IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Tom Brady, et al., individually, and on behalf of all others similarly situated Plaintiffs, vs. National Football League, et al., Defendants.	:	Civil Action No. 0:11-cv-00639-SRN-JJG **SUPPLEMENTAL DECLARATION OF RICHARD A. BERTHELSEN**

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

1. I am General Counsel of the National Football League Players Association ("NFLPA"), and have served in that capacity since 1983. I submitted a declaration dated March 11, 2011 in support of the request of the class for a preliminary injunction enjoining the NFL Defendants' "lockout" ("3/11/11 Decl."). I make this supplemental declaration in further support of that request.

The NFL's Waiver of Any Sham Renunciation Defense

2. In my March 11 Declaration, I reviewed the history of the provision in the Reggie White Stipulation and Settlement Agreement ("SSA") in which the NFL waived any right to challenge a decision by the majority of NFL players to give up their union status once the SSA expires. 3/11/11 Decl., at 2-5.

3. That provision is as follows:

> **Section 5.** (a) In effectuation of this Agreement, the Parties agree that, after the expiration of the express term of such CBA, then, if there is a Players Union in existence, the Parties agree that none of the Class Members or any player represented by any Players Union shall be able to commence an action, or assert a claim under the antitrust laws for conduct occurring, until either: (i) Defendants and any Players Union have bargained to impasse; or (ii) six months after such expiration, whichever is later; at that time, the Parties reserve any arguments they may make regarding the application of the labor exemption.
>
> (b) In effectuation of this Agreement, the Parties agree that, after the expiration of the express term of any CBA, in the event that at that time or any time thereafter a majority of players indicate that they wish to end the collective bargaining status of any Players Union on or after expiration of any such CBA, the Defendants and their respective heirs, executors, administrators, representatives, agents, successors and assigns waive any rights they may have to assert any antitrust labor exemption defense based upon any claim that the termination by the players or any Players Union of its status as a collective bargaining representative is or would be a sham, pretext, ineffective, requires additional steps, or has not in fact occurred.

Article XVIII, Section 5 of the SSA. Virtually identical language appears in Article LVII, Section 3 of the CBA.

4. I reviewed the history of the Freeman McNeil, Keith Jackson, and Reggie White litigations in some detail in my initial declaration. These litigations provide the context for the waiver provisions in Article XVIII, Section 5.

5. The McNeil case was filed after the Eighth Circuit had decided that NFL players could not pursue antitrust claims against the NFL while

they were represented in collective bargaining by the NFLPA. Powell v. NFL, 888 F.2d 559 (8th Cir. 1989).

6. Accordingly, in 1989, the Executive Committee of the NFLPA decided to abandon collective bargaining rights, a substantial majority of NFL players indicated that they agreed with the NFLPA's decision to end union representation in order to allow player antitrust lawsuits to go forward, and the player representatives unanimously voted to end the NFLPA's status as the players' collective bargaining representative and to restructure the organization as a voluntary trade association.

7. The NFLPA filed a labor organization termination notice with the U.S. Department of Labor; filed with the IRS to reclassify its status from a labor organization to a business league; gave up the right to engage in collective bargaining with the NFL over any terms and conditions of employment; gave up the right to negotiate benefits with the NFL; gave up the right to strike without it being challenged as an antitrust violation; gave up the right to participate in the administration of player retirement plans; gave up the right to represent players in grievance proceedings (with the result that players had to pursue any claims against the NFL or its clubs with their own counsel); gave up the right to receive player contracts and salary information directly from management to enable the NFLPA to maintain records on player compensation; gave up the right to meet

regularly with players on club property; and gave up the right to regulate player agents and thereby protect players from any unscrupulous agents.

8. In doing so, when the NFLPA renounced its union status in 1989, the players gave up valuable benefits under the labor laws as the price for obtaining their antitrust rights.

9. These events are reviewed by Judge Doty in his decision in McNeil v. NFL, 764 F. Supp. 1351, 1354-56 (D. Minn. 1991), but I have personal knowledge of these events as well. I saw then, first hand, the choices the players had to make to give up their labor law rights to pursue their antitrust rights.

10. Notwithstanding all of these steps, in 1991, as now, the NFL owners claimed that the NFLPA's actions "may be a sham because the NFLPA still functions as a labor union and the disclaimer is merely a tactical maneuver to pressure the NFL defendants into negotiations," and that disputes exist "regarding the NFLPA's motive, credibility and good faith." Id. at 1354-55. Judge Doty rejected all of those arguments and determined that no ongoing collective bargaining relationship existed, and that the nonstatutory labor exemption had ended. Id. at 1359.

11. The McNeil jury trial then followed, in which the NFL owners were determined to have violated the antitrust laws in restricting NFL players. The NFL owners were found by a jury to have gone too far and violated the Sherman Act. Then, in the Keith Jackson action, Judge Doty issued a

preliminary injunction against continued application of the owners' restrictions, including on the basis that the Court had determined in McNeil that the non-statutory labor exemption no longer applied after the players abandoned their union. Jackson v. NFL, 802 F. Supp. 234, 236 (D. Minn. 1992).

12. After that, the Reggie White class action litigation was filed, predominantly seeking injunctive relief, and the parties engaged in settlement discussions. Thus, when the SSA was agreed to by the parties, it occurred in the context of the NFL owners already strenuously claiming that the NFLPA's decertification was a sham, and Judge Doty having squarely rejected those assertions.[1]

13. When the Reggie White settlement discussions commenced, with the NFLPA acting as an advisor to class counsel in those negotiations, I and the late Gene Upshaw, the now-deceased former Executive Director of the NFLPA, were strongly opposed to reforming the NFLPA as a labor organization

[1] As Judge Doty noted in his decision approving the SSA, the NFLPA properly acted as an advisor in the negotiation of the SSA. White v. NFL, 822 F. Supp. 1389, 1430-31 (D. Minn. 1993) ("[B]y sponsoring various lawsuits, the NFLPA was not thereby acting as the players' collective bargaining representative. Where it was appropriate for the NFLPA to finance the prosecution of antitrust litigation challenging the terms and conditions of employment, the court finds that the NFLPA's role as consultant to class counsel in settling the same litigation is also lawful and appropriate.") (citations omitted). The settlement talks that started during the McNeil action and resulted in the SSA were conducted under letter agreements in which the NFL agreed that the discussions were litigation settlement discussions, and not collective bargaining, and could not be used against the players for any legal purpose. (Letters attached hereto as Exhibit A).

because the NFLPA's experience in collective bargaining had been much less successful than the route of acting only as a trade association and advisor, and pursuing antitrust litigation against the NFL clubs. Thus, when the NFL representatives insisted that resumption of a collective bargaining relationship between the NFL and the NFLPA be a condition of settlement, the NFLPA counter-insisted that the NFLPA would be permitted to cease acting as a collective bargaining representative at the expiration of the collective bargaining agreement and the NFL would not be permitted to object to that change or argue that it was a sham. That deal was struck as part of the settlement negotiations and, in fact, it is my belief that without the restriction of the NFL's purported right to object to the possible later dissolution of the NFLPA, there would have been no settlement in the Reggie White case.

14. As reviewed in my initial declaration, the players re-formed the NFLPA as a union only because the owners insisted on that step as a condition of the settlement remaining in place, with the owners having the right under the SSA to terminate the agreement if the NFLPA was not re-formed as a union. SSA, as amended May 6, 1993, Article XXVI, Paragraph 5 ("In effectuation of this Agreement, in the event that a majority of NFL players have not decided to be represented by a Players Union or a CBA is not executed by the time of Court Approval, Defendants shall have the option to terminate this Agreement and the parties will return to the status quo prior to this Agreement, under the same terms

and conditions as if Court Approval had been denied at such time.") (attached hereto as Exhibit B).[2]

15. Thus, the NFL's insinuation in their opposition papers that class counsel and the NFLPA made less than truthful representations to the Court in the McNeil litigation that the NFLPA's disclaimer was intended to be permanent (Opp'n at 6-7) – is disingenuous. The NFL knows that the NFLPA was re-formed as a union, and the CBA was entered into, only because the owners insisted on it as a condition under the SSA after the McNeil jury verdict was rendered and after the players had no union for more than three years.

16. In my initial declaration, I quoted from the sworn declaration of Gene Upshaw, which was submitted to this Court in connection with the NFL's failed 1997 attempt to terminate this Court's jurisdiction to enforce the SSA. As Mr. Upshaw said then, in relevant part:

> The only reason I agreed to recommend that the NFLPA be converted from a trade association back into a union, however, is because the owners demanded that as a condition for the Settlement Agreement, but *also agreed to a provision that, at the end of the settlement, a majority of players could indicate their desire to terminate the union and the owners couldn't then use against the players the existence of the union during the term of the Settlement Agreement.* I would never have recommended that the players reform the NFLPA as a union in 1993, shortly after the White Settlement Agreement had been agreed to, and agreed to a Collective Bargaining Agreement with the NFL owners, if the union could be

[2] This provision was moot once the NFLPA was re-formed as a union, so it was omitted from subsequent versions of the SSA when the SSA was later extended and amended in various respects.

> used to hurt the players. Indeed, if that were the result, I would not hesitate to recommend that the players immediately decertify the NFLPA as their collective bargaining representative.

Declaration of Eugene Upshaw, dated August 25, 1997, at ¶ 8 (italics added).

17. Thus, when class counsel in consultation with the NFLPA agreed on the waiver provisions in the SSA dealing with potential NFL assertions that a future decertification of the NFLPA would be a "sham," that took place in the context of Judge Doty having already rejected those NFL assertions in the McNeil litigation. As Mr. Upshaw stated in his sworn declaration, the NFLPA (and class counsel) would never have recommended that the SSA be entered into unless it contained a "provision that, at the end of the settlement, a majority of players could indicate their desire to terminate the union and the owners couldn't then use against the players the existence of the union during the term of the Settlement Agreement." Id. (emphasis added).

18. The NFLPA's possible renunciation of its collective bargaining status as the CBA expired was expressly contemplated by the SSA, with a waiver provision designed to prohibit the NFL from resurrecting its already-rejected "sham" argument. To the extent that history is repeating itself, it is doing so in a manner already reviewed and approved by the courts in both the McNeil and White actions, and in a manner contemplated by the parties to the SSA.

19. Moreover, as occurred nearly 20 years ago, the NFLPA's recent renunciation of its collective bargaining status is not a matter of mere form, but carries with it the surrender of all of the players' labor law benefits, so that the players may assert their antitrust rights.

20. As in 1989, the NFLPA is filing a labor organization termination notice with the U.S. Department of Labor, is filing with the IRS to reclassify its status from a labor organization to a business league, has given up the right to engage in collective bargaining on behalf of NFL players, has given up the right to negotiate benefits with the NFL, has given up the right to strike without it being challenged as an antitrust violation, has given up the right to represent players in grievance proceedings (with the result that players must pursue any claims against the NFL or its clubs with their own counsel), and has given up the right to regulate player agents.

21. By taking these steps, the NFLPA is returning to the status quo that existed before the SSA was entered into, and before the NFL insisted that the NFLPA reconstitute itself as a union as a condition of the Reggie White settlement.

The NFL's Imposition of the Illegal Lockout

22. On March 11, 2011, shortly before midnight, after the NFLPA had advised the NFL earlier that day that it had renounced its status as the collective bargaining representative of NFL players, the NFL sent a notice to the

NFLPA stating as follows: "Please be advised that, assuming that the National Football League ('NFL') and the National Football League Players Association ('Union') have not agreed upon terms for a collective bargaining agreement by 11:59 p.m. on March 11, 2011 (when the parties' current agreement expires), the NFL's member Clubs will institute a lockout of members of the Union's bargaining unit immediately thereafter." A copy of that notice is attached hereto as Exhibit C.

The NFLPA's Reaffirmation of Its Renunciation Establishes Beyond Any Question That the NFL Cannot Make Any "Sham" Argument

23. Article XVIII, Section 5(b) of the SSA applies when the players have indicated that they no longer wish to be represented in collective bargaining, and that status continues after the SSA has expired. However, even if Section 5(b) required an affirmative act by the players after expiration of the SSA (it does not), the players have done that as well.

24. Specifically, after the expiration of the SSA, the player directors of the NFLPA (formerly known as player representatives when the NFLPA was a union), undertook to contact all of their teammates to determine the extent to which the players wished to reaffirm that the NFLPA is not the collective bargaining representative of NFL players. The player directors then voted to reaffirm the NFLPA's renunciation of its collective bargaining status based on the majority view of the players on each of their teams.

25. The player directors for all 32 teams have reported that they contacted their teammates, and, as authorized by the indications of more than a majority of NFL players on each of those teams, have unanimously voted to reaffirm that the NFLPA is not the collective bargaining representative of NFL players. Attached hereto as Exhibit D is a copy of the votes cast by the player directors for all 32 NFL teams.

26. These actions, done after expiration of the SSA, more than fulfill any asserted requirement for a post-expiration "indication" from a majority of the players as to the NFLPA's non-union status.

The NFL's Characterization of the NLRB "Proceedings"

27. The NFL has described the current status of its unfair labor practice (ULP) charge before the NLRB in a manner that does not comport with how the NLRB deals with such charges. I say this based on decades of experience with NLRB cases.

28. Any person can file a ULP charge with the NLRB. That does not mean that it has any merit, or that the NLRB will initiate a proceeding to address the issue.

29. As an initial matter, any ULP charge is investigated and reviewed by staff at an NLRB regional office. That is the current status of the NFL's charge that the NFLPA did not engage in good faith collective bargaining

(notwithstanding the two years of effort), and its charge as to the NFLPA's renunciation of its collective bargaining status.

30. Unless and until the NLRB regional office, in consultation with the NLRB General Counsel's office in the District of Columbia in certain cases, decides to issue a complaint, there is, in fact, no NLRB proceeding pending. Unless and until the NLRB decides to actually file a complaint, the filing of the ULP charges evidences nothing more than allegations of a complaining party.

31. The NLRB staff can take many months before deciding whether to file a complaint, and, after a complaint is filed, the NLRB proceedings themselves can take years.

32. For example, on November 13, 1990, Larry Csonka, a former NFL player seeking to form a new union after the NFLPA had renounced its union status in 1989, filed a ULP charge, claiming that the NFL's continuing refusal to recognize the non-union status of the NFLPA interfered with his ability to organize a new union. The threshold issue was whether the NFLPA was still a "labor organization" under the NLRA, because, if it was not, no ULP complaint could be issued as a jurisdictional matter.

33. On June 26, 1991, more than seven months after the charge was filed, the NLRB Division of Advice issued an advice memorandum concluding that the charge had no merit and should be dismissed. The NLRB did

so after rejecting the NFL's contention that the NFLPA's disclaimer was a "sham," concluding that "the disclaimer is valid."

34. This advice memorandum was issued long after the charge was filed, and after Judge Doty had issued his decision that the non-statutory labor exemption no longer applied.

35. Judge Doty did not wait for the NLRB regional office to deal first with this charge. Indeed, in the proceedings before Judge Doty, the NFL argued that the NLRB had to determine the NFLPA's status, by "decertifying" the NFLPA, the functional equivalent of the relief the NFL seeks in response to this motion. Powell/McNeil, 764 F. Supp. at 1355. Judge Doty rejected that argument, holding that "there is no need for the NLRB to decertify the NFLPA." Id. at 1358 & n.7 ("Where, as here, the union concedes that it no longer has the support of a majority of employees to serve as their collective bargaining representative, requiring a decertification proceeding makes no sense.").

The NFL's Denial of Off-Season Irreparable Harm

36. The declaration submitted by Peter Ruocco on behalf of the NFL asserts that the players will not suffer irreparable harm in the absence of an immediate injunction, essentially because nothing or not much is happening in the NFL during the off-season. This is completely inconsistent with my experience in the NFL.

37. The facts are that the NFL has increasingly become a year-round business over the past twenty years, with players participating at many important club activities during this time of the so-called "off-season."

38. For example, the off-season would normally be comprised of up to 14 weeks of practice activity as well as classroom sessions where players spend valuable time with their coaches learning their club's offensive and defensive systems. Players are constantly working out at club facilities, under the supervision of club personnel who are constantly evaluating players. Players also undergo club supervised medical procedures and evaluations during the off-season. Veteran players typically engage in team-related activities during this time of year to maintain their playing abilities, and players, few of whom are assured of employment with a team, are doing everything possible to try to impress management personnel so they are better positioned to make the team.

39. Indeed, at this time of year, teams are intensively preparing for the "draft" of new players leaving college. The draft has a profound impact on team rosters and decisions as to which players to keep, or not keep, in preparation for the upcoming season. Notwithstanding the lockout, the NFL is proceeding with the draft, and teams are making personnel decisions for the draft, affecting player careers and lives.

40. Most significantly, now is the time when free agency should be taking place and players should be marketing their services to find the right

team in which they have the best chance to make a roster, be a starter, or otherwise advance their careers. This process requires an extended period of time to play out in a fair manner for all players, and any elimination or compression of this free agency period will lead to a set of scrambled outcomes and harms to different players that cannot be undone.

41. The continuing lockout of players is thus already having an adverse and irreparable impact on player careers far beyond issues of money. The most obvious issue is the continuing impact on whether players will, or will not, make a particular team or be able to sign with the team that gives them the best chance to play. Those decisions are impacted on a continuing basis with workouts, classroom study, medical rehabilitation, on-field team practices, and other interaction with the NFL teams.

42. The fact that players will be boycotted and denied any activities with the NFL teams during the lockout will especially affect the less experienced players, and players who were recently signed by teams, because those players need to learn new systems to better enable them to compete for a job. These players are among the most vulnerable and cannot afford to be held back with weeks or months of inactivity when they will have to compete against already established players competing for the same jobs. On the opposite end, players who are holding on at the end of their careers will likely be severely harmed by

any prolonged period of inactivity, so that their careers may prematurely end due to the lockout.

43. In short, one way or another, virtually all players throughout the league will be irreparably harmed by the owners' lockout before training camp begins or a single game is missed.

Dated: March 28, 2011

s/Richard A. Berthelsen

Richard A. Berthelsen