IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CARL ELLER, *et al.*, Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, *et al.*, Defendants.	No. 0:11-cv-00748-SRN-JJG

Memorandum of Law
of the National Football League and Its Member Clubs
In Opposition to Plaintiffs' Motion for a Preliminary Injunction

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INTRODUCTION

The *Eller* plaintiffs' motion for a preliminary injunction suffers from all of the legal deficiencies that undermine the *Brady* plaintiffs' motion plus one more. Like the *Brady* motion, the *Eller* motion is precluded at the threshold by, separately, the jurisdictional bar of the Norris-LaGuardia Act and the primary jurisdiction doctrine. Even if the Court had jurisdiction to reach the merits of the *Eller* motion, it must fail because of (i) the non-statutory labor exemption to the antitrust laws; and (ii) the balance of equities, which tilts sharply against the requested relief. In addition, the *Eller* plaintiffs do not—and cannot—allege antitrust injury.

On the threshold legal issues, the authorities supporting the NFL and its member clubs are three acts of Congress (the Norris-LaGuardia Act, the Labor Management Relations Act, and the National Labor Relations Act), the Supreme Court's decision in *Brown v. Pro-Football, Inc.*, 518 U.S. 231 (1996), the Eighth Circuit's decision in *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), a plethora of Supreme Court and Eighth Circuit cases addressing the doctrine of primary jurisdiction, and established precedent at the National Labor Relations Board that a union's disclaimer must be unequivocal, made in good faith, and not a tactical measure.

Against these authorities, the *Eller* plaintiffs—like the *Brady* plaintiffs—rely almost entirely on Judge Doty's pre-*Brown* decisions in

McNeil and *Jackson*. Neither of those decisions was reviewed by the Eighth Circuit; neither dealt with a motion to enjoin a lockout; neither involved a situation where there was pending before the NLRB a proceeding addressing a key predicate issue in the lawsuit; neither is binding on this Court; and each is otherwise readily distinguishable, as we demonstrate below.

That the *Eller* plaintiffs are not members of the bargaining unit does not enable them to circumvent the governing legal principles and authorities that bar an injunction here. Instead, that fact offers another reason why their motion should be denied: They are unlikely to succeed on the merits of their claim not only because of the legal deficiencies noted above, but also because they lack standing and cannot allege antitrust injury.

The four moving *Eller* plaintiffs are *former* NFL players. (*See* Compl. ¶¶13-16.) None is currently employed by or seeking employment with an NFL club. (*See id.* ¶¶20-21) None is a buyer or seller of services in the allegedly restrained market for player services. None is being locked out.[1]

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[1] The *Eller* complaint was amended on April 1—one day after the original plaintiffs filed their motion for a preliminary injunction—to add a new plaintiff, Antawan Walker, who purports to be draft-eligible. (Am. Compl. ¶17.) His claims are barred for the same reasons as those of the draft-eligible plaintiff in *Brady*, Von Miller. If either Mr. Miller or Mr. Walker seeks to enter into an employment relationship with an NFL Club, he will be within the scope of the bargaining unit and lawfully locked out under the federal labor laws. But as of now, neither is seeking employment with a club, neither is being locked out, and neither has standing to seek to enjoin the lockout.

And the remote and speculative injury that they allege—the prospect that an NFL retirement plan can be "terminated" "if no new CBA is created within a year" (*id.* ¶ 104)—is plainly not antitrust injury. Moreover, the uncertainty and indirectness of any injury to the *Eller* plaintiffs underscore the fact that the balance of equities weighs against preliminary injunctive relief.

We address each point briefly below, and incorporate by reference our Opposition to the *Brady* plaintiffs' motion for a preliminary injunction ("Opp.") (Docket No. 34 in Case No. 11-cv-639).

ARGUMENT

I. The Norris-LaGuardia Act Divests this Court of Jurisdiction to Grant the Requested Injunctive Relief.

Plaintiffs' request for a preliminary injunction fails at the jurisdictional threshold because of the anti-injunction provisions of the Norris-LaGuardia Act. (*See* Opp. 9-16.) That the moving *Eller* plaintiffs are former NFL players is irrelevant; the injunction that they seek is against the clubs' lockout of *current* players. The Norris-LaGuardia Act specifically forbids granting such relief.

The *Eller* plaintiffs, like the *Brady* plaintiffs, fail to cite a single case in which an injunction was issued against a lockout. We are aware of none, aside from the vacated district court decision in *Chicago Midtown Milk Distributors*; that injunction was immediately dissolved on Norris-LaGuardia

grounds by the Seventh Circuit. *See Chi. Midtown Milk Distribs. v. Dean Foods Co.*, 1970 WL 2761 (7th Cir. July 9, 1970).

In contrast, numerous courts have held that the Norris-LaGuardia Act prohibits a court from entering an injunction against a lockout. *See, e.g.*, *Chi. Midtown Milk Distribs.* 1970 WL 2761, at *1; *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298, 1311 (E.D. Wash. 1981); *Auto. Transp. Chauffeurs, Demonstrators & Helpers, Local Union No. 604 v. Paddock Chrysler-Plymouth, Inc.,* 365 F. Supp. 599, 601-02 (D. Mo. 1973). That bar is evident in the general prohibitions of Section 1 of the Act as well as the specific prohibitions of Sections 4 and 5. *See* 29 U.S.C. §§ 101, 104, 105.[2]

After enactment of the Labor Management Relations Act ("LMRA"), there can be no doubt that the Norris-LaGuardia Act removes jurisdiction from the federal courts to enjoin lockouts as well as strikes. The LMRA *authorizes* presidentially-initiated injunctions against a "strike *or lock-out*"

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[2] Plaintiffs argue (Mem. 15) that this Court can issue an injunction under Section 7 of the Act, 29 U.S.C. § 107. But when Section 4 applies, no injunction may issue, and there is no need to address Section 7. *See, e.g.*, *Chi. Rock Is. & Pac. R.R. Co. v. Switchmen's Union of N. Am.*, 292 F.2d 61, 62 (2d Cir. 1961). Even if Section 7 applied, plaintiffs have not met and cannot meet any of its many requirements; as but one example, plaintiffs have not alleged (and could not responsibly allege) any committed or threatened acts of "violence, intimidation, threats, vandalism, breaches of the peace [or] criminal acts" that would meet the "unlawful act" requirement of Section 7(a), 29 U.S.C. § 107(a). *Marine Transp. Lines, Inc. v. Int'l Org. of Masters, Mates & Pilots*, 770 F.2d 1526, 1530 (11th Cir. 1985).

that imperils national security (*see* 29 U.S.C. §178(a) (mentioning "lockout" twice)), and it explicitly exempts such injunctions from the jurisdictional bar of the Norris-LaGuardia Act (*see* 29 U.S.C. § 178(b)). If injunctions against lockouts were not within the scope of that bar, there would have been no need for the LMRA specifically to exempt from the anti-injunction provisions of the Norris-LaGuardia Act presidentially-initiated injunctions against lockouts.[3]

The four moving *Eller* plaintiffs allege (Mem. 12) that the Act does not bar the injunction they seek because, as retired players, "they no longer have an employment relationship with the NFL or any of its member clubs." But the anti-injunction provisions of the Norris-LaGuardia Act apply broadly to "*any* case ... *growing out of any* labor dispute," regardless of who seeks the injunctive relief. 29 U.S.C. § 104 (emphases added). *See W. Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 726 (5th Cir. 1985) (Section 4 of the Act "forbids courts to enjoin work stoppages in any case involving or

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[3] Even before the caselaw was settled to require a broad reading of the scope of the Norris-LaGuardia Act, leading labor law scholars relied on the LMRA to reach the same conclusion. *See, e.g.,* Donald H. Wollett & Harry H. Wellington, *Federalism & Breach of the Labor Agreement*, 7 Stan. L. Rev. 445, 456 n. 59 (1955) ("Section 208 of the [LMRA], 29 U.S.C. § 178 … empowers the federal courts to issue injunctions in certain cases involving strikes *or* lockouts imperiling the national health and safety, and it states that the Norris-LaGuardia Act shall not be applicable. Implicit in th[is] provision[] of the [LMRA] is the proposition that the Norris-LaGuardia Act is, in the absence of specific statutory provisions to the contrary, applicable to any case growing out of a labor dispute, irrespective of whether employer or employee conduct is in question.") (emphasis in original).

growing out of a labor dispute."); *see also* 29 U.S.C. § 105 (withdrawing jurisdiction to issue any injunction "upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy" because of any of the enumerated activities in Section 4 (which include strikes and lockouts)).

The NFL and its member clubs fit squarely within the definition of persons "participating or interested in" a labor dispute. 29 U.S.C. § 113(b). And there is no question that this "case … grow[s] out of a labor dispute" because it involves "persons who are engaged in the same industry, trade, craft, or occupation; or have direct *or indirect* interests therein." *Id.* § 113(a) (emphasis added). The moving *Eller* plaintiffs, who allege that the lockout may have a detrimental impact on their retirement benefits, assert an "indirect interest" in the labor dispute between the NFL clubs and their player-employees.

Like the *Brady* case, therefore, this case is subject to the anti-injunction provisions of the Act. *See Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 714 (1982) (reaffirming the principle in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 555, 563 (1938), that the Act applies even when "[t]he relation of employer and employees does not exist between" the parties)).

Plaintiffs' extensive reliance (Mem. 13-15) on Judge Doty's TRO decision in *Jackson v. NFL*, 802 F. Supp. 226 (D. Minn. 1992), misses the mark for several reasons. First, *Jackson* did not restrain a lockout, and thus it did not implicate the express prohibitions of Section 4. The TRO in *Jackson* applied to free agency rules known as "Plan B" which Judge Doty expressly found did *not* implicate any of the "enumerated activities" of Section 4. *See* 802 F. Supp. at 232 n.12. This case, in contrast, *does* involve an enumerated activity: "ceasing or refusing to … remain in any relation of employment," 29 U.S.C. § 104(a).

Second, Judge Doty entered a TRO in *Jackson* only after an antitrust challenge to Plan B had been tried to a jury verdict in *McNeil*.[4] (Immediately after that verdict, four players who were not parties in *McNeil* filed the *Jackson* case to challenge the same Plan B rules as applied to them.) Judge Doty relied on the *McNeil* verdict to find *Jackson* "clearly distinguishable" (802 F. Supp. at 234) from his decision four years earlier in *Powell*, in which he had *denied* preliminary injunctive relief against more restrictive free agency rules based upon the jurisdictional bar of the Norris-LaGuardia Act.

In *Powell*, Judge Doty correctly recognized that the Act's scope is "intentionally broad, covering any case … in which the employer-employee

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[4] The judgment based on the jury verdict in *McNeil* has since been vacated. (*See* Dkt No. 499 in Case No. 90-476.))

relationship is at the matrix of the controversy." *Powell v. NFL*, 690 F. Supp. 812, 814-17 (D. Minn. 1988) (internal citation and quotation omitted). Of course, the grounds for denial of an injunction here are even more compelling than the grounds upon which Judge Doty relied in *Powell*: While *Powell* involved only "player movement[,] a term or condition of employment" (*id.* at 814), this case implicates a lockout, one of the "enumerated activities" of Section 4 of the Act as to which the withdrawal of jurisdiction is absolute.

II. Resolution of Plaintiffs' Claims Requires Determination of Issues Within the Primary Jurisdiction of the NLRB.

Separate and apart from the lack of jurisdiction under the Norris-LaGuardia Act, the doctrine of primary jurisdiction requires a stay of this case until the NLRB can address the predicate, threshold issue of the validity of the NFLPA's purported disclaimer. (*See* Opp. 17-26.)

The *Eller* plaintiffs argue that "the union has, in effect, decertified itself" (Mem. 20) and that this Court should itself decide that the purported decertification is valid. But that is precisely why the primary jurisdiction doctrine must apply here: there is, at the very least, a serious question whether the NFLPA's tactical disclaimer violated its obligations under the National Labor Relations Act, and is therefore invalid. That issue must be resolved by the NLRB.

The NFLPA publication *The Huddle*, published before the Union's purported disclaimer, indicates that the NFLPA members "gave the NFLPA

permission to renounce its union status in the event of a lockout." (Connolly Decl. Ex. A, at 5.) This conditional delegation of authority confirms that the players were not dissatisfied with the NFLPA or its leadership; instead, they simply voted to let the Union's leadership decide if and when it perceived a tactical advantage to disclaim an interest in bargaining. At the very least, there is a question whether such gamesmanship constitutes a valid exercise of the Union's obligation under Section 8 of the National Labor Relations Act to bargain in good faith—a question that falls within the *exclusive* jurisdiction of the NLRB. *See, e.g.*, *San Diego Bldg & Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

"Obviously, the Board is not compelled to find a valid and effective disclaimer just because the union uses the word, and regardless of other facts in the case. … The question must be decided in each case whether the union has in truth disclaimed, or whether its alleged disclaimer is simply a sham and for that reason not to be given force and effect." *Capitol Market No. 1*, 145 NLRB 1430, 1431 (1964). *Accord IBEW (Texlite)*, 192 NLRB 1792, 1798-99 (1958), *enf'd,* 266 F.2d 349 (5th Cir. 1959) ("A union's 'bare statement' of disclaimer is not sufficient to establish that it has abandoned its claim to representation if the surrounding circumstances justify an inference to the contrary.").

The players, of course, are free to file their own unfair labor practice charge if they believe that the NFL clubs are improperly influencing their exercise of Section 7 rights to be or to not be represented by the NFLPA; they may also seek expedited injunctive relief from the Board to protect any such rights allegedly infringed by the lockout. *See* 29 U.S.C. § 160(j). But the doctrine of primary jurisdiction requires that this Court stay this action pending Board resolution of the threshold, predicate issues already before the Board that implicate the NLRA and the Board's specialized expertise.

As against the established Board precedent and the established caselaw on the primary jurisdiction doctrine, the *Eller* plaintiffs rely entirely on Judge Doty's decision twenty years ago in *McNeil v. NFL*, 764 F. Supp. 1351 (D. Minn. 1991). That decision does not control here for several reasons. To begin, Judge Doty recognized in *McNeil* that his decision with respect to the nonstatutory labor exemption presented an issue as to which there was "substantial ground for difference of opinion." 764 F. Supp. at 1360. Moreover, *McNeil* was decided five years before the *Brown* decision in which the Supreme Court articulated the "sufficiently distant in time and in circumstances test" and advised that courts must seek the "detailed views of the Board" when addressing the exemption. 518 U.S. at 250.

Second, the decertification at issue in *McNeil* was arguably distant in time, if not in circumstances, from the collective bargaining process. It came

years after the 1987 CBA had expired, and it followed years of litigation. Here, in contrast, the NFLPA purported to disclaim before the CBA even expired—literally in the midst of negotiations—and the NFLPA caused its members to file suit the very same day.

Third, when Judge Doty decided *McNeil*, there was no pending unfair labor practice charge relating to the purported disclaimer. Here, to the contrary, the case is in the same posture as *Powell*, where Judge Doty appropriately stayed his decision on the merits of the nonstatutory labor exemption when an unfair labor practice charge related to a predicate issue had been filed, but the Board had not yet decided whether to issue a complaint. *See Powell* 930 F.2d at 1296 (recounting procedural history).[5]

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[5] An unfair labor practice charge initiates a "proceeding" under the National Labor Relations Act. *See, e.g.*, 29 U.S.C. § 160; 29 CFR Pt 101. Without mentioning or considering whether the Board had issued a complaint, the Eighth Circuit has routinely applied the primary jurisdiction doctrine when cases implicate matters within the NLRB's jurisdiction. *See, e.g.*, *Minn-Dak Farmers Coop. Emps. Org. v. Minn-Dak Farmers Coop.*, 3 F.3d 1199 (8th Cir. 1993); *Constr. Bldg Materials, Local 682 v. Bussen Quarries, Inc.*, 849 F.2d 1123 (8th Cir. 1988); *Morello v. Federal Barge Lines, Inc.,* 746 F.2d 1347 (8th Cir. 1984). *Cf. Powell*, 930 F.2d at 1303-04 ("[A]s long as there is *a possibility that proceedings may be commenced before the Board*, or until final resolution of Board proceedings and appeals therefrom, the labor relationship continues and the [nonstatutory] labor exemption applies.") (emphasis added).

Fourth, history now establishes what Judge Doty could not have known in 1991: When the NFLPA says it is no longer collectively bargaining, that does not mean that it will no longer collectively bargain. (*See* Opp. 4-9.)

III. Even if this Court Had Jurisdiction, Plaintiffs Are Not Entitled to a Preliminary Injunction.

Even if the Court had jurisdiction to consider their motion, the *Eller* plaintiffs, like the *Brady* plaintiffs, could not demonstrate entitlement to the extraordinary injunction they seek. They cannot show a likelihood of success on the merits because (a) the nonstatutory labor exemption bars their claim and (b) separately, they do not suffer antitrust injury. As to the other factors, the *Eller* plaintiffs cannot demonstrate irreparable harm and the balance of the equities favors the NFL.

A. Plaintiffs cannot show a likelihood of success on the merits.

1. *Nonstatutory Labor Exemption.* Plaintiffs here, like the *Brady* plaintiffs, simply fail to come to grips with *Brown*'s "sufficiently distant in time and in circumstances" test or with *Brown*'s direction that a court should not decide the outer boundaries of the test "without the detailed views of the Board." 518 U.S. at 250. (*See* Opp. 27-39.)

Like the *Brady* plaintiffs, the *Eller* plaintiffs simply refuse to read the entirety of the Supreme Court's opinion in *Brown*, including the passages addressing the nonstatutory labor exemption at page 250 of the reported opinion. (*See* Mem. 19 (quoting *Brown*, but omitting the following: "We need

not decide in this case *whether*, *or where*, within these extreme outer boundaries [of decertification of a union or "extremely long impasse" accompanied by "defunctness" of the multiemployer bargaining unit] to draw that line. *Nor would it be appropriate for us to do so without the detailed views of the Board, to whose specialized judgment Congress intended to leave many of the inevitable questions concerning multiemployer bargaining bound to arise in the future.*" 518 U.S. at 250 (emphasis added).) And, like the *Brady* plaintiffs, the *Eller* plaintiffs rely exclusively on pre-*Brown* caselaw to argue that the nonstatutory labor exemption does not bar their claim.

The *Eller* plaintiffs contend that because they are not members of the bargaining unit, the nonstatutory labor exemption cannot apply. That is simply wrong as a matter of law. *See, e.g.*, *Clarett v. NFL*, 369 F.2d 124, 139 (2d Cir. 2004) (rejecting argument that nonstatutory exemption could not apply to bar an antitrust claim by a prospective draftee challenging the upcoming NFL Draft as a "group boycott"). Nor have the plaintiffs cited any law that would subject to antitrust challenge retired players' claims about threatened deprivation of collectively-bargained retirement benefits. *Cf. Atwater v. NFL*, 626 F.3d 1170, 1185 (11th Cir. 2010) (fact that retired players were not members of the bargaining unit did not mean that their claims were not preempted by federal labor law).

In their complaint, the *Eller* plaintiffs seek to invoke the purported "waiver" in Article LVII, Section 3(b) of the CBA (Article XVIII, Section 5(b) of the SSA). (*See* Compl. ¶¶116-20.) Their attempt to do so fails for the same reasons that the *Brady* plaintiffs' similar argument fails. (*See* Opp. 39-42.) Because the players purported to end the NFLPA's collective bargaining status *before* expiration of the CBA and SSA, presumably in an effort to avoid the six-month bar on antitrust suits imposed by Section 3(a), the "waiver" contemplated by Section 3(b) simply does not apply.

The purported "reaffirmation" of the disclaimer is irrelevant. "Reaffirming" a pre-expiration vote "*to end* the collective bargaining status of the NFL," Section 3(b) (emphasis added), does not and cannot change the fact that the vote being "reaffirmed" was taken pre-expiration; nor can it change the fact that if, as plaintiffs contend, the pre-expiration vote was effective, there was no collective bargaining status post-expiration "to end." The predicate for Section 3(b)—a vote after expiration "to end" the collective bargaining status of the NFLPA—simply has not been met.

Even if the predicate for Section 3(b) were satisfied, the waiver itself would have to be declared void as against public policy. Plaintiffs cannot seek to hold the NFL liable under the antitrust laws for conduct that is exempt from antitrust scrutiny. If invoked to prevent the NFL from demonstrating that the antitrust laws are not applicable here, Section 3(b)

and its SSA counterpart would be void as against public policy. *See, e.g.*, *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1397 (9th Cir. 1991) (voiding provision in consent judgment, citing *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) and *Restatement (Second) of Contracts* § 178 (1981)).

In any event, there can be no argument that Section 3(b) operates to waive the jurisdictional bar of the Norris-LaGuardia Act, the doctrine of primary jurisdiction, the NFL's right to pursue an unfair labor practice charge before the Board[6], or the "sufficiently distant in time and in circumstances" test of *Brown*—each of which is sufficient to find that plaintiffs are not entitled to an injunction.

2. *Antitrust Injury.* The moving *Eller* plaintiffs cannot show antitrust injury because the indirect injury that they allege—a speculative possibility that their pensions or other benefits will be affected—is not the type of injury against which the antitrust laws protect.

The *Eller* plaintiffs misstate the law in arguing that all that is required under Section 16 of the Clayton Act to seek injunctive relief "is that the alleged anticompetitive conduct creates a threat of injury, not that actual injury exists currently." (Mem. 3, citing *Cargill, Inc. v. Monfort of Colo.*, 479

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[6] The NFL's rights under the NLRA to present charges to the Board are not waivable. *See, e.g.*, *JI Case Co. v. NLRB*, 321 U.S. 332, 337 (1944).

U.S. 104, 122 (1986).) In fact, in *Cargill*, the Supreme Court held that a private plaintiff invoking Section 16 of the Clayton Act as a basis for injunctive relief must demonstrate "antitrust injury," a component of "antitrust standing." 479 U.S. at 122; *see also Ginsburg v. Inbev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010).

Plaintiffs invoking Section 16 must show that their injuries will be "inflicted directly" by the alleged anticompetitive conduct, and that they will suffer more than "indirect, secondary, or remote injury." *Lovett v. Gen. Motors Corp.*, 975 F.2d 518, 520-521 (8th Cir. 1992). "In short, consequential injury is not an antitrust injury." *Id.* at 521.

The moving *Eller* plaintiffs are all retired players; none is a "competitor, participant, nor consumer" within the allegedly restrained market for player services. *Henke Enters. v. Hy-Vee Food Stores, Inc.*, 749 F.2d 488, 489-90 (8th Cir. 1984); *see also S.D. v. Kan. City S. Indus., Inc.*, 880 F.2d 40, 46 (8th Cir. 1989) n.6 ("[T]he fact that a party is not a participant in the relevant market must be weighed heavily against a grant of standing.").

The injuries that the moving plaintiffs allege, a potential loss of retirement benefits and the potential absence of fine money to fund charities from which indigent retired players may seek help in the future, is at best "incidental to the alleged antitrust activity" and not antitrust injury of the kind that Section 16 requires. *See Lovett*, 975 F.2d at 521; *see also Kan. City*

S. Indus., Inc., 880 F.2d at 47 ("Because the antitrust laws were intended to protect competition, standing has been generally limited to actual participants in the relevant market: competitors and consumers.").

The moving *Eller* plaintiffs also cannot show that they "face a sufficiently impending or imminent threat to satisfy the standing requirement of § 16 [of the Clayton Act]." *Fair Issac Corp. v. Experian Information Solutions, Inc.*, 645 F. Supp. 2d 734, 754 (D. Minn. 2009). They allege that *if* the lockout lasts for more than a year, and *if* there is no new CBA, and *if* the NFL Retirement Plan is then terminated, then they *might* lose benefits. The first three components are obviously not immediate; the fourth is simply wrong. The Retirement Plan itself provides that even in the event of termination "the right of affected Players to benefits accrued to the date of such termination … will be nonforfeitable." (Pls.' Ex. Q at 33.)[7]

B. The balance of the equities favors the NFL.

Finally, the balance of the equities favors the NFL. For the same reasons that they cannot show antitrust injury, the moving plaintiffs here cannot show any harm—let alone harm that is immediate and irreparable, or

[7] Even if the Court were to consider the motion brought on behalf of the subsequently-added plaintiff, Mr. Walker, there would still be no ground for an injunction. If drafted, Mr. Walker (like Mr. Miller in the *Brady* case) would fall within the bargaining unit represented by the NFLPA, and his antitrust claim against the lockout would not have a likelihood of success on the merits due, among other reasons, to the nonstatutory labor exemption.

that would not have an adequate remedy at law in a claim for damages, under ERISA or otherwise.

On the other hand, the NFL would be irreparably harmed by an injunction because it would put the NFL clubs in a Catch-22 of being compelled by an antitrust court to choose between exposing themselves to antitrust challenge under the plaintiffs' own theories or attempting to operate without any common terms and conditions of employment of the kind necessary to sustain competitive balance on the football field.

A preliminary injunction against the lockout also would undoubtedly place the NFL in a situation in which it would be impossible to unscramble the eggs and restore the League and individual clubs to the positions they hold today. (*See* Opp. 45-47.)

In addition, here, as in *Brady*, the public interest in collective bargaining—especially multi-employer collective bargaining—free from intervention by antitrust courts favors denial of the injunction. (*See* Opp. 47-49.)

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' motion.

Respectfully submitted,

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