not disproportionate to the wrong done or to the compensatory award. Viewed in a light most

> favorable to the verdict, the evidence was clear and convincing.

77. In April of 2011, a second lawsuit was brought by a class of retired players against the NFLPA and its licensing arm for additional breaches of fiduciary duties. *Grant v. NFLPA*, No. 2:11-cv-00318-RGK-FFM (C.D. Cal. June 6, 2011) ("*Grant*"). A copy of the amended complaint in that action is attached as Exhibit U.

78. Upshaw summed up his views of retired NFL players to a reporter for the *Charlotte Observer* in 2007: "[t]he bottom line is, I don't work for them [retired NFL players]. They don't hire me, and they can't fire me. They can complain about me all day long. They can have their opinion. But the active players have the vote. That's who pays my salary."

79. After Upshaw's death in 2008, he was succeeded as Executive Director of the NFLPA by Smith. It was reported in April of 2009 that Smith "said the union has a fiduciary duty to retired players." As an attorney, Smith knew or should have known of the significance of this admission.

80. While this appeared to be a turnaround from the attitude expressed by Upshaw, that has not been the case. In April of 2010, Smith sent a letter to NFL retired players, indicating he had an informal "blacklist " of dissidents prepared by his predecessor:

> They will use their friends in the media, they will use former players, and they will find current players to attack the solidarity of this Union, to extort every leverage point....I am blessed because Gene left me a detailed history of those who stood for what was right. He also left me a wealth of

> information detailing the efforts of those who fought and will fight against our players.

81. By early 2009, the "Retired Players Department" of the NFLPA was being viewed as ineffectual. As one NFL retiree website stated (under the heading "Is the NFLPA Retired Players Department Still Relevant?":

> The current state of the NFLPA Retired Players Department has left many retirees looking for representation elsewhere. In recent years the membership of many chapters of the NFL Retired Players Association has dropped dramatically. Less than 175 of the NFL's 13,000 retirees attended the NFLPA Retired Players Convention in Puerto Rico in 2008. This has led to many retirees questioning the relevance of the organization. Andre Collins, the director of the retired players department of the NFLPA, did not attend a single session of the three week class action trial regarding retired player licensing. Also absent was NFLPA Retired Players Steering Committee President Jean Fugett.
>
> The NFLPA has stated that every dollar that goes to retirees comes from the pockets of today's active players. This has lead to what many perceive as an adversarial relationship between NFL retirees and current players. The Retired Players Department at the NFLPA offices has done little to create a relationship between today's and yesterday's players. Many retirees feel that if they had a forum to discuss these issues with current players that it would be a positive for both groups.
>
> Retired Players Steering Committee President Jean Fugett will attend the active players annual meeting in Hawaii next weekend. Fugett will appear to represent the NFL's 13,000 retirees. In reality, Fugett only represents the less than 175 NFLPA Retired Players members who voted in the Steering Committee election in Puerto Rico.
>
> During his trip to Hawaii, Fugett has said he will not discuss the current lack of communication between active and retired players. Nor will he discuss the possibility of resolving the

> retired players class action lawsuit as several steering committee members and chapter presidents have requested. Fugett will not carry the message of the majority of NFL retirees to the active players in Hawaii. Active players should realize that while Fugett speaks in Hawaii he is representing roughly one percent of the NFL retired player population.

82. In 2010, New Orleans Saints quarterback Brees, one of the *Brady* plaintiffs and a member of the NFLPA's Executive Committee, voiced his antipathy for NFL retirees:

> There's some guys out there that have made bad business decisions. They took their pensions early because they never went out and got a job. They've had a couple divorces and they're making payments to this place and that place. And that's why they don't have money. And they're coming to us to basically say, "Please make up for my bad judgment."

83. DeLamielleure responded in a sharply-worded open letter:

> You want retired players to be on your team. You gotta be kidding me! On every team that I ever played on, we all had the same game plan. Well, your game plan is a lot different than the one most retired players want to see executed.
> Could one of the reasons you want us to join the "Team" be because the NFL Owner's have discontinued their contributions to your Annuity Plan, Second Career Savings Plan, Tuition Assistance Plan, Health Reimbursement Account? Well, if you want us to fight for your benefits, you better start fighting for ours!
>
> If you really wanted the retired players to rally around you Drew, you should have mentioned something about increasing the Pension Plan, or reforming the Disability Plan, which are the top two issues that concern retired players.
>
> "So where were you when the owners recently proposed to increase retired player pension benefits by $100 Million? The money for that expense would have come from a wage cap on rookies.

> It is simply astonishing to me that you expressed your concern about better health insurance for NFL wives, especially in light of the fact that there are thousands of retired players that never received a plug nickel for post-career health insurance and a Health Reimbursement Account like the one you will have when you retire.
>
> Some players have been denied an NFL disability and as a result, their bank accounts have been drained dry due to hospital and doctor bills. Many retired players can't find affordable health insurance because they're self-employed. Many others have the added problem of insurance companies dropping them, capping their annual payments, or outright denying them coverage because of (football related) pre-existing conditions.
>
> Unfortunately, I received some bad advice from the union and was encouraged to take my Pension at age 45. We were given bogus information that told us NFL players were dying at a much younger age than the general population, so I did what I thought was best for my family.
>
> Many retired players had to take their pension money out of necessity. We didn't make the millions that you and other players now make. I should note that the NFLPA finally realized their mistake and stopped allowing retired players to take early pensions and the Social Security Adjustment Option too.
>
> Like a lot of retired players, I'm sick and tired of hearing multi-millionaire players talk about increasing their own benefits, while at the same time giving lip service to retired players.

84. Sam Huff, a former linebacker for the Washington Redskins and a member of the Football Hall of Fame, echoed this criticism: "Drew Brees should keep his mouth shut. We [he and his Giants teammates from the 1950s and 1960s] would put a target on his back. I don't understand all this crap."

85. Indeed, soon after the NFLPA renounced its union status in March of 2011 (as described in further detail below), Smith tried to rewrite history, claiming that the NFL had never paid anything to League retirees and that it was not the fault of the NFLPA:

> [Reporter Michael Francesca of WFAN]: And your money [NFLPA] is disgraceful and your money is not nearly enough either.
>
> Smith: If that's a disgrace Mike.....teams pay nothing to former player pensions right now, and it's been that way since 19.....it's been that way since history.....I was going to date myself, but it's been that way since the AFL and NFL merged. So I think it's disgraceful that teams don't pay anything to the former players who made this game great.

In fact, the NFLPA had been acting in concert with the NFL in keeping retiree benefits low for many years. On information and belief, that practice was carried on in the period after its renunciation of union status, as described below.

86. George Martin, President of NFL Alumni, an organization that represents a number of retired NFL players, has tried to meet with Smith to discuss the NFL lockout described below and retiree benefits without any success. In late March of 2011, he met with Smith and other members of the NFLPA. Martin said the "atmosphere was very defiant, accusatory, and outright disrespectful." As he went on to state, "[r]egrettably, the long awaited and greatly anticipated one on one meeting with Mr. DeMaurice Smith never materialized as I had hoped. Although he was present during my two hour interrogation, no accommodation of my request for the private meeting was ever addressed." None has occurred since, as Martin discussed in a June 2011 article:

> Martin is frustrated that he cannot get a meeting with Smith to talk about the role and interests of retired players in the current collective bargaining agreement negotiations. He said it was "questionable" that Smith had the best interests of the alumni in mind.
>
> "When you don't have a conversation with the recognized leader of the NFL alumni, how can you say you have the best interests of retired players at heart when you won't even sit down and talk to their leadership," Martin said. "That to me flies in the face of that rationale."

**<u>The NFL's Decision to Terminate the SSA and CBA And The NFLPA's Decision To Renounce Its Union Status.</u>**

87. As reported by ESPN, shortly after the NFL and NFLPA entered into the March 2006 iteration of the CBA, the NFL club owners began to consider the possibility of a lockout. The word "lockout" became a popular term among owners. According to witness testimony and documents filed in recent litigation over NFL television contracts, a lockout was on the agenda of all NFL owners' meetings in 2007 and early 2008.

88. Internal NFL documents and testimony from NFL Commissioner Roger Goodell ("Goodell") in *White II* indicated that the NFL club owners knew early in 2008 that "in order for them to get a new labor deal that works for them, they need to be able to sustain a lockout, which requires financing and requires proper planning." Dallas Cowboys owner Jerry Jones told his fellow owners that they "needed to realistically assume they were locking out in 2011" to obtain a CBA that "worked for them."

89. The "financing" aspect of a lockout involved securing, in effect, "lockout insurance" from broadcasters with whom the NFL had existing contracts. As the court in *White II* explained (2011 WL 706319 at *2) (citations omitted):

> Soon after opting out of the CBA, the NFL began to negotiate extensions of its broadcast contracts. Rights fees in the broadcast contracts generate approximately half of the NFL's total revenues. Existing broadcast contracts effectively prevented the NFL from collecting revenue during a lockout in 2011 because the contracts did not require broadcasters to pay rights fees during a lockout or required the NFL to repay lockout fees in 2011. Moreover, some of the NFL's loan obligations include "average media revenues" covenants which provide that an "event of default" occurs if average annual league media revenues fall below a specified value. The NFL worried that its creditors could argue that a default event had occurred if the NFL locked out the Players in 2011, the same year that some broadcast contracts were set to expire, and that a default would give the Players bargaining power in labor negotiations. In light of "market conditions and strategic considerations," the NFL understood that it was "prudent to consider [broadcast contract] extension alternatives today."

90. As of May of 2008, the NFL had television broadcasting contracts with DirecTV for the 2006-10 seasons, with CBS, FOX and NBC, respectively, for the 2006-11 seasons, and with ESPN for the 2006-13 seasons.

91. Beginning in July of 2008, the NFL began to negotiate a contract extension with DirecTV. The resulting extended contract provided that DirecTV would pay a substantial fee if the 2011 season was not cancelled and up to 9% more, at the NFL's discretion, if the 2011 season was cancelled. "As a result, the NFL could receive substantially more from DirecTV in 2011 if it locks out the Players then if it does not." *White II*, 2011 WL 706319 at *2.

92. In April of 2009, the NFL began negotiating with CBS and Fox. Under the existing contracts, the broadcasters had to pay rights fees during a work stoppage, but would be entitled to refunds for the first three cancelled games during the affected season and for the remaining cancelled games during the following season. Under the renegotiated contracts, the requirement that the NFL repay rights fees attributable to the first three lost games in the affected season was eliminated and the NFL could repay the funds, plus money-market interest, over the term of the contract. If an entire season was cancelled, the contracts were automatically extended for an additional season. "Initially, FOX expressed reluctance to pay rights fees during a work stoppage. Goodell Direct Test. 19. The NFL considered opposition to the work-stoppage provision a 'deal breaker[ ].' " *White II*, 2011 WL 706319 at *3. The NBC contract negotiation, commenced in March of 2009, contained similar concessions.

93. In the fall of 2009, the NFL negotiated with ESPN that: (a) ESPN would, at the NFL's discretion, pay up to the full rights fee during a work stoppage; (b) a credit for the first three cancelled games of the season would be applied the same year; (c) the NFL could request less than the full rights fee; and (d) the NFL would repay the funds, with LIBOR interest plus 100 basis points, over the term of the contract. If an entire season was cancelled, the contract would be extended for an additional season. The NFL was not liable to repay more than ESPN's yearly rights fee. As part of this deal, ESPN got certain additional digital rights. "ESPN agreed to pay rights fees for July 2010 through July 2014. ESPN requested that the fee not be payable in the event of a work stoppage, but the NFL rejected the request. The NFL stated that the digital deal and the

work-stoppage provisions were 'linked.' " *White II*, 2011 WL 706319 at *4 (citations omitted).

94. The court in *White II* found (2011 WL 706319 at *8):

> However, under the terms of the SSA, the NFL is not entitled to obtain leverage by renegotiating shared revenue contracts, during the SSA, to generate post-SSA leverage and revenue to advance its own interests and harm the interests of the Players. Here, the NFL renegotiated the broadcast contracts to benefit its exclusive interest at the expense of, and contrary to, the joint interests of the NFL and the Players. This conduct constitutes "a design ... to seek an unconscionable advantage" and is inconsistent with good faith.

95. As an example of this bad faith, the court in *White II* offered the following (2011 WL 706319 at *12 n.4 (citation omitted)):

> The NFL's "Decision Tree" is one glaring example of the NFL's intent and consideration of its own interests above the interests of the Players. Moving forward with a deal depended on the answer to the question: "Does Deal Completion Advance CBA Negotiating Dynamics?" If yes, the NFL should "Do Deal Now"; if no, the NFL should "Deal When Opportune."

A copy of this "Decision Tree" is attached as Exhibit B. Similarly, an internal NFL document entitled "Key Current NFL Media Objectives" (attached as Exhibit C) referred to "secur[ing] access to revenue in 2011 if a work stoppage occurs"; this would permit "greater leverage in upcoming labor negotiations." Other internal NFL documents (attached as Exhibits D and E) referred to "shift[ing] leverage in labor negotiations away from Union...ability to pull money into a Work Stoppage year" and using revised broadcasting contracts as "leverage in negotiations...no hold up value for union."

Goodell and NFL CEO Steve Bornstein conceded in testimony in *White II* that the lockout insurance was a critical element in renewing the broadcast deals.

96. As a result of these broadcasting contract renegotiations, the NFL obtained a $4 billion war chest to use against the NFLPA in the event of a lockout.

97. The "planning" aspect of the NFL's lockout strategy was explained in an ESPN article:

> The owners' planning was equally bold. The league and its lawyers knew the players had been highly successful in antitrust litigation against the owners in the past, as a series of cases led by the late union leader, Gene Upshaw, resulted in skyrocketing salaries, bonuses for players and free agency and vastly increased health and disability benefits. If a lockout was to succeed, the owners reasoned, they must do something about their exposure to antitrust liabilities. In a development that stunned lawyers, judges and law professors across the nation, the league and its attorneys asked the U.S. Supreme Court to review a case the NFL had already won, arguing for an expansion of the decision to a total exemption from antitrust scrutiny. If the league's strategy had been successful in American Needle Inc. v. NFL, it would have eliminated the most formidable weapon the players had in their quest for fair treatment from team owners.
>
> But in a 9-0 decision, the Supreme Court rejected the league's claim of immunity from antitrust laws. It was a humiliating end to an owner strategy that could have changed the entire landscape of sports labor. As a result, the league likely faces another antitrust lawsuit from the players in Doty's courtroom, which, based on their track record there, is the last place the owners want to be.

98. The NFL's planning for a lockout took other forms as well.

99. NFL club owners began imposing lockout clauses in coaches' and executives' contracts that gave clubs the right to reduce compensation in the event of a

lockout. Examples of such clauses included language allowing the clubs to reduce, terminate, or suspend the contract on 20 days' notice, reduce salary by 50 percent if a lockout continued for more than 90 days, terminate the employee without pay on 60 days' notice, and extend the contract another year at the same terms as 2011 if at least eight NFL games were canceled due to a lockout.

100. In February of 2008, the NFL asked the United States Court of Appeals to end the jurisdiction of District Judge David Doty over the free agency/salary cap system. The NFL claimed that Judge Doty was biased in favor of the players. The appellate court rejected this contention. *White v. NFL*, 585 F.3d 1129, 1138-41 (8th Cir. 2009).

101. In March of 2008, the NFL retained veteran labor-relations attorney, Bob Batterman ("Batterman"), as outside counsel. Batterman is widely credited for orchestrating the 2004-05 lockout in the National Hockey League.

102. In December of 2008, the NFL began a strategic and premeditated course of action designed to reduce expenses by laying off 15 percent of its staff.

103. In March of 2009 at the annual NFL owners' meeting, the NFL club owners passed a resolution allowing all NFL teams to opt out of a defined benefit pension plan for NFL coaches and executives. As a result, nine teams have opted out of the league's established policy and now provide less beneficial pension plans to coaches and executives.

104. In December of 2009, the NFL informed the NFLPA of its intent to terminate the Supplemental Revenue Sharing ("SRS") program that purportedly promotes

competitive balance and helps the lower-revenue clubs compete. Andrew Brandy, the former Vice-President of the Green Bay Packers, described the NFL's decision to pull out of the SRS plan as "sending a clear message to its players and the union that the teams that want to go under the floor and cut team payroll to pre-2006 levels, say $85-$90 million...will now have a legitimate reason for doing so."

105. In February of 2010, The NFL launched a new website, www.NFLlabor.com, to exclusively address labor matters and present the league's position on negotiations with the NFLPA.

106. In February of 2010, the NFLPA initiated proceedings against the league because it discovered that the NFL did not provide its lower-revenue clubs with all of the SRS that was promised in the CBA for the years 2006-08.

107. In that same month, the NFL announced the hiring of former NFLPA President Troy Vincent as Vice-President for Player Development for Active Players, less than a year after he lost the election to be the NFLPA's Executive Director and as the league and union are engaged in contentious negotiations for a new CBA. The timing of the hiring raised questions about the league's motives; William Gould, former Chairman of the National Labor Relations Board ("NLRB"), said it was quite uncommon for management to hire a former leader of the union it negotiates against during the midst of collective bargaining.

108. In that same month, the NFL rejected the NFLPA's proposal to continue the salary cap system for an additional year.

109. In August of 2010, the NFL club executives negotiated contracts of the 2010 first-round draft picks in a manner that reflected their belief that there would be a lockout in 2011 by changing the payment date of option bonuses from the first two weeks of the league year, which begins in March, to around the time the first regular-season game is played in 2011, whenever that might be.

110. In September of 2010, the NFL informed its employees of its three-phase plan that will require many of its employees to take unpaid leaves of absence as well as pay cuts.

111. In October of 2010, the NFL's political action committee, "Gridiron PAC," made donations to Speaker Nancy Pelosi, both the House Minority and Senate Majority leaders and the chairmen of the House and Senate judiciary committees, who oversee the league in numerous capacities, as well as several other influential lawmakers. An Associated Press report stated: "The union wants Congress to use its leverage to help prevent a lockout. The NFL, by contrast, wants Congress to butt out,"

112. In October of 2010, the NFL required banks lending to its teams to extend the traditional six-month grace period for declaring a default to stretch instead through to the end of the 2011 season in preparation for a lockout.

113. In the context of these ongoing developments, the NFL and NFLPA were negotiating a new CBA for over two years before the efforts failed.

114. Initially, NFL club owners had three proposals. The first was to reduce the players' salary cap revenue base by allowing an 18 percent increase in new stadium cost credits. This base reduction would cut the players' share of total revenue

(57.5 percent in 2009) by about 10 percent. The second proposal sought to modify the existing EPP by imposing a rookie wage scale. In their third proposal, the NFL club owners wanted to increase the regular season from 16 to 18 games by reducing the preseason from four to two games.

115. Throughout these negotiations, the NFLPA sought to obtain information from the NFL that would back up the latter's demands. Exhibits F through K are copies of letters sent by Richard Berthelsen, General Counsel for the NFLPA, to NFL representatives on August 6, 2009 and on May 18, June 7, July 8, October 27, and December 15, 2007 asking for information on NFL club costs, television contracts and insurance and benefits. As several of the letters reflect, the NFL was not all that forthcoming in providing some of this information. NFL club members declined to attend negotiation sessions with representatives of the NFLPA. The parties were also discussing proposals that would have increased benefits to retired NFL players.

__**Renunciation By The NFLPA And The NFL's Lockout**__

116. On February 10, 2011, the NFL filed a charge against the NFLPA with the NLRB, accusing the union of failing to negotiate in good faith.

117. Four days later, federal mediator George Cohen ("Cohen") was brought in and numerous days of mediation ensued in which the parties extended the expiration date of the CBA several times.

118. The mediation was unsuccessful. On March 11, 2011, Cohen issued the following statement:

> [T]he parties have not achieved an overall agreement , nor have they been able to resolve the strongly held, competing positions that separated them on core issues.
>
> In these circumstances, having reviewed all of the events that have transpired, it is the considered judgment of myself and Deputy Director Scott Beckinbaugh, who has been engaged with me throughout this process, that no useful purpose would be served by requesting the parties to continue the mediation process at this time.

A copy of Cohen's statement is attached as Exhibit O.

119. On March 11, 2011, Smith sent a letter to all NFL Club Presidents and General Managers, informing them that the NFLPA had "renounced its status as collective bargaining agent for all NFL players." As a result, no NFLPA representative "has the authority or authorization to engage in any collective bargaining discussions, grievance processing or any other activities associated with collective bargaining on behalf of players at either the club or the league level." The letter stated that the NFLPA would also no longer be overseeing the activities of player agents. A copy of this letter is attached as Exhibit L. On the same day, Smith sent a similar letter to Goodell, which is attached as Exhibit M.

120. The practical significance of these communications was explained in *Powell v. NFL*, 764 F. Supp. 1351, 1358-59 (D. Minn. 1991) (footnote and citations omitted):

> Based on the foregoing, the court holds that the plaintiffs are no longer part of an "ongoing collective bargaining relationship" with the defendants. The NFLPA no longer engages in collective bargaining and has also refused every overture by the NFL defendants to bargain since November of 1989. The NFLPA further has abandoned its role in all

> grievance arbitrations and has ceased to regulate agents, leaving them free to represent individual players without NFLPA approval. The plaintiffs have also paid a price for the loss of their collective bargaining representative because the NFL defendants have unilaterally changed insurance benefits and lengthened the season without notifying the NFLPA.
>
> Because no "ongoing collective bargaining relationship" exists, the court determines that nonstatutory labor exemption has ended. In the absence of continued union representation, the Eighth Circuit's rationale for the exemption no longer applies because the parties may not invoke any remedy under the labor laws, whether it be collective bargaining, instituting an NLRB proceeding for failure to bargain in good faith or resorting to a strike.

*Accord McNeil II*, 790 F.Supp. at 883-84. The result of the NFLPA's renunciation of its union status was thus: (a) that it or its representatives could no longer negotiate collectively on behalf of NFL players without violating the antitrust laws and (b) that the NFL Defendants could no longer negotiate collectively with NFL players without violating the antitrust laws.

121. By March 11, 2011, the NFLPA had amended its bylaws to prohibit it or its members from engaging in collective bargaining with the NFL, the NFL's member clubs or their agents.

122. The NFLPA filed a labor organization termination notice with the DoL.

123. An application was filed with the Internal Revenue Service to reclassify the NFLPA for tax purposes as a professional association rather than a labor organization.

124. On March 11, 2011, the NFL sent a letter to Smith announcing its intention to commence a lockout on March 12. A copy of that letter is attached as Exhibit N. The lockout took effect at the appointed time.

125. On March 17, 2011, Goodell wrote directly to active NFL players, presenting the league's side of the controversy. That letter is attached as Exhibit V. In that letter, he noted that the League had offered at the federal mediation overseen by Cohen:

> - Enhanced retirement benefits for pre-1993 players. More than 2,000 former players would have received an immediate increase in their pensions averaging nearly 60 per cent, funded entirely by the owners.
>
> - A new entry-level compensation system that would make more than $300 million per draft class available for veterans' pay and player benefits.

126. Subsequently on April 4, 2011, Mark Murphy (President and CEO of the Green Bay Packers) and Jerry Richardson (owner of the Carolina Panthers), both of whom are former players, sent a letter to former NFL players. That letter, attached as Exhibit W, stated in part:

> On March 11, the NFL Players Association - which states that it represents players "past, present and future" - walked away from the bargaining table, announced it was giving up its status as a labor organization, and sued the NFL in Minnesota. As retired players who are members of the owners' bargaining committee, we have a unique perspective because we understand these issues from all sides. More importantly, we understand the challenges former players and their families face.
>
> The union walked away from mediation, cutting off negotiations on an offer that was made by the clubs to avoid a

> work stoppage and that would have provided important improvements in retired player benefits. We know some former players have struggled financially. This was a real attempt to address those financial concerns. We are committed to making sure that when we reach a new agreement it better addresses the needs of our retirees. It's the fair thing to do. It's the right thing to do and it recognizes and respects your contributions to our game.
>
> ****
>
> It is important to us that you know the facts about what we offered the union. Among the elements of our March 11 proposal that would have improved benefits for former players are the following:
>
> --A new pension supplement for retired players aged 55 or above. This supplement would give more than 2,000 retirees an immediate increase in pension payments averaging almost 60 percent.
>
> --Improvements in the Disability Plans and the 88 Plan to ease the qualifications for disability benefits and increase the value of those benefits to qualifying retirees.
>
> --Expanded career transition programs to assist former players in developing second careers, both in and out of football.
>
> --A new rookie pay system that would re-allocate more than $300 million per draft class to fund benefits for current and retired players.
>
> These are significant offers that would have a measurable impact on the people who made football great. Sadly, the players' union wasn't listening.

127. Reaction to the NFL's lockout strategy has been negative, even before it was effectuated. A *New York Times* article quoted Fay Vincent, the former Commissioner of MLB, as saying: "[b]ut it's hard to look at these circumstances and not

see a case of owners' wanting their cake and eating it, too." As he added: "[t]he N.F.L. is the premier sports business in the country by a large margin….There is only one way to go, and that is down. It's pretty dangerous to tamper with fans' passion and good will."

128. Jonathan Weiler, Professor of International Studies at the University of North Carolina Chapel Hill has likewise noted that players (including former players), not club owners, bear the brunt of any lockout:

> But the two sides are not really comparable. Yes, there are many wealthy players in the NFL, but the vast majority will not be for most of their lives.
>
> If they stick on NFL rosters for a full season or more, they make great salaries by normal standards. But the average NFL player won't last four years in the league and this is, in itself, a misleading figure, because there are plenty of players who last 10-15 years. So, if the average player tenure in the league is 3.6 years..., the median tenure of an NFL player, which is a much more relevant gauge of the life of a typical player, is less than that figure implies.
>
> The media (and the owners) spend a lot of time focusing on the salaries of players like Sam Bradford and Albert Haynesworth. But for every Haynesworth or Bradford, there are dozens of players who may make the league minimum for the short duration in which they play in the league. And given the significant long-term health problems that many NFL players face, the impact of those problems on their job prospects, the bills they owe, those few years of good earnings can evaporate quickly. No NFL owner is ever going to be out on the street. By contrast, NFL players do find themselves there (remember Hall-of-Fame center Mike Webster?).
>
> In sum, every single owner is insanely wealthy by any reasonable standard and will remain so for the rest of their lives. The same cannot be said of many players….

But it's much worse than the simple fact that the majority of players who put on an NFL uniform at some point will not last in the league very long nor make a ton of money.
One central justification under capitalism for rewarding some people with great wealth is the risk they take to achieve that wealth. That risk, while pursued for the sake of self-interest, contributes to a greater good in the form of innovation and wealth creation. No such risk accrues to NFL owners, however. Once you are granted a franchise, you are granted a license to print money. Incompetent owners may cost their team wins on the field, but they will still make a killing off the field.

NFL revenues run to $8 billion a year and, as Forbes magazine frequently points out, many other benefits redound to owners of sports franchises, even if those benefits don't show up on franchise balance sheets. King writes that it's a burdensome new reality for NFL franchises that they have to finance new stadiums on their own, rather than have taxpayers pay for them. Only in the outrageously entitled world of the super-wealthy would it be burdensome that rather than being handed a billion dollar asset, they might actually have to pay for it themselves. And Jerry Jones' new stadium, for example, was built with an estimated quarter of a billion dollars in public funds. Furthermore, if building new stadiums weren't a profitable endeavor in the long run, let me assure you that teams wouldn't be building them in the first place.

The stadium financing issue aside, the risk in the NFL is all on the side of the players. They are the ones who exist in an intensely competitive market for talent. And they are the ones who put their bodies on the line everyday. It's the players, not the owners who, in football especially, but to lesser degrees in other sports, risk the possibility of a lifetime of pain and discomfort or, as the evidence about the long-term effects of brain trauma increasingly shows, depression and suicide (and those realities the NFL spent many years denying).

Rutgers' Eric LeGrand, paralyzed from the neck down Saturday night in an on-field collision, is only the latest reminder of this simple, indisputable fact: the risk is all on the side of the players. All of it. The owners cannot lose and they don't lose. Period. The players can lose catastrophically. Remarkably, while King does discuss the players' concerns about pensions and health care for retired players, he fails to mention the long-term health consequences from playing football, as if that has no relevance to the players' views about much of the league's revenue they're entitled to.

****

The owners win when media focus on things like the rookie wage scale, 60% revenue sharing, and the like. The owners lose when media point out that only the players are putting their lives and bodies on the line in a cauldron of intense competition. The reality is that owners of sports franchises are, in many cases, spoiled brats who expect to make impossibly large sums of money by dint of the fact that, since they are already rich, they are entitled to become richer still. They assume virtually no risk, earn massive sums of guaranteed money regardless of the product they put on the field and still feel a need -- with the indispensable aid of Commissioner Goodell -- to distort basic facts about the nature of sports economics and their own profitability.

As I wrote a few years ago, in the context of growing evidence of the devastating long-term impact of traumatic brain injury on retired NFL players, this is especially indefensible.

And remember one more thing -- when there is a work stoppage in sports, it's almost always blamed on the players. But the 2011 season, if it isn't played, will be because of an owners' lockout, not a players' strike. And in keeping with their true nature, the owners have announced that, if there is a lockout, they will stop paying for players' health insurance, though they are still estimated to receive an estimated $1 billion in TV revenue next year, regardless of whether a game is played.

129. The concerns about brain injuries to former NFL players caused by concussions during their service in the league have been increasing in recent years as a

result of several studies of former NFL players. An article in the *New York Times* dated October 21, 2010 reported the following:

> A 2000 study surveyed 1,090 former N.F.L. players and found more than 60 percent had suffered at least one concussion in their careers and 26 percent had had three or more. Those who had had concussions reported more problems with memory, concentration, speech impediments, headaches and other neurological problems than those who had not, the survey found.
>
> A 2007 study conducted by the University of North Carolina's Center for the Study of Retired Athletes found that of the 595 retired N.F.L. players who recalled sustaining three or more concussions on the football field, 20.2 percent said they had been found to have depression. That is three times the rate of players who have not sustained concussions.
>
> As scrutiny of brain injuries in football players has escalated in the past few years, with prominent professionals reporting cognitive problems and academic studies supporting a link more generally, the N.F.L. and its medical committee on concussions have steadfastly denied the existence of reliable data on the issue.
>
> But in September 2009, a study commissioned by the N.F.L. reported that Alzheimer's disease or similar memory-related diseases appear to have been diagnosed in the league's former players vastly more often than in the national population — including a rate of 19 times the normal rate for men ages 30 through 49.

130. The plight of former NFL players suffering from brain injuries caused by their service in the game is no better illustrated than in the case of Dave Duerson ("Duerson"), a former safety for the Chicago Bears and the New York Giants. After suffering months of headaches, blurred vision and deteriorating memory, Duerson committed suicide at the age of fifty on February 17, 2011. His final note asked that his

brain be given to the NFL brain bank for evaluation. On May 2, 2011, researchers at Boston University reported that Duerson was suffering from CTE, the trauma-induced disease found in numerous deceased former NFL players. When this information was reported, Smith stated that the fact that Duerson was suffering from CTE "makes it abundantly clear what the cost of football is for the men who played and the families. It seems to me that any decision or course of action that doesn't recognize that as the truth is not only perpetuating a lie, but doing a disservice to what Dave feared and what he wanted to result from the donation of his brain to science."

**Litigation And Settlement Discussions**

131. On March 11, 2011, the *Brady* plaintiffs filed a class action lawsuit against the NFL and its member clubs in connection with some of the events described herein, alleging various antitrust, contract and tort theories. In their complaint, the *Brady* plaintiffs did not seek to represent a class of former NFL players. They did seek to represent classes of rookies, established active players and free agents.

132. On information and belief, This lawsuit has been controlled by the NFLPA, as a reasonable opportunity for discovery should establish. Some of the named plaintiffs therein, like Brees and Vrabel, are members of the NFLPA's Executive Committee. Outside counsel for the NFLPA and Smith represent the named plaintiffs and have participated in settlement talks. On information and belief, the NFLPA is subsidizing the lawsuit.

133. On March 28, 2011, a complaint was filed by the named plaintiffs herein against the NFL and its member clubs. *Eller v. NFL*, No. 11-cv--00748 (D. Minn.) ("*Eller*"). That complaint was brought principally on behalf of a class of retired NFL players, as well as a class of prospective rookies defined more narrowly than in the *Brady* complaint. The Court has since consolidated the *Eller* and *Brady* cases under the *Brady* docket number.

134. Counsel for the *Brady* plaintiffs have repeatedly disclaimed any intent to represent the class of retired players defined in the *Eller* complaint.

135. The position taken by the NFL in the *Brady* and *Eller* lawsuits is that the lockout will continue until the NLRB rules on the League's complaint, which could take many months, if not years.

136. On April 6, 2011, the district court held a hearing on the motions to enjoin preliminarily the NFL's lockout filed by both the *Brady* and *Eller* plaintiffs; counsel for the *Eller* plaintiffs were among those who argued. On April 25, 2011, the district court issued an order enjoining preliminarily the NFL's continuation of its lockout, *Brady v. NFL*, No. 11-639 (SRN/JGG), 2011 WL 1535240 (D. Minn. April 25, 2011). The district court subsequently denied the request to stay that order pending appeal. *Brady v. NFL*, No. 11-639 (SRN/JGG), 2011 WL 1578580 (D. Minn. April 27, 2011). The United States Court of Appeals for the Eighth Circuit stayed the injunction order on a provisional basis until it could rule on the NFL's formal stay motion. *Brady v. NFL*, 638 F.3d 1004 (8th Cir. 2011). It thereafter issued a formal stay on May 16, 2011.

*Brady v. NFL*, 640 F.3d 785 (8th Cir. 2011). The Eighth Circuit heard oral argument on June 4, 2011, but has yet to issue any decision on the merits.

137. On April 11, 2011, the district court ordered mediation to occur before Chief Magistrate Judge Arthur Boylan. Mediation at which all parties were present occurred on April 14-15 and 19-20, and May 15-16. At all times in those proceedings, counsel for the *Eller* plaintiffs alone represented the interests of retired NFL players.

138. Indeed, in connection with proposals to be submitted to Judge Boylan on May 27, counsel for the *Brady* plaintiffs wrote an e-mail to counsel for the *Eller* plaintiffs, on May 19, saying "[w]e would propose that the Brady plaintiffs cover the economic system issues: free agency rules and restrictions, rookie rules and restrictions; and the economic split (*i.e.*, salary cap or no salary cap, revenue split with players, etc). Eller would make the proposal on the retired player issues." *See* Exhibit X.

139. Thereafter, the talks broke up in separate sessions. In the separate sessions, on information and belief, Smith has played a leading role on behalf of the *Brady* plaintiffs and the NFLPA.

140. Counsel for the *Eller* plaintiffs met with Dennis Curran of the NFL to discuss retiree issues on two occasions. They made a proposal for increased benefits that went significantly above the level proposed by the NFL at the federal mediation overseen by Cohen and proposed alternatively that 2-1/2% of all League revenues be set aside for the needs of retired NFL players, to be contributed equally by the League and by current NFL players. While the League provided information to counsel for the *Eller*

plaintiffs in connection with these discussions, it has made no substantive counteroffer of its own.

141. Counsel for the *Eller* plaintiffs also repeatedly told the League that any settlement would have to provide that its interaction with former NFL players would have to occur through an organization devoted to the interests of such players that was separate from the NFLPA.

142. Counsel for the *Ell*er plaintiffs made it clear to all Defendants while these separate discussions were ongoing that they alone represented the interests of retired players, as reflected in a letter sent on June 6 to Judge Boylan. As counsel for the *Eller* plaintiffs told a reporter on June 28: "[i]f our side is not heard and our desire for change is not met, we will not agree to a settlement of this case....We want substantial changes in all phases of the post-career life of retirees and those issues will be addressed." Eller himself met with Goodell on June 22, 2011 and voiced his concerns.

143. Counsel for the *Eller* plaintiffs were also active in organizing the largest gathering ever of various groups within the NFL retired community to come together in supporting a combined effort to resolve retiree issues with the League. They caused to be convened a retiree summit held in Minneapolis, Minnesota on May 15, 2011. Attendees from Fourth and Goal, Gridiron Greats (Ditka's organization), Retired Players' Association (Eller's organization), Independent Football Veterans, Dignity After Football, NFL Alumni chapters, and NFLPA were all present. A follow-up meeting was held in Chicago on May 25 for the purposes of making a combined presentation to Judge Boylan on retiree issues.

144. Counsel for the *Eller* plaintiffs also organized a massive press conference on the plight of retirees held at the National Press Club on June 20, 2011. Members of the Football Hall of Fame (Eller, Elvin Bethea of the Houston Oilers, DeLamielleure, Krause, Lem Barney of the Detroit Lions), as well as George Visger, Conrad Dobler, Irv Cross, Dave Pear, and several recently retired NFL players were all present. Retired NFL players from every decade since the 1960s were in attendance. A petition of support has been signed by hundreds of persons, including many former NFL players and Hall of Famers.

145. In the period since May 16, it has been publicly reported that the NFL and the *Brady* plaintiffs (represented by Smith and other NFLPA staff members) have held five negotiating sessions in Chicago, Boston, Long Island, Maryland and Minneapolis. Neither the *Eller* plaintiffs nor their counsel were allowed to attend these meetings. Nolan Harrison ("Harrison"), the NFLPA's Senior Director of Retired Players, was quoted as saying on June 28 that "[w]e obviously can't comment on any of the specifics, but the suit by their group is what it is. I think the retired players were very well represented in the earlier negotiations [before Cohen]by Cornelius Bennett, Jim McFarland and even [NFLPA president] Kevin Mawae who has been retired for a year now."

146. In fact, upon information and belief and as a reasonable opportunity for discovery should confirm, at least one former NFL player who serves in a position with the NFLPA has complained privately about representatives for retired players being excluded from these meetings.

147. In June of 2011, it became clear from news reports that the *Brady* plaintiffs and the NFLPA and the NFL were negotiating issues relating to retired NFL players. A public tweet by Harrison dated June 22, 2011 indicated that "[a]t each session the interest of former players have been well represented by hall of famer Cornelius Bennett and others." No one among the *Eller* plaintiffs authorized the NFLPA or the *Brady* plaintiffs to assume that role.

148. Upon information and belief and as a reasonable opportunity for discovery should establish, the reported terms being discussed by the NFL and NFLPA with respect to retired NFL players are substantially less than what the *Eller* plaintiffs had proposed to the NFL and substantially less than what the League had presented in the federal mediation before Cohen.

149. Upon information and belief and as a reasonable opportunity for discovery should establish, the League was willing to pay additional amounts to retired NFL players within and outside of the League's salary cap, but the NFLPA has insisted that the sum within the salary cap be given to current players instead.

150. Consequently, it appears that the NFLPA is sacrificing the rights and benefits earned by and owed to NFL retired players in order to increase the revenues to active NFL players. The settlement talks among the *Brady* plaintiffs the NFLPA and the NFL and its member clubs with respect to former NFL players was intended to, and did, circumvent and harm retired NFL players for the benefit of the NFLPA and the NFL and its member clubs. Through the settlement they are forging, the *Brady* plaintiffs, the

NFLPA and the NFL Defendants are conspiring to set retiree benefit and pension levels at artificially low levels.

## COUNT I

## Violation of Section 1 of The Sherman Act (Against All Defendants)

151. Plaintiffs repeat and reallege each of the allegations contained in the foregoing paragraphs.

152. There is a relevant market for the services of major league professional football players in the United States. The settlement discussions among the NFL Defendants and the *Brady* plaintiffs (and through them, the NFLPA) substantially restrain and injure competition in that market and will continue to do so.

153. As of the time the NFLPA renounced its union status, the NFL Defendants could not agree to bargain jointly with respect to the rights and benefits of former NFL players without violating the antitrust laws. As alleged herein, they nonetheless did so. Likewise, as of the time the NFLPA renounced is union status, neither the *Brady* plaintiffs nor the NFLPA nor Smith (either acting directly or through their agents) could negotiate on behalf of current NFL players with respect to the rights of former NFL players. As alleged herein, they nonetheless did so. Likewise, as of the time the NFLPA renounced is union status, no antitrust immunity protected the NFL Defendants , the *Brady* plaintiffs, Smith and the NFLPA from liability for any agreement on the level of benefits to be provided to former NFL players.

154. The subsequent consensual discussions among the NFL Defendants, the *Brady* plaintiffs and the NFLPA (in which Smith was a critical participant) were designed to limit the benefits accorded former NFL players in order to divert more revenue to current NFL players are a *per se* violation of the antitrust laws or, alternatively, are actionable under the Rule of Reason.

155. Each of the Defendants is a participant in this unlawful contract, combination or conspiracy. The claims against the *Brady* plaintiffs under this count are raised as crossclaims pursuant to Fed. R. Civ. P. 13(g).

156. The Plaintiffs and class members have suffered and will suffer irreparable antitrust injury to their business or property by reason of the continuation of this unlawful contract, combination or conspiracy. The contract, combination or conspiracy described herein will injure Plaintiffs and class members by depriving them of the ability to receive the level of retirement, health and medical benefits that they could have obtained in a market free from the alleged restraint.

157. Plaintiffs and members of the class seek injunctive relief pursuant to 15 U.S.C. § 26 to prevent these discussions between the NFL and the NFLPA aimed at injuring retired NFL players from proceeding and to preclude any agreement among Defendants that depresses or limits the benefits given to former NFL players from being implemented.

158. In addition, Plaintiffs and members of the class seek a declaration of rights that the NFLPA cannot represent the interests of retired NFL players in the settlement or prosecution of this litigation.

159. In the event that the Court deems injunctive relief to be unavailable to remedy the violation alleged in this count, Plaintiffs and members of the class in the alternative seek treble damages pursuant to 15 U.S.C. § 15.

## COUNT II

## Violation of Section 1 of The Sherman Act (Against The NFL Defendants)

160. Plaintiffs repeat and reallege each of the allegations contained in the foregoing paragraphs.

161. There is a relevant market for the services of major league professional football players in the United States. The lockout by the NFL Defendants and the NFLPA substantially restrains and injures competition in that market and will continue to do so.

162. No antitrust immunity protects the NFL Defendants from monetary liability for agreeing to engage in the lockout.

163. The lockout by the NFL and its member clubs is a *per se* violation of the antitrust laws or, alternatively is actionable under the Rule of Reason.

164. Each of the NFL Defendants is a participant in this unlawful combination or conspiracy.

165. The Plaintiffs and class members have suffered and will suffer irreparable antitrust injury to their business or property by reason of the continuation of this unlawful combination or conspiracy. The agreement described herein has injured and will continue to injure Plaintiffs and class members by depriving them of the ability

to receive the level of retirement, health and medical benefits that they could have obtained in a market free from the alleged restraint.

166. For this antitrust violation, Plaintiffs and members of the class seek treble damages pursuant to 15 U.S.C. § 15. as well as declaratory rlief.

## COUNT III

## Breach of Fiduciary Duty (Against The NFLPA)

167. Plaintiffs repeat and reallege each of the allegations contained in the foregoing paragraphs.

168. As noted above, Smith has conceded that the NFLPA owes a fiduciary duty to retired NFL players.

169. The NFLPA cannot represent the interests of retired NFL players in any negotiations with the NFL because it has a conflict of interest in light of the adverse interests between current and former NFL players in such negotiations, the statements made by NFLPA representatives with respect to former NFL players, the ongoing litigation between the NFLPA and former NFL players in *Grant*, the jury verdict in *Adderley*, and the statements of the NFLPA's counsel in the litigation concerning the lockout.

170. By nonetheless seeking to represent the interests of former NFL players in this litigation, the NFLPA has breached its fiduciary duty as to them and harmed them irreparably.

171. For such breach, Plaintiffs and members of the class are entitled to injunctive relief, as well as a declaration that the NFLPA breached its fiduciary duty to

Plaintiffs and the members of the class. In the alternative, Plaintiffs and members of the class seek.compensatory and punitive damages in an amount to be determined.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment with respect to their Complaint as follows:

1. With respect to Count I, certifying the class proposed in this Complaint pursuant to Fed. R. Civ. P. 23(b)(1), Rule 23(b)(2) and 23(b)(3);

2. With respect to Count I, enjoining discussions between the NFL and the NFLPA aimed at injuring retired NFL players from proceeding;

3. With respect to Count I, declaring that the agreement and discussions among the NFL its member clubs, the NFLPA, as it applies to matters involving former NFL players, violate Section 1 of the Sherman Act;

4. With respect to Count I, as an alternative if injunctive relief is deemed unavailable, awarding Plaintiffs and members of the class compensatory damages in an amount to be trebled by law;

5. With respect to Count II, awarding Plaintiffs and members of the class compensatory damages in an amount to be trebled by law and declaratory relief;

6. With respect to Count III, awarding Plaintiffs and members of the class injunctive and declaratory relief, or, in the alternative, compensatory and punitive damages in an amount to be determined.

7. With respect to both counts, awarding Plaintiffs their costs and disbursements in this action, including reasonable attorneys' fees;

8. With respect to both counts, granting Plaintiffs and class members such other and further relief as may be appropriate.

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury on all matters so triable.

Dated: July 4, 2011

Respectfully Submitted,


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