IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

| | | |
|---|---|---|
| Tom Brady, Drew Brees, Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Von Miller, Brian Robison, Osi Umenyiora, and Mike Vrabel, individually, and on behalf of all others similarly situated,<br>Plaintiffs,<br><br>v.<br><br>NATIONAL FOOTBALL LEAGUE, et al.,<br><br>Defendants. | : | No. 11-cv-00639-SRN-JJG |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**STATUTES**

Plaintiffs Tom Brady, Drew Brees, Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Von Miller, Brian Robison, Osi Umenyiora, and Mike Vrabel ("Plaintiffs" or "Players") submit this Memorandum in Support of their Motion for Summary Judgment against Defendants National Football League and its member teams ("Defendants" or "NFL"), requesting a declaration that Defendants' "lockout" violates Section 1 of the Sherman Act, 15 U.S.C. §1. In addition, the "Under-Contract Plaintiffs" – Brady, Brees, Robison and Umenyiora – seek a declaration that Defendants are breaching their Player Contracts for 2011 by refusing to pay amounts contractually owed and by depriving them of the opportunity to render services as professional football players. An expedited determination of liability is warranted given the Court of Appeals' ruling that the Norris-LaGuardia Act precludes preliminary injunctive relief against the lockout as to Under-Contract Plaintiffs.[1]

## PRELIMINARY STATEMENT

This is the unusual antitrust case in which the existence and terms of Defendants' horizontal agreement to completely eliminate competition are undisputed. See, e.g., Ltr. from D. Curran to D. Smith, March 11, 2011 ("Lockout Notice") (Ex. A).[2] The controlling liability issue is whether Defendants' "lockout" constitutes a violation of

[1] The Players will pursue treble damages and other remedies for their claims against the lockout after the Court decides the liability issues presented by this motion.

[2] References to "Ex. __" are to the exhibits to the declaration of Barbara Berens filed concurrently herewith.

Section 1 of the Sherman Act ("Section 1"). Given the undisputed factual record, that pure legal question is for the Court and no discovery is necessary.

This Court preliminarily answered that question in the affirmative (Memorandum Opinion and Order at 83-84, Apr. 25, 2011, ECF No. 99 ("PI Order")), and nothing warrants changing that conclusion now. Defendants do not deny that their "lockout" constitutes a per se illegal group boycott and price-fixing agreement that violates the antitrust laws. E.g., id. at 84 ("[T]he NFL presently has identified no defense against Count I of the Brady Plaintiffs' Complaint"); Defendants' Notice of Appeal, Apr. 25, 2011, ECF No.100 (not appealing District Court's preliminary determination on the antitrust merits of Count I).

The Eighth Circuit's holding that the Norris-LaGuardia Act ("NLGA") deprives the Court of jurisdiction to enjoin the lockout as to Under-Contract Plaintiffs does not preclude a finding of antitrust liability. Opinion at 34, No. 11-1898 (8th Cir. July 8, 2011) ("The parties agree that the Act's restrictions on equitable relief are not necessarily coextensive with the substantive rules of antitrust law, and we reach our decision on that understanding."). Defendants themselves concede the availability of antitrust damages even when the NLGA prevents injunctive relief. Preliminary Injunction Hearing Tr. 122, Apr. 6, 2011 ("The Norris-LaGuardia Act . . . does not bar claims for damages . . . .").

Defendants will respond that the non-statutory labor exemption gives them carte blanche to violate the antitrust laws. This labor exemption defense – preliminarily rejected by this Court – rests on the false premise that a collective bargaining relationship

persists. But the Players exercised their labor law right not to unionize, following the steps previously approved by Judge Doty and the NLRB. See PI Order at 37-39; Powell & McNeil v. NFL, 764 F. Supp. 1351, 1356-58 (D. Minn. 1991); Pittsburgh Steelers, Inc., Case 6-CA-23143, 1991 WL 144468, at *1-2 (N.L.R.B.G.C. June 26, 1991).[3] And, regardless, Defendants waived any right to contest the Players' disclaimer of their union. See White Stipulation & Settlement Agreement ("SSA"), Art. XVIII § 5(b); 2006-2012 NFL Collective Bargaining Agreement ("CBA"), Art. LVII § 3(b) (Exs. B and C). The effectiveness of Defendants' waiver is another legal issue appropriate for summary judgment. In sum, when "the union disclaims its role as the bargaining agent for its members or formally obtains decertification, the protection provided employers by the non-statutory labor exemption is lifted." PI Order at 85; Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996).

Finally, the Under-Contract Plaintiffs' breach of contract claims also warrant summary disposition. Each of their contracts entitles them to work as professional football players and to be compensated for their services in 2011. Yet, it is undisputed that Defendants refuse to pay or permit these Players to work. See, e.g., Lockout Notice at 2, ¶¶ 2-3 (Players "will not receive any compensation from the Club" and "will not be permitted to perform any services under [their] Player Contract[s] or otherwise perform any duties for the Club."). No "labor exemption" shields such contractual breaches from legal redress, and the applicable state laws entitle the Under-

[3] This Court already has declined to defer to the NLRB the question of whether the NFLPA's disclaimer was effective. PI Order at 19-48. That ruling should stand.

Contract Plaintiffs to an award of damages or the right to void their contracts for material breach and become free agents.

## STATEMENT OF UNDISPUTED MATERIAL FACTS[4]

### A. The Parties

1. Plaintiffs are professional football players currently employed by or seeking employment with an NFL team.

2. The NFL is an unincorporated association of 32 separately owned and independently operated professional football teams. See Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2207 (2010).

3. The remaining Defendants are the NFL member teams.

4. The NFL teams compete for the services of major league professional football players and constitute the only participants in the market for the services of those players. Id. at 2212. The NFL Defendants possess undisputed monopoly power in the relevant market. See, e.g., McNeil v. NFL, No. 4-90-476, 1992 WL 315292, at *3 (D. Minn. Sept. 10, 1992) ("McNeil Verdict") ("The NFL Defendants are the only purchasers of players' services in th[e] relevant market."); Clarett v. NFL, 306 F. Supp. 2d 379, 407 (S.D.N.Y. 2004) ("That the League has exclusive market power in [the market for player services] is obvious; the very fact that it can establish a Rule that excludes players from the market altogether demonstrates its market domination."), rev'd on other grounds, 369 F.3d 124 (2d. Cir. 2004). Judge Doty recently reaffirmed the

[4] Plaintiffs also incorporate all facts found by the Court in granting Plaintiffs' Preliminary Injunction Motion. PI Order at 2-17.

NFL's "enormous market power" of the NFL. See White v. NFL, Civil No. 4-92-906(DSD), 2011 WL 706319, at *9 n.6 (D. Minn. Mar. 1, 2011).

## B. The Players Exercised Their Labor Law Right to End Their Union and Assert Antitrust Rights

1. Since 1993, the Players and the League operated under both the White SSA and the CBA, which mirrors certain provisions of the SSA. PI Order at 11.

2. In May 2008, the NFL "opted out of the last two years of the operative SSA and CBA for various reasons, including a desire to seek a greater share of revenues, and to impose new restraints, such as a rookie wage scale." Id. at 12. The National Football League Players Association ("NFLPA") and the NFL engaged in collective bargaining, but failed to achieve a new CBA. Id.

3. Effective March 11, 2011 – the day the CBA and SSA expired – a majority of Players determined "it would not be in their interest to remain unionized if the existence of such a union would serve to allow the NFL to impose anticompetitive restrictions with impunity." Id. at 13-14. To gain antitrust protection, the Players exercised their right not to unionize and terminated their collective bargaining relationship with Defendants through the following steps.

4. Pre-expiration, a substantial majority of NFL Players voted to end the NFLPA's collective bargaining representative status. By this majority vote, the Players gave up the right to bargain collectively, the right to strike without being subject to the antitrust laws, and all other labor law rights that are only available to unionized employees. The NFLPA also restructured itself as a voluntary professional association. See Berthelsen Decl. ¶ 19, 27, Mar. 11, 2011, ECF. No. 7. The decision to disclaim the

union was also reaffirmed by the Players after March 11, 2011. See Berthelsen Reply Decl. ¶ 24-25, Mar. 28, 2011, ECF No. 42.

5. On the afternoon of March 11, 2011, NFL Commissioner Roger Goodell was informed that the Players had renounced their collective bargaining rights. The NFLPA also disclaimed any interest in continuing to serve as the Players' collective bargaining representative and amended its bylaws to prohibit collective bargaining with the NFL, individual teams, or their representatives. Berthelsen Decl. ¶ 20-21.

6. Also on March 11, 2011, all certified player-agents were advised that they were no longer NFLPA representatives and that their conduct is no longer regulated by the NFLPA. This change in agent status was promptly communicated to the NFL. Id. ¶ 25.

7. The NFLPA also withdrew from all pending fine appeals and all pending injury and non-injury grievances, and advised the affected players that they no longer would have NFLPA representation. Id. ¶ 24.

8. The NFLPA also ended all participation in the benefit application process or other business being conducted by the Bert Bell Plan or any other benefit plans provided by the expiring CBA. The NFL was notified of this change. Id. ¶ 26.

9. The NFLPA filed a labor organization termination notice with the United States Department of Labor and an application with the Internal Revenue Service to become a non-profit business league. Id. ¶¶ 22-23; see Department of Labor Form LM-2; IRS Form 1024 (Exs. D and E).

10. The Court recognized that the above actions ended the NFLPA's collective bargaining status. PI Order at 83. The Court went on to hold that post-disclaimer statements by individual players and NFLPA representatives about the "motive" for the disclaimer are legally irrelevant. Id.

**C. Defendants' Price-Fixing & Group Boycott**

1. After the expiration of the SSA and CBA, the League "locked out" Players effective March 12, 2011. PI Order at 15.

2. The NFL specified the terms of the lockout in the Lockout Notice it sent to all Players:

- Clubs may not sign, compete for, or negotiate with any Player;
- Players may not enter any Club facility;
- Players will not receive any compensation under their Player Contracts;
- Clubs will not pay for or provide health insurance or other active-player benefits or services;
- Players are not permitted to perform any services under their Player Contracts;
- Neither Players nor their agents can communicate with coaches, trainers, and other non-player staff regarding football or any Club or NFL business matters, which would include Player Contract negotiations.

See Lockout Notice at 2-3.

3. On March 11, 2011, Plaintiffs sued to, inter alia, prevent Defendants from using their group boycott to fix wages, eliminate competition, and coerce Players into accepting a new, anticompetitive system of restraints upon competition for player services.

4. On April 25, 2011, this Court preliminarily enjoined the lockout because Plaintiffs have a "fair chance" of prevailing on the merits of their Section 1 claim. PI Order at 84. The Eighth Circuit reversed on other grounds, but did not disturb this Court's finding that a per se antitrust violation is likely to be established – a finding not appealed by Defendants. Opinion at 34, No. 11-1898 (8th Cir. July 8, 2011).

**D. Defendants' Breach of the 2011 Contracts**

1. The Lockout Notice also provides that, contrary to the terms of the 2011 Contracts, the Under-Contract Plaintiffs "will not receive any compensation from the Club" and "will not be permitted to perform any services under [their] Player Contract or otherwise perform any duties for the Club. This includes, but is not limited to, any duties [Players] would otherwise be performing at Club facilities, such as playing, practicing, working out, attending meetings, consulting with Club medical or training staff . . . and making promotional appearances for the Club." Lockout Notice at 2, ¶¶ 2-3.

2. Since Defendants perpetrated the lockout, the Under-Contract Plaintiffs have not been allowed to perform services as professional football players and have not received any amounts owed to them under their 2011 Contracts.

3. On September 10, 2010, Plaintiff Brady signed a contract with the New England Patriots that extends from the 2011 through 2014 seasons. The Patriots agreed to pay Brady a base salary of $5,750,000 and a $4,000,000 roster bonus for the 2011 season. Brady's contract is governed by Massachusetts law. See the 2011 Contracts (Ex. F).

4. On or about March 16, 2006, Plaintiff Brees signed a six-year, $60 million contract with the New Orleans Saints. The Saints agreed to pay Brees a base salary of $7,393,500 and a $200,000 workout bonus for the 2011 season. Brees' contract is governed by Louisiana law. Id.

5. On March 3, 2011, Plaintiff Robison signed a three-year, $13.5 million contract extension with the Minnesota Vikings. The Vikings agreed to pay Robison approximately $4.5 million in base salary in 2011. Robison's contract is governed by Minnesota law. Id.

6. On December 23, 2005, Plaintiff Umenyiora signed a six-year, $41 million contract extension with the New York Giants, which runs through the 2012 season. The Giants agreed to pay Umenyiora a base salary of $3.125 million for the 2011 season, in addition to various bonuses, including a $31,250 bonus for each game in 2011 that Umenyiora is on the active 53-man roster. Umenyiora's contract is governed by New York law. Id.

## ARGUMENT

Summary judgment on Defendants' liability is warranted now because "the evidence, viewed in the light most favorable to the nonmoving party, shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." Cordry v. Vanderbilt Mortg. & Fin., Inc., 445 F.3d 1106, 1109-10 (8th Cir. 2006). The 2009 Amendments to Rule 56 of the Federal Rules of Civil Procedure allow motions for summary judgment to be filed at anytime, even before discovery: "The timing provisions for summary judgment are outmoded . . . The new rule allows a party

to move for summary judgment at any time, even as early as the commencement of the action." Fed. R. Civ. P. 56 advisory committee's note (2009 Amendments). This motion presents two discrete issues: (i) antitrust liability for Defendants' lockout; and (ii) contractual liability for Defendants' deliberate breaches. They involve undisputed facts and should be determined on an expedited basis in light of the Eighth Circuit's holding that injunctive relief is not available to end the lockout for Under-Contract Players.

## I. Defendants' Lockout Violates Section 1 As A Matter of Law

### A. The Court is Empowered to Hold Defendants' Lockout to be an Antitrust Violation

Although the Eighth Circuit ruled that the NLGA prevents this Court from enjoining the lockout against Under-Contract Players, it is still subject to a determination of antitrust illegality and treble damages. See AT&T v. Broadband, LLC v. Int'l Bhd. of Elec. Workers, 317 F.3d 758, 761 (7th Cir. 2003) ("What Congress established through the Norris-LaGuardia Act is that a substantive right does not imply an injunctive remedy. Employers have to settle for damages or other forms of *ex post* review, even if they turn out to be less effective at vindicating the underlying right."); Elsinore Shore Assoc. v. Local 54, Hotel Emps. & Rest. Emps. Int'l Union, 820 F.2d 62, 69 (3d Cir. 1987) ("The Norris-LaGuardia Act does not bar federal courts from granting relief for illegal strikes in the form of damages."). The NFL has conceded as much: "The prospect of treble damages ensures that any harm to the players will not be irreparable, but trebly compensated." Appellants' Emergency Motion for Stay Pending Appeal at 2, No. 11-1898 (8th Cir. Apr. 27, 2011). See also Opening Brief of Appellants at 14, No. 11-1898 (8th Cir. May 9, 2011) ("The players, by contrast, are shielded by the ne plus

ultra of protection against irreparable harm—treble damages."); Id. at 56 ("As to harm to the players, they assert claims for treble damages; such damages would be more than adequate (trebly adequate) to remedy any possible harm caused by the lockout."); Preliminary Injunction Hearing Tr. 122, Apr. 6, 2011 ("The Norris-LaGuardia Act does not bar this lawsuit, does not require the dismissal of this lawsuit, does not bar claims for damages, does not bar them for pursuing the claims."); Id. at 136 ("All Norris-LaGuardia Act says, is that they are not entitled to an injunction. They may be entitled to damages. If they are right about the antitrust laws, they're entitled to treble damages and attorneys' fees.").

### B. Defendants' Lockout is a Per Se Violation of Section 1

To establish a violation of Section 1, Plaintiffs must show: (i) an agreement (ii) that unreasonably restrains trade, (iii) affects interstate commerce, and (iv) causes antitrust injury to Plaintiffs. The undisputed facts establish each of these elements.[5]

First, the existence and terms of the horizontal agreement among the competing NFL Clubs are undisputed. The 32 NFL Clubs compete for the services of professional football players. PI Order at 84. As competitors, any agreements entered into by the Clubs are subject to Section 1 of the Sherman Act. Am. Needle, 130 S. Ct. at

[5] Plaintiffs are unquestionably employed, or seek to be employed, in interstate commerce by the Clubs and have suffered and will continue to suffer antitrust injury as a result of the lockout. This Court already has held that the lockout has inflicted irreparable harm on Plaintiffs who are being deprived of their ability to work, to receive contractually-mandated compensation, and to offer their services as professional football players in a free and open market. PI Order at 71-79.

2211-2214; McNeil v. NFL, 790 F. Supp. 871, 878-81 (D. Minn. 1992). The Lockout Notice provides undisputed evidence of this horizontal agreement to eliminate all competition for Players' services. See Lockout Notice (Ex. A).

Second, the undisputed terms of Defendants' agreement – to, inter alia, refuse to negotiate with, pay, or deal with NFL Players to coerce them to agree to new anticompetitive terms of employment – constitute a naked restraint of trade that operates both as a group boycott and a horizontal price-fixing agreement, and is therefore per se illegal. See, e.g., FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 422-28, 433-35 (1990) (applying the per se rule to a group boycott designed to force higher wages); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 290 (1985) ("Concerted refusals to deal . . . are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se [illegal] . . . ."); Flegel v. Christian Hosp., Northeast-Northwest, 4 F.3d 682, 687 (8th Cir. 1993) (holding "the per se rule should be invoked for a group boycott").[6]

Defendants have not attempted to defend their lockout on the antitrust merits, nor have they denied that – absent the non-statutory labor exemption – their lockout would constitute a per se Section 1 violation. Tellingly, Defendants did not appeal this Court's ruling that the lockout is likely either a "per se violation of Section 1

[6] The Supreme Court's decision in American Needle supports a per se approach here. If a restraint on competition is not "essential if the product is to be available at all," the per se rule may apply. 130 S. Ct. at 2216 (emphasis added). Defendants do not claim that their lockout is necessary for NFL football to be available at all.

or, under the Rule of Reason, a concerted refusal to deal that constitutes an unreasonable restraint of trade." PI Order at 83.

This is for good reason. Where, as here, a concerted refusal to deal is concededly designed to obtain non-competitive wages, it is condemned not only as a boycott "but also a horizontal price-fixing arrangement – a type of conspiracy that has been consistently analyzed as a per se violation for many decades." Superior Court Trial Lawyers Ass'n, 493 U.S. at 436 n.19; see also NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100 (1984) ("Horizontal price fixing . . . [is] ordinarily condemned as a matter of law under an 'illegal per se' approach . . . ."); Robertson v. NBA, 389 F. Supp. 867, 893 (S.D.N.Y 1975) (holding the then extant NBA reserve clause, uniform player contract, and college draft to be per se violations of the Sherman Act as both group boycotts and price-fixing agreements). Indeed, more than sixty years ago, in Radovich v. NFL, 352 U.S. 445 (1957), the Supreme Court held that an NFL team boycott in the market for player services stated an antitrust claim.

Unlike cases in which certain NFL agreements have been subject to rule of reason scrutiny (e.g., Am. Needle, 1305 S. Ct. at 2216-17; Clarett, 306 F. Supp. 2d at 405; McNeil, 790 F. Supp. at 897), Defendants' lockout involves both a group boycott and horizontal price-fixing, the undisputed purpose and effect of which is to totally eliminate all competition for player services without any arguable procompetitive benefit (such as the maintenance of competitive balance). Thus, notwithstanding the sports league context which sometimes implicates the rule of reason, Defendants' refusal to deal for the concerted purpose of coercing a reduction in player wages and other restraints

warrants per se condemnation.[7] See, e.g., Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 750-51 (10th Cir. 1999) (applying per se rule to group boycott); Wash. State Bowling Proprietors Ass'n, Inc. v. Pac. Lanes, Inc., 356 F.2d 371, 375-76 (9th Cir. 1966) (condemning rules restricting eligibility of players to participate in tournaments as per se illegal group boycott); Boris v. U.S. Football League, No. Cv. 83-4980 LEW (Kx), 1984 WL 894, at *1 (C.D. Cal. Feb. 28, 1984) ("eligibility" rule by the United States Football League and member teams per se illegal group boycott); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1323 (D. Conn. 1977) (holding that a World Hockey Association regulation banning hockey players under the age of 20 constituted a per se illegal arrangement); Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1066 (C.D. Cal. 1971) (preliminarily enjoining group boycott of a player by NBA owners as per se illegal).[8]

---

[7] Concerted refusals to deal for coercive purposes have long been subject to per se treatment. See Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 41 (1930) (group boycott's "manifest purpose" was to "coerce the exhibitor and limit the freedom of trade."); U.S. v. First Nat'l Pictures, Inc., 282 U.S. 44, 54-55 (1930) (group boycott by film distributors not to deal with exhibitors who refused particular contractual terms per se illegal); see also St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 543-44 (1978) (unlawful to engage in "concerted refusals to deal" with a customer who refuses to accede to particular contractual terms); Anderson v. Shipowners' Ass'n of Pac. Coast, 272 U.S. 359, 361-65 (1926) (finding an agreement by an association of ship owners refusal to deal with seamen except pursuant to the association's fixed terms of employment unlawful).

[8] The Antitrust Division of the Department of Justice has repeatedly deemed horizontal agreements restraining competition for employees to be per se illegal. See, e.g., U.S. v. Adobe Sys., Inc., 75 Fed .Reg. 60820-01, at *60822 (Dep't of Justice Oct. 1, 2010) (notice) (charging a per se violation for an agreement by competing employers not to recruit each other's employees); Complaint at 5, U.S. v. LucasFilm Ltd., No. 110-cv-02220, 2010 WL 5344347 (D.D.C. Dec. 21, 2010) (same); Complaint at 6, U.S. v. Ass'n

...(continued)

### C. Defendants' Lockout Violates Section 1 Even Under a Rule of Reason Analysis

Nor could Defendants' lockout pass the "flexible" rule of reason, which "may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'" Am. Needle, 130 S. Ct. at 2217 (citation omitted). As an agreement among competitors with market power that has an undisputed anti-competitive purpose, Defendants' lockout would, at a minimum, be subject to condemnation under the "quick look" approach. See Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998); Chi. Prof'l Sports Ltd. P'ship v. NBA, 754 F. Supp. 1336, 1357 (N.D. Ill. 1991), aff'd, 961 F.2d 667 (7th Cir. 1992).

With just a "quick look," the Clarett court determined that an NFL limit on employee eligibility violates Section 1: "[O]ne can scarcely think of a more blatantly anticompetitive policy than one that excludes certain competitors from the market altogether. Because the Rule has the actual anticompetitive effect of excluding players . . . from the NFL, it is a naked restriction." 306 F. Supp. 2d at 408; see also Bd. of Regents, 468 U.S. at 109 ("[W]hen there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'"); Law, 134 F.3d at 1019-24 (NCAA rule restricting college coach salaries violates Section 1 under "quick look" test).

---

...(continued)
of Family Practice Residency Dirs., No. 96-575-CV-W-2, 1996 WL 557841 (W.D. Mo. Aug. 15, 1996) (same).

As in Clarett, the anticompetitive effects of Defendants' concerted refusal to deal are so obvious that "an observer with even a rudimentary understanding of economics could conclude that" the lockout will have an "anticompetitive effect." Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999). Because the lockout eliminates all market competition for player services, in the absence of any evidence "which competitively justifies" the need for such a severe restraint, the Court needs no more than a "quick look" to determine that Section 1 is violated. Bd. of Regents, 468 U.S. at 113.[9]

Finally, "the NFL's desire to keep its costs down is not a legitimate procompetitive justification. The fact that the League and its teams will save money" by engaging in their anticompetitive lockout does not excuse the restraint. Clarett, 306 F. Supp. 2d at 409 (footnote omitted); see also Chi. Prof'l Sports, 754 F. Supp. at 1359 ("[I]t's more profitable is not a defense under the Sherman Act.").

### D. The NFL Defendants' Concerted Refusal to Deal is Not Protected by the Non-Statutory Labor Exemption

Under Powell and Brown, the non-statutory labor exemption ended when the Players disclaimed their union. In Powell, the NFL conceded that the non-statutory exemption only applies when "the affected employees continue to be represented by a labor union vested with collective bargaining authority under the labor laws." NFL's

[9] Nor could the lockout survive full-blown rule of reason scrutiny under which the proponent of a facially anticompetitive agreement must establish that the arrangement is "reasonably necessary" to achieve a purported procompetitive objective. McNeil, 1992 WL 315292, at *5; see also Law, 134 F.3d at 1023; Jackson v. NFL, 802 F. Supp. 226, 228 n.2 (D. Minn. 1992). As a matter of law, the total elimination of competition in the market for player services cannot be condoned as "reasonably necessary" to achieve any purportedly procompetitive objective of the NFL Defendants.

Powell Br. 17-18 (Ex. G). The NFL made the same concession to the Supreme Court in Brown: "[o]nce the employees give up their bargaining rights, the employers could not take any affirmative steps, exercise their economic weapons under the bargaining process." See Brown Tr. 25 (Ex. H). As counsel for the NFL explained in a colloquy with the Supreme Court:

> The Court: [I]n this respect you are agreeing, if I understand you correctly, totally with Judge Edwards [in the ruling below] on that, it ends when the union decertifies so that there's no more bargaining regime?
>
> [Counsel]: I would like to add this wrinkle, Your Honor, that certainly after the union decertifies . . . , affirmative exercise of economic weapons taken by the employers is not protected by the non-statutory labor exemption. There is a question which the courts have not addressed about what happens to steps that the employers have taken prior to decertification that remain in place after the union decertifies.

Id. at 31–32 (emphasis added).

Before this Court, however, the NFL argues the opposite – contending that a post-disclaimer boycott is protected by the labor exemption for an indefinite period of time. Apart from the NFL's contrary representations in Brown and Powell, its position is foreclosed by the decisions themselves.

As this Court recognized, the holding in Brown about the end of the non-statutory labor exemption is limited to an "impasse occurring within the context of a collective bargaining relationship that likely could continue." PI Order at 84 (citing Brown). In contrast, the Players in this case have ended their collective bargaining relationship.

The issue in Brown was whether the non-statutory exemption permits members of a multiemployer bargaining group to implement the "last best bargaining

offer" after reaching a bargaining impasse. 518 U.S. at 234. In countenancing that joint action, the Supreme Court hewed closely to the rationale underlying the exemption: "to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place." Id. at 237. Brown's "sufficiently distant" in time reference addressed when, after impasse but still within the collective bargaining relationship, the non-statutory labor exemption ended.[10]

Significantly, the Supreme Court identified "collapse of the collective-bargaining relationship, as evidenced by decertification of the union," as an "extreme outer boundar[y]" where the non-statutory labor exemption would end. Id. at 250. The Eighth Circuit came to the same conclusion in Powell. 930 F.2d 1293, 1303 n.12 (8th Cir. 1989) (stating that the Sherman Act becomes applicable when "the affected employees ceased to be represented by a certified union"). This court should hold that the non-statutory labor exemption does not apply because of the absence of any collective bargaining relationship. See PI Order at 45-48.[11]

[10] The Supreme Court noted that even when a collective bargaining relationship continues, some cases would be "sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process." Brown, 518 U.S. at 250.

[11] In addition to the exemption being inapplicable because the union has ended, in granting the preliminary injunction, the Court found an additional reason why the lockout is subject to the Sherman Act: "a lockout is not a substantive term or condition of employment." PI Order at 86. The Plaintiffs, however, urge the Court to also hold the labor exemption inapplicable because of the termination of their collective bargaining relationship – a conclusion squarely supported by the decisions in Brown and Powell as well as prior concessions by the NFL. See Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).

Further, the SSA prevents Defendants from invoking any labor exemption to shield their lockout because the Players' disclaimer of union representation cannot be challenged. SSA, Art. XVIII § 5(b); CBA, Art. LVII § 3(b). As the Court already recognized, the NFL's agreement not to contest any de-unionization was the quid pro quo in the SSA that the Players relied upon in yielding to the NFL's demand that a union be resurrected, and the waiver was an important consideration in this Court's approval of the SSA. PI Order at 11-12 (ECF No. 99); see White v. NFL, 822 F. Supp. 1389, 1431 (D. Minn. 1993) ("A central issue . . . is the applicability of the non statutory labor exemption to the NFL's player rules. As part of the compromise of those issues, class counsel has agreed that the new rules would be protected by the labor exemption [only] for the express term of any new collective bargaining agreement in which such rules are incorporated.").

But even if the waiver were not applicable, this Court should hold that the NFLPA effectively disclaimed collective bargaining representation as a matter of law. Indeed, a substantial majority of the Players twice exercised their right to de-unionize, and this Court found no NFLPA conduct to be inconsistent with that disclaimer. PI Order at 34-42.

The NFL will undoubtedly argue that a few statements by individual players are inconsistent with the disclaimer, but those statements demonstrate nothing more than the NFLPA's "motive" to support this litigation and are therefore legally irrelevant. White, 822 F. Supp. at 1430-31; see also Pittsburgh Steelers, 1991 WL 144468, at *2 n.8 (holding that the intent of a disclaimer is irrelevant so long as it is

"otherwise unequivocal and adhered to"). At bottom, Defendants cannot advance any genuine issue of material fact to dispute the effectiveness of the union disclaimer and the termination of the labor exemption.

## II. Defendants' Lockout Materially Breaches the 2011 Player Contracts

As a matter of law, Defendants have breached the 2011 Contracts by refusing to pay contractually owed amounts to the Under-Contract Plaintiffs and by preventing them from working as professional football players. See 2011 Contracts (Ex. F). Defendants' Lockout Notice proves that the Players' contracts have been breached by Defendants' agreement not to, inter alia, pay amounts owed or permit the Players to perform services. See Lockout Notice at 2, ¶¶ 2-3. Since Defendants instituted their lockout, none of the Under-Contract Plaintiffs have been allowed by the NFL to render services as professional football players and none have received the amounts called for by their 2011 Contracts.

Defendants' refusal to abide by the terms of the 2011 Contracts deprives the Under-Contract Plaintiffs not only of the compensation that was promised, but also of the invaluable opportunity to perform services as professional football players and to earn contractual bonuses.

Thus, each Under-Contract Plaintiff is entitled to a summary judgment in his favor under applicable state law:

- **Tom Brady (Massachusetts):** To establish breach of contract under Massachusetts law, Brady need only show (1) the existence of an agreement supported by valid consideration (see Brady's 2011 Contract

(Ex. F)); (2) his willingness and ability to perform (Brady Decl., ¶ 6, July 14, 2011; (3) a breach (see Lockout Notice); and (4) injury (Brady Decl. ¶ 7). See Singarella v. City of Boston, 173 N.E.2d 290, 291 (Mass. 1961).

- **Drew Brees (Louisiana):** To prove breach of contract under Louisiana law, Brees need only show (1) the obligor's undertaking an obligation to perform (see Brees' 2011 contract (Ex. F)); (2) the obligor's failure to perform the obligation (see Lockout Notice); and (3) an injury resulting from the obligor's non-performance (Brees Decl. ¶ 7, July 14, 2011). Favrot v. Favrot, No. 2010-CA-0986, 2011 WL 458708, at *7 (La. Ct. App. Feb. 9, 2011).
- **Brian Robison (Minnesota)**: Under Minnesota law, Robison need only show (1) the formation of a contract (see Robison's 2011 contract (Ex. F)); (2) Robison's performance of conditions precedent (see id. (noting no conditions precedent to Defendants' performance)); and (3) Defendant's breach of contract (see Lockout Notice). See Thomas B. Olson & Associates v. Leffert, Jay, & Polglaze, 756 N.W.2d 907, 918 (Minn. Ct. App. 2008).
- **Osi Umenyiora (New York):** To establish breach of contract under New York law, Umenyiora need only show (1) the existence of a valid contract (see Umenyiora's 2011 contract (Ex. F)); (2) Umenyiora's performance pursuant to that contract (see below establishing inapplicability of this requirement); (3) Defendants' breach of contractual obligations (see

Lockout Notice); and (4) injury resulting from the breach (Umenyiora Decl. ¶ 7, July 14, 2011). See Elisa Dreier Reporting Corp. v. Global Naps Networks, Inc., 921 N.Y.S.2d 329, 333 (App. Div. 2011).

Defendants cannot avoid their contractual breaches by refusing to allow the Under-Contract Plaintiffs to perform pursuant to their 2011 Contracts.[12] Each state's law makes Defendants accountable for breach of contract by preventing the Under-Contract Plaintiffs from performing. See Winchester Gables, Inc. v. Host Marriot Corp., 875 N.E.2d 527, 536 (Mass. App. Ct. 2007) ("[O]ne who prevents the performance of a contract cannot take advantage of its nonperformance.") (internal citation omitted); Zobel & Dahl Constr. v. Crotty, 356 N.W.2d 42, 45 (Minn. 1984) ("[C]ontract performance is excused when it is hindered or rendered impossible by the other party[;] . . . [s]tated differently, every contract contains an implied condition that each party will not unjustifiably hinder the other from performing."); A-1 Gen. Contracting Inc. v. River Mkt. Commodities Inc., 622 N.Y.S.2d 378, 381-82 (App. Div. 1995) ("[T]he general rule . . . [is] that a party to a contract cannot rely on the failure of another to perform when he has frustrated or prevented the performance . . . ."); Young v. Whitney, 490 N.Y.S.2d

[12] Even workers who are represented by a union may assert individual state law contract rights without any labor law obstacle. Caterpillar, Inc. v. Williams, 482 U.S. 385, 396 (1987) ("[A] Plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights independent of [the CBA], including state-law contract rights, so long as the contract relied upon is not a collective-bargaining agreement."). A fortiori, labor law cannot present an obstacle to the enforcement of state law contract rights by non-unionized employees.

330, 332 (App. Div. 1985) ("[T]he law implies in every contract that one party will not prevent the other party's performance.") (citations omitted).

Finally, Defendants' contractual breaches entitle the Under-Contract Plaintiffs, at their option, to either full contract damages or contractual rescission because Defendants are in material breach of contract by (i) not paying the amounts owed and (ii) not allowing Plaintiffs to perform services as professional football players. See Richard v. Gary Matte Builders, Inc., 944 So. 2d 725, 729 (La. Ct. App. 2006) ("[T]he obligee has a right to the judicial dissolution of the contract or . . . to regard the contract as dissolved when an obligor fails to perform under a contract.") (internal citation omitted); Lease-It, Inc. v. Mass. Port Authority, 600 N.E.2d 599, 602 (Mass. App. Ct. 1992) ("It is well established that a material breach by one party excuses the other party from further performance under the contract.") (internal citation omitted); Johnny's, Inc. v. Njaka, 450 N.W.2d 166, 168 (Minn. Ct. App. 1990) ("Rescission is justified by a material breach of contract . . . [w]here the injury caused by the breach of contract is irreparable . . . ."); Dep't of Econ. Dev. v. Arthur Anderson & Co. (USA), 924 F. Supp. 449, 483 (S.D.N.Y. 1996) (Under New York law, "rescission is permitted when a breach . . . defeat[s] the object of the parties in making the contract.") (internal citations omitted). Rescission, if the Plaintiffs choose to exercise that right, would make the Under-Contract Plaintiffs free agents.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment.

Dated: July 18, 2011

Respectfully Submitted,

s/Barbara P. Berens
Barbara P. Berens # 209788
Berens & Miller, P.A.
3720 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6171
(612) 349-6416 (fax)
Bberens@berensmiller.com

Timothy R. Thornton # 109630
Briggs & Morgan, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8550
(612) 977-8650 (fax)
Pvolk@briggs.com

James W. Quinn
Bruce S. Meyer
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Jeffery L. Kessler
David G. Feher
David L. Greenspan
Dewey & LeBoeuf LLP
1301 Avenue of the Americas
New York, NY 10019
(212) 259-8000

and

DeMaurice Smith
1133 20th Street NW
Washington, DC 20036
(800) 372-2000

Attorneys for Plaintiffs