IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Carl Eller, Priest Holmes, Obafemi Ayanbadejo, Antawan Walker, and Ryan Collins, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

National Football League, Arizona Cardinals, Inc., Atlanta Falcons Football Club LLC, Baltimore Ravens Limited Partnership, Buffalo Bills, Inc., Panthers Football LLC, Chicago Bears Football Club, Inc., Cincinnati Bengals, Inc., Cleveland Browns LLC, Dallas Cowboys Football Club, Ltd., Denver Broncos Football Club, Detroit Lions, Inc., Green Bay Packers, Inc., Houston NFL Holdings LP, Indianapolis Colts, Inc., Jacksonville Jaguars Ltd., Kansas City Chiefs Football Club, Inc., Miami Dolphins, Ltd., Minnesota Vikings Football Club LLC, New England Patriots, LP, New Orleans Louisiana Saints, LLC, New York Football Giants, Inc., New York Jets Football Club, Inc., Oakland Raiders LP, Philadelphia Eagles Football Club, Inc., Pittsburgh Steelers Sports, Inc., San Diego Chargers Football Co., San Francisco Forty Niners Ltd., Football Northwest LLC, The Rams Football Co. LLC, Buccaneers Limited Partnership, Tennessee Football, Inc., Washington Football Inc.

Defendants.

Civil No. 11-CV-748 (SRN/JJG)

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Plaintiffs Carl Eller, Priest Holmes, Obafemi Ayanbadejo, Antawan Walker,[1] and Ryan Collins (collectively "Plaintiffs") hereby submit this reply brief in support of their motion to enjoin preliminarily the NFL and its member clubs from continuing a lockout that threatens to cancel the 2011 NFL playing season and in response to the "Memorandum of Law of the National Football League and Its Member Clubs In Opposition To Plaintiffs' Motion for a Preliminary Injunction" (April 4, 2011) (Dkt. No. 34) ("NFL Mem.").

In its opposing papers, the league has advanced various reasons why the motion should be denied. *First*, it contends that former and prospective NFL players lack standing to sue under the antitrust laws. NFL Mem., pp. 15-16. *Second*, it contends that the statutory labor antitrust exemption of the Norris-La Guardia Act (29 U.S.C. §§101-15) ("Norris-La Guardia") bars injunctive relief here. NFL Mem., pp. 3-8. *Third*, it contends that the doctrine of primary jurisdiction requires that the National Labor Relations Board ("NLRB") first decide whether the National Football League Players Association ("NFLPA") has properly renounced its representative status. *Id*., pp. 8-12. Fourth, the NFL argues that the nonstatutory labor antitrust exemption bars Plaintiffs' request for injunctive relief. *Id.*, pp. 12-15. Finally, it contends that injunctive relief

[1] Plaintiff Antawan Walker ("Walker") was added as a plaintiff in the "First Amended Class Action Complaint" (April 1, 2011) (Dkt. No. 33) ("FACAC"). He is a prospective player in the National Football League ("NFL" or "league") who has not been selected in any College Draft and not commenced any negotiations for employment with any NFL member club. Walker joins in the present motion and his status needs to be evaluated in deciding whether or not to grant preliminary injunctive relief.

should be denied because the balance of hardships tips in the league's favor. *Id*., pp. 17-18.relief as well. None of these arguments are meritorious.

II. ANTITRUST STANDING EXISTS.

Plaintiffs represent a class composed of: (a) all retired or former professional football players who were employed by any NFL member but are not now employed by the NFL or any member club and who receive health, retirement or other benefits from the NFL pursuant to the "Bert Bell/Pete Rozelle NFL Player Retirement Plan" (the "Plan") or other benefit plans subsidized by the NFL and (b) rookie professional football players who, as of March 11, 2011 to the date of final judgment in this action and the determination of any appeal therefrom, have not previously commenced negotiation with any NFL club concerning employment and have not been selected in any NFL College Draft. FACAC ¶21. Neither constituent group is employed by the NFL or is member clubs. As explained at paragraph 22 of the FCAC, none of the putative class members fall within the definition of the Collective Bargaining Unit ("CBU") contained in the 2006-12 Collective Bargaining Agreement ("CBA") between the NFL Management Council ("NFLMC") and the NFLPA, the union that formerly represented that CBU.

All putative class members have standing pursue claims for injunctive relief under Section 16 of the Clayton Act (15 U.S.C. §26). As the United States Supreme Court explained in *Cargill, Inc. v. Monfort of Colo*., 479 U.S. 104, 110-11 (1986) ("*Cargill*"):

> Section 16 of the Clayton Act provides in part that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief ... against threatened loss or damage by a violation of the antitrust laws...." 15 U.S.C. § 26. It is plain that § 16 and § 4[of the Clayton Act] do differ in

> various ways. For example, § 4 requires a plaintiff to show actual injury, but § 16 requires a showing only of "threatened" loss or damage; similarly, § 4 requires a showing of injury to "business or property," *cf. Hawaii v. Standard Oil Co*., 405 U.S. 251…(1972), while § 16 contains no such limitation.

The Eighth Circuit has further explained, in the context of claims by indirect purchasers of allegedly price-fixed goods or services, that a plaintiff seeking an antitrust injunction is not subject to the same standing requirements that would be imposed on a plaintiff seeking antitrust damages:

> Indirect purchaser status does not bar the plaintiffs from seeking injunctive relief under § 16 of the Clayton Act. The concerns of the direct purchaser rule have mainly to do with the complexities of incidence analysis, complexities that do not arise when the courts must consider the propriety of injunctive relief. As Professors Areeda and Hovenkamp explain, "An equity suit neither threatens duplicative recoveries nor requires complex tracing through the distribution chain. There are no damages to be traced, and a defendant can comply with several identical injunctions as readily as with one. *Illinois Brick* has not therefore barred an indirect purchaser's suit for an injunction." Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 371d, at 259 (1995)....

Campos v. Ticketmaster Corp., 140 F.3d 1166, 1172 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999) ("*Campos*"). *See Ginsberg v. InBev NV/SA*, 623 F.3d 1229, 1233 (8th Cir. 2010). Here, as well, no tracing or allocation of monetary losses, and no concerns about duplicative injunctive remedies should bar the relief sought.

The NFL responds correctly that Plaintiffs would still be obligated to demonstrate "antitrust injury" under Section 16 of the Clayton Act, citing *Cargill*. NFL Mem., p. 16.

In *Cargill*, no such injury was found because the plaintiff suffered decreased profits due to competition. 479 U.S. at 114-15. *See Campos*, 140 F.3d at 1172. The NFL then relies on a series of cases denying standing to antitrust plaintiffs seeking *damages* under Section 4 of the Clayton Act. NFL Mem., p. 16. *See Lovett v. General Motors Corp*., 975 F.2d 518, 520 (8th Cir. 1992), *cert. denied*, 510 U.S. 1113 (1884); *Henke Enterprises v. Hy-Vee Food Stores, Inc.*, 749 F.2d 488, 489 (8th Cir. 1984). Those cases are inapposite here.

The NFL also contends that the Plaintiffs who are retired or former plaintiffs are not participants in the market for professional football services. The short answer is they are; they derive direct benefits from the *playing of NFL games. Cf. American Ad Management, Inc. v. General Tel. Co. of Calif*., 190 F.3d 1057-58 (9th Cir. 1999) ("market participants" not confined to competitors or consumers, but may include others who can suffer antitrust injury, such as potential entrants, licensors, suppliers, landlords, dealers and indirect purchasers). But even if they were not deemed to be market participants, they would still have standing to seek injunctive relief under Section 16 of the Clayton Act. In *Campos*, the contention was that Ticketmaster and others were fixing the prices charged for ticket distribution services to promoters of shows. The plaintiffs were fans who bought tickets from promoters and the Eighth Circuit held that they stated a claim for injunctive relief. 140 F.3d at 1172.

Here, the simple fact is that the league's lockout has directly and simultaneously harmed multiple groups of plaintiffs. Active NFL players, who are represented in *Brady v. NFL*, No. 0:11-cv-00639-SRN-JJG (D. Minn.) ("*Brady*"), are being deprived of the

opportunity to play in football games, earn their wages, and build their professional careers. Prospective players, who are represented in this case and in *Brady*, suffer similar deprivations. Retired or former NFL players, who are represented only in this case, are actually or potentially deprived of health and retirement benefits that many need in order to survive and may be faced with the closure or financial endangerment of their Plan. All of these harms are direct but distinct and may be properly pursued by the constituent groups suffering them.

With respect to prospective players, there are numerous cases recognizing implicitly or explicitly the right of a potential player in a sports league to sue under the antitrust laws to challenge (usually on a group boycott theory) eligibility or exclusionary rules blocking or limiting player entry into the league. *See, e.g., Clarett v. NFL*, 306 F.Supp.2d 379, 397-98 (S.D.N.Y.), *rev'd on other grounds*, 369 F.3d 124 (2d Cir. 2004) ("*Clarett*") (challenge to league eligibility rule; antitrust standing found); *Linesman v. World Hockey Ass'n*, 439 F.Supp. 1315, 1320 (D. Conn. 1977) ("*Linesman*") (court preliminarily enjoined sports league's age limitation on the hiring of rookie hockey players); *Bowman v. NFL*, 402 F.Supp. 754, 756 (D. Minn. 1975) ("*Bowman*") (court preliminarily enjoined NFL's policy of not hiring former players of the World Football League); *Denver Rockets v. All-Pro Management, Inc*., 325 F.Supp. 1049, 1058-62 (C.D. Cal. 1971), *injunction reinstated sub nom. Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971) ("*Denver Rockets*") (enjoining National Basketball Association's ("NBA") eligibility rules); *Boris v. National Hockey League*, No. CV 83-4980 LEW (Kx), 1984 WL 894 at *4 (C.D. Cal. Feb, 28, 1984) (settlement decree resolving

challenge to National Hockey League's eligibility rules). The NFL effectively concedes that Walker, the prospective NFL player, has antitrust standing. NFL Mem., p. 17 n.7.

There can also be no dispute that *former* professional sports players can challenge ongoing anticompetitive practices of a sports league. *See, e.g., Radovich v. NFL*, 352 U.S. 445, 448-50 (1957) (former NFL player stated an antitrust claim for conspiracy to destroy the All-American Conference through blacklisting and other means); *Mackey v. NFL*, 543 F.2d 606, 609, 622 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) ("*Mackey*") (group of present and former NFL players successfully challenged NFL's Rozelle Rule); *McNeil v. NFL*, 790 F.Supp. 871, 875, 897(D. Minn. 1992) ("*McNeil*") (eight former NFL players allowed to proceed with challenge to NFL's Plan B rules); *Smith v. Pro-Football*, 420 F. Supp. 738, 747 (D.D.C. 1976), *aff'd in part and rev'd in part on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978) ("*Smith*") (in response to challenge by former NFL player, court deemed NFL's College Draft to be an unreasonable restraint of trade); *Robertson v. NBA*, 389 F.Supp. 867, 890-903 (S.D.N.Y. 1975) ("*Robertson*") (14 former players could represent class that included future players to challenge NBA's and American Basketball Association's draft, reserve, blacklisting and boycott policies; defense summary judgment motions denied and class certified); *Kapp v. NFL*, 390 F.Supp. 73, 82 (N.D. Cal. 1974), *vacated in part on other grounds*, 1975 WL 959 (N.D. Cal. April 11, 1975), *aff'd in part and dismissed in part as moot*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (former NFL player had standing to challenge Rozelle rule, draft rule and other rules, and won summary judgment).

The NFL contends that retired or former players are not direct victims of the league's lockout, but instead suffer only from some remote, indirect or secondary injury. NFL Mem., p. 16. That is simply not the case. Retirees and other former NFL players who receive retirement and health benefits are not suffering under the threat of mere collateral damage from the NFL's lockout. As the FACAC alleges (¶¶94-95, 104), the average career of an NFL player is short and they can suffer devastating injuries or long term effects (such as the "dementia" that the NFL's Plan 88 is directed against) that shorten their lives and greatly impact the quality of those lives. Often, their only hope of survival is through benefits received from the league. Any cessation or reduction of those benefits caused by a lockout is an injury that is life-threatening.

Several programs sponsored by the NFL Player Care Foundation and The Professional Athletes Foundation ("Foundations") will be put in jeopardy because they are funded in part by money received if the 2011 NFL season goes forward. FACAC, ¶105. The lockout means these sources of revenue will no longer support these programs. This could result in the removal of vital services for the retirees – which particularly affects those who would otherwise not be able to afford them, *e.g.*, the high percentage of retired players who live off of less than $200 per month in pensions. If these programs are not provided in a timely way, it could result in a player not finding an illness in time, not obtaining vital prescription drugs, and/or medical treatment. *Id.*[2]

[2] The affected programs include: (a) the Cardiovascular Health Program, which provides extensive cardiovascular screenings and education; (b) obesity screening and nutritional counseling; (c) the prostate screening program; (d) the NFL Neurological Care Program, which evaluates and treats spine-related conditions among retired players; (e) priority

Former or retired players are injured by the lockout in other ways as well. *Id*. They may be denied access to their medical records which could prevent a timely diagnosis. Testing and treatment for dementia under the NFL's 88 Plan will not be allowed for those retired players who were not enrolled prior to the expiration of the 2006 CBA. Tuition assistance programs for retired players will be eliminated and a retired player may be unable to finish his education. The presence of the lockout and the absence of a new CBA mean that there will not be needed revenue that might permit medical monitoring for retired players. With the high rate of retired players being diagnosed with dementia and deceased retired players being diagnosed with CTE (Chronic Traumatic Encephalopathy), the faster such monitoring procedures are instituted, the faster players will be able to receive treatment. And NFL Hall of Famers and prospective Hall of Famers may not receive the once in a lifetime Hall of Fame experience that is normally guaranteed to Hall of Famers because the Hall of Fame game may be canceled due to the lockout and the funds that are obtained through that game go toward funding the Hall of Fame ceremonies.[3]

The NFL makes the point that even if the Plan is dissolved due to a continued lockout with no CBA, the benefits accrued up to that date are nonforfeitable. NFL Mem.,

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access to eligible retired players for assisted living; (e) the Discount Prescription Drug Card program; (f) the Medicare supplement program; and (f) the Player Assistance Trust, which provides financial assistance to former players for financial crises, completion of bachelor degrees, and programs provided by the NFL Care Foundation.

[3] *See NFLPA v. NFL*, 598 F.Supp.2d 971, 982 (D. Minn. 2008) ("*NFLPA*") (inability to play in Pro Bowl deemed to be part of irreparable harm supporting players' request for an injunction).

p. 17. That argument misses the point. The preliminary injunction is sought to ensure that *future* league contributions to the Plan are protected. This is a legitimate concern. In August of 2010, the United States Department of Labor ("DoL") put the Plan on "endangered" status because the Plan's funded percentage was only 75%.[4] The DoL's letter to the Plan (available from its website at http://www.dol.gov/ebsa/pdf/e-notice092210001.pdf) noted that the Plan needed to devise a "funding improvement plan" and said that "*if the collective bargaining agreement is extended and provides for future contributions by the NFL Clubs under the same methodology as currently exists*, those future contributions will exceed the minimum amounts required under federal law for a funding improvement plan." (Emphasis added.) Of course, the league's "lockout strategy," culminating in its actual lockout (*White v. NFL*, No. 4-92-906 (DSD), 2011 WL 706319 at *1-*5 (D. Minn. March 1, 2011) ("*White II*"); FACAC ¶¶51-88)), precluded that possibility. If the 2011 NFL season is not played and the revenue otherwise obtainable from that season is not available to the Plan, it could well fall from

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

"endangered" to "critical" status and the former and retired NFL players who are beneficiaries of the Plan could be injured irretrievably.

In sum, the retired and former NFL players, like current and prospective players, are suffering actual or threatened antitrust injury directed against them, for which they are entitled to injunctive relief.[5]

III. THE STATUTORY LABOR ANTITRUST EXEMPTION IS INAPPLICABLE.

The NFL argues that the statutory labor antitrust exemption embodied in Norris-LaGuardia bars Plaintiffs' claims. It reasons that under 29 U.S.C. §104, this Court lacks jurisdiction to issue an injunction in "any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts." There follows a list of nine types of conduct; employer lockouts are not listed.

In interpreting this language, it is important to understand both its purpose and its subsequent judicial interpretation. it is well-settled that courts may issue injunctions in labor disputes so long as the injunctive relief is consistent with the Act's underlying

[5] *Cf. Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1365 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) (the Los Angeles stadium was held to have standing to raise an antitrust damage claim against a league rule prohibiting the Oakland Raiders from transplanting to Los Angeles. The Ninth Circuit held that the stadium suffered direct harm because of the NFL's conduct, not some mere "ripple effect" based on its "indispensable and intimate connection with professional football and football teams. An injury such as that suffered by the Coliseum in the present case cannot be characterized fairly as an indirect 'ripple effect.'"); *Piazza v. Major League Baseball*, 831 F.Supp. 420, 432-34 (E.D. Pa. 1992) (individual partners in partnership denied the right to enter sports league with a new club stated an antitrust claim).

policies "to safeguard the right to strike in a labor dispute" (the "core" concern of the Act), and to encourage the arbitration of labor disputes. *See Ozark Air Lines, Inc. v. Nat'l Mediation Bd.*, 797 F.2d 557, 562-63 (8th Cir. 1986). *See also Burlington Northern Railroad Co. v. Bhd. of Maintenance of Way Employees,* 481 U.S. 429, 437 (1987) ("[Norris-LaGuardia] expresses a basic policy against the injunction of activities of labor unions.")

Courts have recognized that Norris-LaGuardia's anti-injunction provision has to be read in light of subsequent judicial and legislative developments. As the Ninth Circuit explained in *Camping Constr. Co. v. District Council of Ironworkers,* 915 F.2d 1333, 1343 (9th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) (emphasis in original):

> With many statutes our inquiry would end with the discovery of a literal meaning so plain. However, the Supreme Court has made it clear that the Norris-LaGuardia Act is not necessarily to be construed literally in all circumstances. Enacted in 1932, the Norris-LaGuardia Act is one of the oldest surviving pieces of labor legislation in this country. More recent acts providing for more extensive regulation of labor-management relations (such as the Wagner Act, the Taft-Hartley Act, and Title VII of the Civil Rights Act of 1964) have changed the face of labor law in the United States, yet there has been no accompanying revision of the Norris-LaGuardia Act. The courts have thus been left with the task of attempting to accommodate Norris-LaGuardia to later acts in order to create a coherent whole. … The result has been that, in spite of what the Norris-LaGuardia Act says, the Supreme Court has held that federal courts *do* have jurisdiction to issue injunctions in *some* labor disputes, even in some of the circumstances covered by section 4's outright ban.

It is well-established that the Norris-LaGuardia Act must "give way" when its "jurisdictional bar" is inconsistent with "the mandates of [another] specific federal

statute." *See Local 1814, Int'l Longshoremen's Ass'n v. N.Y. Shipping Ass'n, Inc.*, 965 F.2d 1224, 1232 (2d Cir. 1992), *cert. denied*, 506 U.S. 963 (1993) (enjoining consent judgment to accommodate the policies underlying federal racketeering statute); *Jackson v. NFL*, 802 F. Supp. 226, 233-34 (D. Minn. 1993) ("*Jackson*") ("the Act [Noeeis-LaGuardia does not preclude injunctive relief' because "such relief will not undermine any labor policy set forth in the Act" and because denying such relief would "justify the continued application of a system found illegal" under federal antitrust statutes).

The NFL relies on three cases that it claims recognize the statutory bar on injunctions applies to lockout activity: *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298, 1311 (E.D. Wash. 1981) ("*Morris*"); *Automobile Transport Chauffeurs, demonstrators & Helpers, Loc. No. 604 v. Paddock-Chrysler Plymouth, Inc.*, 365 F.Supp. 599 (E.D. Mo. 1973) ("*Paddock*") and *Chicago Midtown Milk Distribs. v. Dean Foods Co.*, Nos. 18577 and 18578, 1970 WL 2761 (7th Cir. July 9, 1970) ("*Dean Foods*").[6] The cases on which the NFL relies are distinguishable.

In *Dean Foods*, a lockout was not the subject of a temporary restraining order ("TRO"); it was the defendants' refusal to sell milk to master vendors based on their lockout against the relevant union that was enjoined. The Seventh Circuit reversed the grant of the TRO, but did *not* cite 29 U.S.C. §104. It did note that there was a basis to

[6] It also relies on the fact that under the Labor Management Relations Act ("LMRA"), the President of the United States can enjoin a lockout imperiling national security. The fact that the President is empowered to do so in certain instances does not mean that courts were disempowered to do so in others.

conclude that the master vendors were represented by the union for collective bargaining purposes. 1970 WL 2761 at *1. That is not true here. No case has followed *Dean Foods*.

In *Paddock*, the Court was dealing with a request for an injunction under Norris-LaGuardia (pursuant to 29 U.S.C. §107) and the LMRA. It did not construe 29 U.S.C. §104. More importantly, there was a factual dispute as to whether a lockout had occurred because picketing employees had been allowed to return to work. 365 F.Supp. at 601. The district court did not say that lockouts cannot be enjoined; it stated that the plaintiff had not made a sufficient showing to warrant injunctive relief, noting that a prior TRO had been "improvidently granted because of the gross contradictions in the verified complaint and the actual facts." *Id*. at 602. No subsequent decision has cited *Paddock*.

In *Morris*, members of a local union were locked out in a dispute with a MCA, a multi-employer collective bargaining agent for mechanical contractor firms, over exclusive bargaining rights. The local began entering into collective bargaining agreements with non-MCA members. The MCA brought an unfair labor charge, saying the local was trying to withdraw from a historical bargaining unit. That matter settled and the local filed an unfair labor charge of its own alleging that the lockout resulted from a conspiracy in support of MCA's goal to force the local to recognize MCA as the exclusive bargaining agent for all firms in the local's jurisdiction. *See* 511 F.Supp. at 1305. The district court found no restraint of trade:

> Local began negotiations with non-MCA members shortly after the lockout. It both recognized and signed an agreement with a newly formed employer group during the strike and lockout period. Obviously, its freedom to do so was unimpaired by the lockout. Again, the question: what trade of

> Local was restrained? Local and its employees relationship with independent contractors was unaffected through the strike and lockout. Indeed, Local's interests in relationships with non-MCA members appears to have been strengthened.

Id. at 1309. In acknowleged *dicta* (id. at 1310-11), the court said the statutory labor antitrust exemption applied, with very little analysis. *Id*. at 1311. This *dicta* is hard to reconcile with the court's previous statement that:

> Local characterizes this [MCA's exclusivity demand] as a demand backed by the coercive force of the lockout. But Local rejected MCA's proposal, presented no counter proposal, and struck, aware that the Defendants intended to lockout. The union could freely reject any "demand" so long as it bargained in good faith. Presented with an impermissible motivated negotiating demand Local could have filed a complaint with the NLRB. The union had other choices. It could consent to an agreement containing an unlawful demand and safely refuse to abide by a term the effective enforcement of which would violate Section 1 or 2 of the Sherman Act....*It could sue for declaratory or injunctive relief.*

Id. at 1309 n. 6 (emphasis added). *Morris* is thus unpersuasive and no court has followed it.

Under the NFL's view, 29 U.S.C. §104 bars injunctive relief with respect to *any* dispute that in *any way* arises from or is related to the differences between the league and the NFLPA, no matter whom it is brought by or when it is brought. A plain reading of the statute indicates, however, that disputants need not have an employer-employee relationship *only* where the dispute concerns "the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment." The Fourth Circuit has stated:

> From its study of the Clayton and Norris-LaGuardia Acts and the interpretation of those acts by the courts, the trial court concluded, and we agree, that boycotting and price-fixing activities, such as those engaged in by the defendants in the instant case, would be exempt from operation of the antitrust laws (1) if the parties to a dispute stand in the relationship of employer and employee and dispute some aspect of that relationship, or (2) if the employer-employee relationship of others is the crux of the dispute between the parties.

Taylor v. Local No. 7, Int'l U. of Journeymen Horseshoers of the United States & Canada (AFL-CIO), 353 F.2d 593, 605 (4th Cir. 1965), *cert. denied*, 384 U.S. 969 (1966). The employer-employee relationship must have a "central bearing" on the dispute in question. *Betteroads Asphalt Corp. v Federacion de Camioneros*, 391 F.Supp. 1035, 1038 (D.P.R. 1975) (association of truck owners picketing manufacturer to give them exclusive hauling rights not a labor dispute). *See Converse v. Highway Constr. Co. of Ohio*, 107 F.2d 127, 131 (6th Cir. 1939) (coercion to join contractors' association not a labor dispute); *Boise Cascade Int'l Corp. v. Northern Minn. Pulpwood Producers Ass'n*, 294 F.Supp. 1015, 1024-25 (D. Minn. 1968) ("[t]he court is clear that the Norris-LaGuardia Act, 29 U.S.C. § 104, does not apply to the facts of this case so as to prevent preliminary injunctive relief. It would seem that this is not a 'labor dispute' in the traditional sense and thus that act has no application….Rather what is presented in the case at hand is an apparent violation of the Sherman Act by virtue of what appears to be an illegal boycott by what the trier to [*sic*] fact may ultimately well find to be a legal organization").

More recently, in *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's U.*, 457 U.S. 702, 712-13 (1982) (footnote omitted), which the league cites in its brief (NFL Mem., p. 6), the United States Supreme Court explained that:

> The critical element in determining whether the provisions of the Norris-LaGuardia Act apply is whether "the employer-employee relationship [is] the matrix of the controversy." *Columbia River Packers Assn., Inc. v. Hinton*, 315 U.S. 143, 147…(1942). In this case, the Employer and the Union representing its employees are the disputants, and their dispute concerns the interpretation of the labor contract that defines their relationship. Thus, the employer-employee relationship is the matrix of this controversy.

Here, the dispute between Plaintiffs and the NFL—the continuance of the lockout—does not concern the nature of any labor contract that defines their relationship. The 2006 CBA to which Plaintiffs were not parties (attached as Exhibit P to the prior Declaration of Mark Feinberg (Dkt. No. 13)) has no provision dealing with a lockout after the expiration of the agreement; it does contain a provision (Article IV §1) precluding the NFL or its member clubs from engaging in any lockout, but only for the duration of the agreement.[7] Moreover, the NFLPA has renounced its representational status and no longer seeks to negotiate or arrange terms of employment; the 2006 CBA has ended and no successor CBA is being discussed. The employee-employer relationship between active players and the NFL and its member clubs is not the "crux" or "matrix" of the controversy between Plaintiffs and the NFL.

[7] Indeed, in *Powell v. NFL*, 930 F.2d 1293, 1300 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) ("*Powell I*"), the Eighth Circuit suggested that even once a labor impasse has been reached, "an employer's continued adherence to the status quo is authorized." Under the logic of *Powell I*, the lockout ban in the 2006 CBA, should have continued to have been adhered to by the NFL and its member clubs.

In addition, the NFL's broad reading of Norris-LaGuardia is hard to square with cases in this Circuit and district (as well as elsewhere) that have permitted the granting of injunctive relief against the NFL and other sports leagues. The Eighth Circuit in *Mackey* upheld an injunction against the Rozelle Rule, saying the statutory labor exemption was intended to "insulate legitimate collective activity by employees…." 543 F.2d at 611. *See Powell v. NFL*, 930 F.2d 1293, 1298 n.4 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) ("*Powell I*"); *McNeil*, 790 F.Supp. at 880-81. The statutory labor antitrust exemption was also not applied in injunction cases like *Bowman*, *Linesman*, and *Denver Rockets*. *See Clarett*, 306 F.Supp.2d at 391 n. 74 (statutory exemption deemed inapplicable to league eligibility rules); *White v. NFL*, 822 F.Supp. 1389, 1411 (D. Minn. 1993), *supplemented*, 836 F.Supp. 1458 (D. Minn. 1993), *aff'd*, 41 F.3d 402, 406 (8th Cir. 1994), *cert. denied sub nom. Jones v. NFL*, 515 U.S. 1137 (1995) ("*White I*") (court certified a settlement class under Fed. R. Civ. P. 23(b)(2), saying that "[t]he factual circumstances of this case, and its predecessors, confirm that it is a case in which the plaintiff class's claims for structural, injunctive relief 'predominate' over its claims for damages"); *Robertson*, 389 F.Supp. at 886-90 (finding no exemption under labor laws); *White II*, 2011 WL 706319 at *12 (court ordered a separate hearing at which injunctive relief could be sought).

The statutory labor antitrust exemption was also explicitly not applied in *Jackson*, where the district court said that "[i]t would be ironic if a statute that had been enacted to protect the rights of individual employees from improper actions by employers and the courts were turned against those employees and used to justify the continued application

of a system found illegal under the Sherman Act." 802 F.Supp. at 233. *See NFLPA*, 598 F.Supp.2d at 978 ("[t]he Act, however, is not a blanket prohibition on any injunction in a labor case").

Even if the Court concludes that Plaintiffs' claims might otherwise fall within 29 U.S.C. §104, the court in *Jackson* squarely held that the statutory antitrust exemption ceases once a union renounces its representative status, as has happened here. 802 F.Supp. at 234. The NFL says that Judge Doty was not dealing with a lockout. NFL Mem., p. 7. That is true, but his opinion does not turn exclusively on that distinction. Judge Doty distinguished his prior ruling in *Powell v. NFL*, 690 F.Supp. 812 (D. Minn. 1988) primarily on the ground that "[t]he present case, however, is clearly distinguishable from *Powell* as a result of the court's subsequent determination that the nonstatutory labor exemption terminated after the players abandoned their union...." 802 F.Supp. at 234.

Finally, if the Court elects to treat the Plaintiffs' claims as falling within the ambit of Norris-LaGuardia, it should alternatively issue an injunction under 29 U.S.C. §107. *NFLPA*, 598 F.Supp.2d at 978.

IV. THE NFL'S PRIMARY JURISDICTION ARGUMENT LACKS MERIT.

The NFL contends that this court should defer to the primary jurisdiction of the NLRB, before which the league has filed an unfair labor charge against the NLPA, asserting that the union has engaged in a sham renunciation of its representative status and has to return to the collective bargaining table. This argument is specious. The NFL says that the union cannot turn its representative status on and off like a light switch. By the same token, the league cannot yank some imaginary collar around the neck of the

NFLPA to coerce it to bargain collectively when its members have said they do not want it to do so.

This argument is unavailing. Judge Doty rejected a similar argument in *White I*:

> The court further concludes that, in the present context, findings with respect to the reconstitution and recognition of the NFLPA as the players' union are not within the primary jurisdiction of the NLRB. The nonstatutory labor exemption is a judicially created doctrine, and the definition of its scope and application must be made by the federal courts, not the NLRB. In order to determine whether the nonstatutory labor exemption applies to the provisions of the Settlement Agreement that have been incorporated into the new Collective Bargaining Agreement, the court must make preliminary findings that the Collective Bargaining Agreement has been negotiated at arm's length by a valid collective bargaining representative, and that the terms of the agreement are mandatory subjects of collective bargaining. In McNeil, the court held that the nonstatutory labor exemption had ended because the NFLPA was no longer a union, thereby rejecting the NFL's argument that such a determination could only be made by the NLRB. *See Powell* [*v. NFL*,], 764 F.Supp. [1351] at 1356-57 [(D. Minn. 19910 ("*Powell II*")] (holding only in *McNeil*). The court now finds that the NFLPA has been validly reconstituted as a union as a necessary predicate to its ruling on the applicability of the nonstatutory labor exemption. The court therefore rejects any claims that the findings concerning the nonstatutory labor exemption are within the NLRB's primary jurisdiction.

Powell I, 836 F. Supp. at 1500-01 (footnote omitted).

Similarly, the district court said in *Mackey*, in an antitrust suit challenging the league's free agency rules:

> 8.1 The National Labor Relations Board does not have exclusive jurisdiction over the subject matter of this lawsuit.

> 8.2 The National Labor Relations Board does not have primary jurisdiction over issues necessary to the Court's determination.
>
> 8.2.1 The doctrine of exclusive primary National Labor Relations Board jurisdiction has never been applied by the Supreme Court to avoid a determination on the merits of an antitrust claim.

407 F.Supp. at 1011. *Accord, Robertson,* 389 F.Supp. at 877 (rejecting primary jurisdiction defense based on NLRB authority).

V. THE NONSTATUTORY LABOR ANTITRUST EXEMPTION IS ALSO INAPPLICABLE.

The NFL also argues that the nonstatutory labor antitrust exemption bars Plaintiffs' claims. Plaintiffs contend that this exemption should not apply to a class that was not a part of the CBU that used to exist. The NFL responds that the Second Circuit in *Clarett* took a different view, finding that the antitrust claims of a prospective NFL player challenging the league's eligibility rules were barred. There are at least five responses to this argument.

First, the Second Circuit disagreed with the Eighth Circuit's analysis in *Mackey*, which is, of course, controlling law here. *See* 369 F.3d at 133-34.

Second, there was no issue in *Clarett* of the union renouncing its representative status. Where that has occurred, courts in this district have deemed the nonstatutory labor antitrust exemption inapplicable. *McNeil,* 790 F.Supp. at 883-84; *Powell II,* 764 F.Supp. at 1358-59. *See Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996). The Eighth Circuit cited the *Powell II* decision in *White I*, saying that the decision recognized the NFLPA's

"disclaimer of its status as exclusive bargaining representative, thus ending the nonstatutory labor exemption." 41 F.3d at 406.

Third, the eligibility rules at issue in *Clarett* were part of the relevant CBA; here, the last applicable CBA said nothing about an employer lockout after the agreement expired.

Fourth, the NFL's current view of the scope of the nonstatutory labor antitrust exemption is impossible to reconcile with its prior unsuccessful effort to sue the NFLPA for allegedly attempting to fix player wages in violation of the antitrust laws. *See Five Smiths, Inc. v. NFLPA*, 788 F.Supp. 1042 (D. Minn. 1992).

Finally, the NFL's current views are also inconsistent with what it told the Eighth Circuit in *Powell I*:

> The League concedes that the Sherman Act could be found applicable, depending on the circumstances, if a challenged restraint related to a permissive rather than a mandatory subject of bargaining; *if the restraint had been imposed on employees outside the collective bargaining process* or had not originally been proposed in good faith; *or if the affected employees ceased to be represented by a certified union.*

930 F.2d at 1303 n. 12 (emphases added).[8]

[8] The NFL also makes arguments about the balance of equities.NFL Mem., p. 17 n. 7. Those arguments have been refuted in Plaintiffs' prior brief.

VI. CONCLUSION

For all of the foregoing reasons, as well as those presented in Plaintiffs' opening brief, the request for preliminary injunctive relief should be granted.

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Respectfully Submitted,

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