

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CHARLES RAY EASTERLING and his wife, MARY ANN EASTERLING; WAYNE RADLOFF and his wife, GARLAND RADLOFF; JAMES McMAHON; JOSEPH E. THOMAS and his wife, NICOLE THOMAS; GERALD FEEHERY; STEVE KINER and his wife CAROL KINER, and MICHAEL FURREY and his wife, KOREN FURREY, in their individual capacity and on behalf of all others similarly situated.

**PLAINTIFFS,**

V.

NATIONAL FOOTBALL LEAGUE, INC.

**DEFENDANT.**

**CIVIL ACTION NO. 11-CV-05209-AB**

**JURY TRIAL DEMANDED**

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**MEMORANDUM OF LAW IN SUPPORT OF THE PLAINTIFFS'  
ANSWER IN OPPOSITION TO A MOTION FOR THE STAY OF PROCEEDINGS**

**INTRODUCTION**

The instant lawsuit was filed on August 17, 2011 by seven former professional football players and their wives. The sole defendant in this action is the National Football League (NFL). The defendant requested and Plaintiffs agreed to an extension of time within which it could answer or otherwise respond to the Complaint until October 28, 2011. On or about October 6, 2011, the Plaintiffs filed their First Amended Complaint. (**Exhibit A**). Plaintiffs agreed to extend the time within which the defendant could respond until November 9, 2011. In the First Amended Complaint, the Plaintiffs seek damages for the harm they have each suffered because of, inter alia, the negligence of the NFL. Several of the Plaintiffs have developed

neurological/cognitive deficits making it difficult and/or impossible to function normally and earn a living. (See **Exhibit A**) The evolving neurological/cognitive deficits are becoming increasingly (and in some instances rapidly) debilitating. [Id.] Some or all of these named Plaintiffs/Players also - in a separate Count - seek the establishment of a Nationwide Class for medical monitoring as permitted under New York law, the defendant's domicile.

According to the NFL Defendant (see **Exhibit B** which is the defendant's "Schedule of Actions" attached as an Exhibit to its Motion for Transfer and MDL assignment), there are currently pending three other lawsuits filed by former players in California, and which the defendant has removed to the Western Division of the Federal District Court in California. These "California cases" involve many additional defendants and different claims, which in some instances are inconsistent with the factual predicate and causes of action being pursued by the Easterling Plaintiffs. The defendants in the California cases include the NFL, NFL Properties, LLC, Riddell, Inc., Riddell Sports Group, Inc., All American Sports Corporation, Riddell Sports Group, Inc., Easton-Bell Sports, Inc., Easton-Bell Sports, LLC, EB Sports Corp. and RBG Holdings Corp.

According to the Complaints filed in the California cases, the plaintiffs seek to recover damages, based upon California law, against each named defendant based upon claims of, inter alia, negligence, "negligent-monopolist", wrongful death, strict liability and failure to warn. In one of these three California cases it is believed that the plaintiffs have requested the establishment of a medical monitoring class for former NFL players who reside in California only.

On November 9, 2011, the Defendant filed a Motion to Dismiss in the instant case, relying upon Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

According to the NFL defendant, in the California cases it removed to Federal Court, the plaintiffs have filed Motions to Remand each of these cases to the California Superior Court.<sup>1</sup> According to the defendant, the Motion to Remand is pending at this time. (See defendant's Memorandum of Law in Support of its Motion To Transfer to MDL, marked as **Exhibit C.**)<sup>2</sup>

On November 15, 2011, the defendant filed a Motion with the Judicial Panel on Multidistrict Litigation and requested that the California cases all be transferred to this Honorable Court for coordinated and consolidated pretrial proceedings. The Easterling Plaintiffs have not yet filed their Response to that Motion. After filing the Motion to Transfer, counsel for the NFL requested that the Easterling Plaintiffs agree to a Stay of the instant lawsuit pending the Panel's decision; respectfully we are not willing to agree to a Stay.

As set forth below, the Plaintiffs respectfully do not believe that a Stay is in their best interests. Further, Plaintiffs remain doubtful that these disparate cases warrant MDL status, and Plaintiffs believe that in light of the defendant's plan to file the same Motion to Dismiss in each

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<sup>1</sup> The NFL states that it removed the California cases based upon the defense of "preemption", which is a federal question under Section 301 of the Labor Management Relations Act. While the Easterling Plaintiffs are not involved in those cases, assuming this is the basis for the removal of those cases, the law in the Ninth Circuit Court of Appeals would seem to warrant remand to the State Courts. In *K2 Am. Corp. v. Roland Oil & Gas*, 653 F.3d 1024, 1029, n. 14 (9<sup>th</sup> Cir. 2011), the Court affirmed the trial court's remand because:

"The general rule is that a defense of federal **preemption** of a state-law claim, even conflict **preemption** under [a federal statute], is an insufficient basis for original **federal question** jurisdiction under § 1331(a) and **removal** jurisdiction under § 1441(a)."

<sup>2</sup> The Defendant states in its Motion to Stay that assuming all the pending cases are consolidated, it plans to file Motions to Dismiss in each case which will be the same as the one it has filed in the instant case. The Defendant's Motion and Memorandum are silent as to the involvement or agreement of the need for consolidation or the need for a Stay from the multiple defendants who are parties to the California cases but not named in the instant case.

case, if the cases obtain MDL status, there is an immediate need for the Plaintiffs to conduct discovery to fully respond to the factual and legal assertions raised by the NFL in its Motion to Dismiss.<sup>3</sup>

### **LEGAL ARGUMENT**

The Plaintiffs recognize that this Honorable Court has the discretion to Stay the proceedings in the instant case if good cause is shown.

The power to stay proceedings is incidental to the power inherent in every court to schedule disposition of the cases on its docket so as to promote fair and efficient adjudication. How this can best be done is a decision properly vested in the trial courts. *Landis v. North American Co.*, *supra*, 299 U.S. at 254-55. District courts have [\*\*27] wide discretion in setting their own calendars, and when a matter is committed to the discretion of those courts, it cannot be said, absent a patent abuse of that discretion, that "a litigant's right to a particular result is 'clear and indisputable.'" *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1077 (3<sup>rd</sup> Cir. 1983)(citation omitted).

It is well settled that before a stay should be issued, the petitioner must demonstrate "a clear case of hardship or inequity," if there is "even a fair possibility" that the stay would work damage on another party. *Gold v. Johns-Manville Sales Corp.*, *supra*. 723 F.2d at 1076; *Landis v. North American Co.*, 299 U.S. 248, 255, 81 L. Ed. 153, 57 S. Ct. 163 (1936).

Since the power to issue a Stay calls into play this Honorable Court's exercise of judgment, by weighing the competing factors raised by the parties, Plaintiffs provide the following information for the Court's consideration.

#### **A. The Pending Motion To Obtain MDL Status and Transfer**

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<sup>3</sup> While other courts have refused to find preemption or dismiss player's claims for injury under similar circumstances, we respect the defendant's right to raise the defense of preemption in this case. See, *Brown v. NFL*, 219 F. Supp. 2d 372 (S. D. N. Y. 2002).

The NFL's pending Motion seeking MDL status asks that all the California cases be transferred and consolidated with the instant lawsuit. The realities are that the Panel will in all likelihood not schedule this matter for argument until January, 2012. And, of course, Plaintiffs have no way of knowing when it will render a decision or how it will rule. Needless to say, the filing of the Motion to Transfer will probably generate some disagreements and it also begs the question whether or not the California cases were improperly removed to federal court. Thus, even the initial question of MDL status is not a foregone conclusion, based upon a jurisdictional (removal) challenge. Second, in light of the disparate legal and factual claims, with parties relying upon different state laws, different party defendants and different theories of law, and with only a few pending cases at this time, obtaining MDL status is not a sure thing.

**B. Denial of the Stay Would Not Result in Wasted Judicial Resources**

The NFL defendant has advised the Court that if MDL status is obtained, it will file the same Motion to Dismiss that is currently pending in the instant case. The Easterling Plaintiffs have advised the defendant, and it has agreed that some additional time should be afforded the Plaintiffs in preparing and filing their opposition to this Motion. Thus, as Plaintiffs have suggested in our portion of the Pre-Trial Discovery Plan, Plaintiffs think that certain limited factual discovery is appropriate to aid in Answering the Motion to Dismiss and it should begin now.

In light of the fact that the Plaintiffs should obtain additional time to take factual discovery (based upon assertions made in the Motion to Dismiss) and that the defendant will agree to the Plaintiffs need for additional time to respond this Motion, moving forward with this aspect of the instant case makes sense. If the Panel decides not to transfer the California cases, the Easterling Plaintiffs have used their time well. If the Panel transfers the California cases, the

other Plaintiffs will have the benefit of the work we accomplish in the interim, thereby effectively moving these cases along until the defendant can file the identical Motion to Dismiss in these other cases. Time working on this case would, therefore, be well spent.

### **C. Harm To The Plaintiffs By Granting A Stay**

A Stay would cause prejudice to the Easterling Plaintiffs. First, as Plaintiffs mentioned at the outset, some of the named Plaintiffs' neurologic problems are evolving and presenting them and their families with increasingly serious hardships. To the extent that any time goes by without allowing the Plaintiffs to pursue this case, that delay adds to their current burdens. Second, the delay in the proceedings may not be as minimal as the NFL suggests. Third, why should the Court delay the activities that must be pursued even if MDL status is obtained?<sup>4</sup>

While the NFL has asserted it will suffer hardship without a Stay because of duplicative discovery and motion practice, we are strained to understand that argument. The NFL filed a Motion to Dismiss in the instant case. Subject to obtaining discovery related to issues raised in that Motion, no other "duplicative discovery" is expected.

### **D. The Stay is Unwarranted For Other Reasons**

While the NFL asserts that a Stay is warranted because the other actions involve the same or similar parties and similar issues, in fact the opposite is true. The California cases involve many, many defendants not named in the Easterling case. The California cases seek recovery for hundreds of individual plaintiffs while the Easterling case involves only 7 former players. The California cases seek Class certification that would only involve people residing in California.

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<sup>4</sup> The defendant has cited to *Cirulli v. Bausch & Lomb, Inc.*, 2009 WL 545572 (E.D. Pa. 2009) without mentioning that the Stay was granted as to the *Cirulli* case after MDL was granted and based upon the Court's finding that the *Cirulli* case was designated a tag-along and, therefore, *Cirulli* could obtain its discovery vis-à-vis the MDL action.

The California cases seek Class certification against all the named defendants and based upon the application of California law, whereas the Easterling Plaintiffs seek national class certification for Medical Monitoring and expect the law of New York to be applied. The California cases involve products liability, “monopolist” claims, and other legal and factual assertions unrelated to the instant case.

### **CONCLUSION**

The Plaintiffs respectfully submit that the issuance of a Stay of proceedings in the instant case is unwarranted. Delay in developing the necessary record to address the defendant’s Motion to Dismiss will accomplishing nothing more than a delay in determining the propriety of this lawsuit. For these reasons, Plaintiffs respectfully request that the defendant’s Motion for a Stay be DENIED.

Dated: November 18, 2011

Respectfully submitted,

ANAPOL SCHWARTZ, P.C.

By:                   /s/ Larry Coben                  

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