IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE
ARBITRATION BETWEEN

THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION On Behalf of Steve Harvey, David Alexander and Marlon Kerner	:	Civil Action No. 08-civ-3658 (PAC)
and	:	**SDNY ECF FILING**
THE NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL On Behalf of THE BUFFALO BILLS and THE NEW YORK JETS	:	
THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION On Behalf of Charles Smith, Dusty Renfro, Michael Swift and Jason Peter	:	
and	:	
THE NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL On Behalf of THE CAROLINA PANTHERS	:	

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITION TO CONFIRM AND MOTION TO DISMISS PETITION TO CONFIRM

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Respondents National Football League Management Council ("NFLMC" or "Management Council"), Buffalo Bills, New York Jets, and Carolina Panthers, collectively "Respondents," hereby oppose Petitioner National Football League Players Association's ("NFLPA" or "Petitioner") amended petition ("Petition") to "confirm" an arbitration award rendered pursuant to the parties' collective bargaining agreement ("CBA"). Respondents further move to dismiss this action pursuant to Federal Rules of Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

As explained below, the Petition should be denied and this action should be dismissed on two independent grounds. First, Petitioner cannot satisfy the justiciability requirements of Article III of the United States Constitution, and its Petition should therefore be dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). At its core, the NFLPA seeks to confirm an arbitration award in the absence of *any* dispute regarding the award or Respondents' compliance with its terms. Indeed, by agreement of the parties, the award itself will not become binding precedent until at least 2010, and, depending on the parties' future collective bargaining negotiations, it is entirely possible that the arbitration award may never become binding. Until the award becomes final and binding, no case or controversy exists as required to maintain a federal court action under Article III of the United States Constitution.

Moreover, the NFLPA does not state a claim for relief under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) ("LMRA" or "Section 301"). In particular, the NFLPA cannot demonstrate, as it must, that the arbitration award is "final and binding." The NFLPA also fails to identify any provision of the CBA breached by Respondents. To the contrary, the grievances underlying the arbitration award have been settled, and the decision

itself will not become binding precedent until at least 2010, if ever. Accordingly, the Petition should be dismissed for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

STATEMENT OF FACTS

I. The Underlying Arbitration

Respondent NFL Management Council is the sole and exclusive collective bargaining representative of all 32 member clubs of the National Football League ("NFL"). *See* NFLPA Petition at 2. The NFLPA is the sole and exclusive bargaining representative of all NFL players. *Id.* Both parties and their members are bound by the NFL CBA. *Id.* at 3. The CBA contains mandatory grievance and arbitration procedures. *See id.*; *see also* Declaration of Stacey R. Eisenstein ("Eisenstein Decl."), attached hereto, at Ex. 2.[1]

[1] The documents attached to the Declaration of Stacey R. Eisenstein may properly be considered in this motion to dismiss. Portions of the NFL CBA are attached to and referenced in the Petition, and the NFLPA relies upon the CBA in making its application to the Court. *See* Petition at 3; Declaration of Adam J. Kaiser in support of NFLPA Petition ("Kaiser Decl.") at Exs. A, B. The parties' agreement to regarding the award, discussed *infra,* is also incorporated by reference in the Petition. *See* Petition at 5 ("By agreement of the parties reached in summer 2006 in connection with their new CBA, however, the final award would not be delivered to any of the parties until July 2007, after the new CBA would be in effect."); *see also* Kaiser Decl. at Ex. D. Therefore, the Court's consideration of these documents does not convert Respondent's motion to dismiss into one for summary judgment. *See Ackerman v. Local Union 363, Int'l Bhd. of Elec. Workers*, 423 F. Supp. 2d 125, 127 (S.D.N.Y. 2006) (proper to consider terms of a collective bargaining agreement where plaintiff "affirmatively pleads the existence and terms" of the agreement); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (citation omitted) (explaining that a court may consider documents incorporated by reference or attached to the complaint without converting a motion to dismiss into a motion for summary judgment); 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357. Moreover, in resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a court may refer to evidence outside the pleadings. *See Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986).

On May 17, 2005, pursuant to the CBA's mandatory dispute resolution procedures, the NFLPA filed a grievance against the New York Jets and the Buffalo Bills, two NFL member clubs, on behalf certain NFL players (the "Grievants") who claimed they were denied workers' compensation benefits under the CBA. *See* Kaiser Decl. at ¶ 3. On September 14, 2005, the NFLPA filed a similar grievance on behalf of other NFL players against the Carolina Panthers, which was consolidated with the grievance filed against the Jets and the Bills ("Consolidated Grievances"). *Id.* at ¶¶ 5, 7. In the Consolidated Grievances, the NFLPA alleged that the Grievants had been denied certain workers' compensation benefits under the CBA as a result of the manner in which the Jets, Bills, and Panthers had claimed an "offset" for certain injury protection benefits already paid to the Grievants. *Id.* at Ex. C.

On January 10, 2006, in accordance with the mandatory procedures set forth in the CBA, the parties participated in an arbitration hearing in New York, New York before NFL Arbitrator Shyam Das. *See* Petition, at 5. On October 10, 2006, prior to the issuance of Arbitrator Das' opinion and award ("Award"), the parties agreed to settle the claims of all of the Grievants as part of an agreement to modify and extend the overall CBA. *See* Kaiser Decl. at ¶ 10; Eisenstein Decl. at Ex. 1. As part of that settlement, the Management Council and the NFLPA agreed that the decision in the underlying arbitration could not be used as precedent for future cases unless and until the CBA reached its "Final League Year." Eisenstein Decl. at Ex. 1. Thus, the agreement states that the forthcoming Award will "*not go into effect* until the beginning of the Final League Year, at which time . . . the opinion and award will constitute the full, final and complete disposition of the grievance and will be binding upon the Players and the Clubs . . . ."

Id. (emphasis supplied). Under the terms of the current CBA, the Final League Year cannot occur before 2010.[2]

On February 14, 2007, the Arbitrator issued his Award in the Consolidated Grievances.

II. The Instant Action

More than one year later, on April 16, 2008, the NFLPA filed the instant Petition "pursuant to the Federal Arbitration Act." *See* Original Petition, at 2. Following the pre-motion conference before this Court, on June 17, 2008, the NFLPA amended its Petition to clarify that it was being brought "under and pursuant to" Section 301 of the LMRA. In its Petition, the NFLPA asks that the Court "confirm" the Award and "enter a judgment declaring that Paragraph 10 of the NFL Player Contract provides only for a time offset, and not for a dollar-for-dollar offset." *Id.* at 7.

ARGUMENT

I. Standard of Review

The Second Circuit has recognized that the standard of review for motions to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) and 12(b)(1) are "substantively identical." *Lerner v. Fleet Bank, N.A.,* 318 F.3d 113, 128 (2d Cir. 2003). In considering a motion to dismiss under either provision, the Court must accept the allegations contained in the complaint as true and draw all reasonable inferences therefrom in favor of the non-moving party. *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 285 (S.D.N.Y. 2005). "The

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[2] Under the parties' current CBA, "Final League Year" is defined as "the final [NFL] League Year of [the CBA] . . . . As of the date hereof, the Final League Year is the 2012 League Year." *See* Eisenstein Decl. at Ex. 2. The CBA further provides that either the NFLPA or the Management Council has the right to terminate the CBA prior to 2012. *See* Eisenstein Decl. at Ex. 4. In the event either party exercises that right, the Final League Year becomes 2010. *See id.*

complaint, however, 'must include allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory.'" *Seneca Ins. Co. v. Kemper Ins. Co.*, No. 02 Civ. 10088 (PKL), 2004 WL 1145830, *3 (S.D.N.Y. May 21, 2004) (citation omitted). The complaint should be dismissed if the plaintiff fails to allege the elements of its cause of action. *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1039-42 (2d Cir. 1992). Conclusions of law and vague, conclusory assertions need not be accepted. *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771-72 (2d Cir. 1994).

II. The Court Lacks Jurisdiction to Confirm the Award under the LMRA

The Petition should be dismissed pursuant to Federal Rule 12(b)(1) because there is no justiciable case or controversy to sustain this Court's jurisdiction. It is well settled that Article III of the Constitution prohibits courts from exercising jurisdiction in the absence of an actual case or controversy. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "A hypothetical or abstract dispute does not present a case or controversy: The question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to justify judicial resolution." *Marchi v. Bd. of Coop. Educ. Serv. of Albany*, 173 F.3d 469, 478 (2d Cir. 1999) (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)) (internal quotations omitted). The plaintiff bears the burden "to allege facts demonstrating that the case presents a justiciable controversy." *Id.*

In several cases, courts have rejected suits seeking confirmation of arbitration awards under the LMRA where, as here, the actions have failed to allege facts to demonstrate the existence of a case or controversy. *See, e.g., Derwin v. Gen. Dynamics Corp.*, 719 F.2d 484 (1st

Cir. 1983); *Steris Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 489 F. Supp. 2d 501, 515 (W.D. Pa. 2007) (dismissing action for confirmation for lack of jurisdiction based on absence of dispute or controversy); *Montgomery Ward & Co. v. Warehouse, Mail Order, Office, Technical & Prof'l Employees Union*, 911 F. Supp. 1094, 1104 (N.D. Ill. 1995) (dismissing case for lack of federal jurisdiction because "at the present time, neither party to this lawsuit has taken any action inconsistent with the arbitral award giving rise to a concrete dispute"); *Local 2414 of United Mine Workers v. Consolidation Coal Co.*, 682 F. Supp. 399, 400 (S.D. Ill. 1998) ("to confirm these awards in the absence of any concrete dispute would merely serve to circumvent Congress' goal of eliminating the cost and complexity of litigation from labor disputes"); *Bethlehem Steel Corp. v. United Steelworkers of Am.*, Civ. No. JFM-90-3071, 1991 WL 338553, at *1 (D. Md. Sept. 18, 1991) (refusing to enter judgment enforcing arbitration award absent a "concrete dispute" between the parties).

These courts have recognized that, in order to satisfy the Constitutional case or controversy requirement, a party seeking to confirm or vacate an arbitration award pursuant to section 301 of the LMRA must show some action was taken inconsistent with the arbitrator's award. *See Derwin*, 719 F.2d at 491. In *Derwin*, for instance, the union brought an action under Section 301 seeking to confirm an arbitration award without alleging that the company had "repudiated or violated" the award in any manner. The court explained that the federal substantive law under Section 301 "subsumes the prudential values of Article III, which militate against ministerial confirmation of awards in the absence of a concrete dispute." *Derwin*, 719 F.2d at 492. The court therefore dismissed the complaint, finding it was "simply being asked to put its imprimatur upon an arbitral award in a vacuum." *Id.* at 491.

The facts here similarly warrant dismissal. All of the claims brought on the Grievants' behalf in the underlying arbitration proceeding have been settled by the parties. *See* Eisenstein Decl. at Ex. 1. The Management Council has not sought to vacate or otherwise challenge the Award. Neither the NFLPA's six-page Petition nor its accompanying four-page declaration identifies any dispute or failure to comply with the Award. Indeed, the NFLPA could not possibly assert that the Management Council has failed to comply with the Award given the parties' express agreement that it will not become binding precedent for any future grievances until at least 2010.[3] Rather, the Petition simply recites the facts surrounding the already-adjudicated and now-settled grievances, summarizes the arbitrator's Award, and asks for confirmation and "a judgment declaring that Paragraph 10 of the NFL Player Contract provides only for a time offset, and not for a dollar-for-dollar offset." NFLPA Petition at 6. Thus, it appears the NFLPA is concerned with a hypothetical grievance that may arise in the future. However, Article III of the Constitution prohibits courts from rendering such advisory opinions, and the NLFPA's petition should be dismissed for lack of jurisdiction. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975);[4] *Montgomery Ward & Co.*, 911 F. Supp. at 1104 (refusing to issue advisory opinion where plaintiff requested that court strike language in arbitration decision "in order to avoid some perceived threat relating to a presently nonexistent 'later grievance[ ].'").

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[3] In fact, the Award may never become binding, depending on the outcome of the parties' collective bargaining negotiations. Specifically, in negotiating a new CBA, the parties may agree, as they did with the underlying claims here, to provisions regarding workers' compensation offset that would render the Award meaningless.

[4] Under the Declaratory Judgment Act, 28 U.S.C. § 2201, a party may seek declaratory relief regarding a collective bargaining agreement under section 301 of the LMRA, "provided of course that the dispute presents a justiciable case or controversy within the meaning of Article III § 2 of the United States Constitution." *Syracuse Supply Co. v. William A. English*, 1979 U.S. Dist. LEXIS 11410, No. 77-CV-230 & No. 78-CV-518, at *3 n.2 (N.D.N.Y. June 27, 1979).

The NFLPA will likely argue that the Petition should be granted regardless of the absence of a concrete dispute because the instant action constitutes a routine summary confirmation proceeding. Thus, rather than initiating this action as a complaint under the LMRA, the NFLPA seeks to "borrow" the petition procedure set forth in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9, by styling the instant action as a "Petition to Confirm." *See* Amended Petition, at 1-2. The NFLPA asserts that "[b]ecause the LMRA does not set forth any specific procedures for confirmation of arbitration awards," this Court should "borrow the petition process outlined in Section 9 of the FAA . . . ." *Id.*

However, the instant action, which contains no allegations warranting enforcement of the Award at this time and pertains to a now-settled arbitration proceeding that is not even binding on the parties, is far from routine. Moreover, courts in the Second Circuit have recognized that it is improper to use the FAA's "summary" confirmation procedure in enforcement proceedings under Section 301 of the LMRA. *See, e.g., United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. E.I. Dupont de Nemours & Co.*, No. 05-CV-533A(F), 2006 U.S. Dist. LEXIS 79384, at *5-6 (W.D.N.Y. July 26, 2006). Indeed, it is settled law in the Second Circuit that "in cases brought under Section 301 of the Labor Management Relations Act . . . the FAA does not apply." *Coca-Cola Bottling Co. of N.Y., Inc. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 53 (2d Cir. 2001). Use of the summary confirmation procedure in the FAA is particularly improper in the instant case to the extent the NFLPA does not merely seek confirmation, but also requests that the Court "enter a judgment declaring that Paragraph 10 of the NFL Player Contract provides only for a time offset, and not for a dollar-for-dollar offset." Petition at 7; *see also* FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court."). Even if the NFLPA could "borrow" the

summary confirmation procedure provided for under the FAA, use of this procedure would not eliminate the case or controversy requirement clearly applicable to all federal cases, including actions for enforcement under the LMRA.

III. The Petition Fails to State a Claim Under the LMRA

Even assuming the Court did have jurisdiction over the instant action, the Petition nevertheless must be dismissed pursuant to Federal Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Section 301 of the LMRA provides that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States . . . .

29 U.S.C. § 185(a).

Although Courts have interpreted Section 301 as vesting "federal courts with jurisdiction over petitions brought to confirm labor arbitration awards," *Local 802, Associated Musicians of Greater N.Y. v. Parker Meridien Hotel*, 145 F.3d 85, 88 (2d Cir. 1998), arbitration awards may not be confirmed unless they are "final and binding" under the governing collective bargaining agreement. *See Gen. Drivers, Warehousemen & Helpers, Local Union No. 89 v. Riss & Co.*, 372 U.S. 517, 520 (1963) ("if it should be decided after trial that the grievance award involved here is not final and binding under the collective bargaining agreement, no action under § 301 to enforce it will lie"); *Serv. Employees Int'l Union, Local 32BJ, AFL-CIO v. Stone Park Assocs., LLC*, 326 F. Supp. 2d 550, 555 (S.D.N.Y 2004).

Moreover, "at a minimum," a party bringing an action under Section 301 must "cite the provision of the contract which the defendant is alleged to have breached and explain how defendant breached the contract." *See Commer v. Am. Fed. of State, County*

& Mun. Employees, 272 F. Supp. 2d 332, 338 (S.D.N.Y. 2003) (citing *Maita v. Killeen*, 465 F. Supp. 471, 473 (E.D. Pa. 1979)). In the context of confirmation proceedings under the LMRA, "[a]bsent a refusal to comply with an award . . . there is no breach of a labor agreement, and therefore no jurisdiction under Section 301." *Yellow Freight Sys., Inc. v. Local Union 710, Int'l Bhd. of Teamsters, AFL*-CIO, No. 93 C 7480, 1994 WL 665086 at *2 (N.D. Ill. Nov. 16, 1994).

The Petition fails to satisfy these prerequisites. As explained above, the award is not final and binding and, as such, may not be confirmed at this time. *See Gen. Drivers, Warehousemen & Helpers, Local Union No. 89*, 372 U.S. at 520; *Gary v. Roadway Express, Inc.*, 941 F. Supp. 94, 96-97 (N.D. Ill. 1996) (rejecting 301 enforcement claim where the arbitration award had not yet gone into effect); *Ernest Disabatino & Sons, Inc. v. Metro. Reg'l Council of Carpenters*, No. CIV. 04-187-SLR, 2005 WL 885165, at *3 (D.Del. Feb 28, 2005) (granting motion to dismiss action to vacate arbitration award under LMRA where award was not final). Additionally, there is no allegation that Respondents have breached the terms of the CBA by "refusing to comply" with the Award; indeed, that would be impossible because *all* of the Grievants' underlying claims have been settled. The only possible dispute relating to the Award concerns its potential future use by the parties as precedent for future arbitration proceedings. Even then, such a dispute may never occur. At the earliest, there could be no dispute until 2010. In that event, the proper recourse for Petitioner would be to commence a grievance and to allow the Arbitrator to decide this issue.

Accordingly, because Petitioner has not demonstrated any refusal to comply with the Award or resulting violation of the CBA, its petition must be dismissed for failure to

state a claim upon which relief can be granted. *See Local 1852 Waterfront Guard Ass'n of Port of Baltimore I.W.A. v. Amstar Corp.*, 363 F. Supp. 1026, 1030-31 (D. Md. 1973) (granting motion to dismiss LMRA complaint based on failure to allege nonperformance with any term of the CBA).

CONCLUSION

For the foregoing reasons, the Management Council requests that this Court deny the NFLPA's Petition to Confirm and dismiss this action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Dated: July 7, 2008
New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition to Petition to Confirm and Motion to Dismiss Petition to Confirm was served this 7th day of July, 2008 via the ECF filing system (registered users) on the following:

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