UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Maurice Clarett,	:	
	:	**NO.: 04-0943**
Plaintiff-Appellee	:	
	:	
v.	:	
	:	
National Football League, Inc.,	:	
	:	
Defendant-Appellant.	:	
	:	

MEMORANDUM IN OPPOSITION TO THE NATIONAL FOOTBALL LEAGUE'S MOTION FOR STAY PENDING APPEAL AND EXPEDITED APPEAL

I. Introduction

Maurice Clarett brought this action alleging that the National Football League's ("NFL's") unilaterally-adopted draft eligibility rule ("the Rule"), which requires that a player be three seasons removed from his high school graduation to be eligible for the draft, violates the federal antitrust laws as an unlawful restraint of trade. The district court properly ruled that, "[b]ecause the Rule violates the antitrust laws, it cannot preclude Clarett's eligibility for the 2004 NFL draft" and specifically ordered that Clarett is eligible to participate in the draft to be held next month. Immediately after the ruling, the NFL publicly announced that, if Clarett were drafted, it would allow him to remain in the League even if the decision were subsequently reversed on appeal.[1]

[1] The NFL's Executive Vice President and Chief Counsel, Jeffrey Pash, stated on the day after the district court's ruling, "Once he's in the draft, if he's selected or any other player signs a contract, he's in the NFL and we wish him well. Subsequent reversals would not effect [sic] his status as an NFL player." *NFL's Big Worry About Clarett?* http://www.msnbc.msn.com/id/4186582/, attached as Exhibit A (all articles cited herein are attached as Exhibit A).

To bolster its claim that it will be irreparably harmed if Clarett is drafted, the NFL has reversed field and now claims it needs a stay and an expedited appeal because, in part, it has decided that a member team drafting an underclassman should forfeit the player if this Court declares the Rule lawful. This argument is makeshift but, in any event, the NFL cannot meet its heavy legal burden required for a stay.

As an initial matter, the NFL allowed *over two weeks* to pass from the date on which the district court denied the NFL's motion for a stay, February 11, 2004, to the time it filed for a stay in this Court, February 27, 2004. This unexplained delay certainly undercuts the NFL's claim of urgency. Specifically, the NFL waited to file this motion until *after* both Clarett and another underclassman, University of Southern California sophomore Mike Williams, declared for the draft and hired professional sports agents in reliance on the district court's merits ruling and denial of a stay and also on the NFL's public announcements that it was extending the deadline for underclassmen to declare for the draft and would not seek to exclude Clarett from the NFL even if it were successful on appeal.[2] Although fully aware that Clarett's participation in the scouting combines conducted on February 18th would cost him his college eligibility, the NFL sat on its hands until *the Friday before Monday, March 1st*, the new deadline it set for underclassmen to declare for the draft, to file this motion for a stay to block Clarett and any other similarly situated player from entering the April 2004 draft.[3]

No basis for a stay or an expedited appeal exists. Contrary to the *in terrorem* arguments the NFL relied upon when it requested the district court to issue a stay, the district

---

2 *See* Williams' affidavit, attached as Exhibit B.

3 One day after the district court's ruling, the NFL announced that it was extending the deadline for underclassmen to declare for the April 2004 draft until March 1, 2004. The initial deadline was January 15, 2004. *See NFL Sets Deadline for Early Entries*, at http://www.katv.com/news/stories/0204/124475.html, attached as Exhibit A.

court's invalidation of the Rule did not open the floodgates to scores of unqualified, emotionally immature young players. In fact, only *two* otherwise ineligible college players, Clarett and Williams, declared for the draft since the district court's ruling, together with another underclassman, Larry Fitzgerald, who, like Clarett and Williams, is a twenty-year-old sophomore two years removed from his high school graduation but presumably deemed acceptable by the NFL.[4] The NFL cannot seriously argue that there would be irreparable harm if two of its teams drafted these NFL-caliber players. In contrast, issuance of a stay would cause Clarett and Williams -- a nonparty to this litigation -- substantial harm because each has forever lost his college eligibility and would then be unable to play either in the NFL or the NCAA.

Nor can the NFL seriously argue that a supplemental draft will redress any harm to Clarett. First, the NFL never raised the supplemental draft argument when it sought a stay before the district court, thereby denying Clarett and the district court the opportunity to address the issue. Second, its promise to conduct a supplemental draft for Clarett and other similarly situated players within ten days of this Court's judgment is hardly a consolation. If a stay were to issue, and Clarett and Williams were later forced to enter a supplemental draft, they would face a number of disadvantages as rookies in the NFL including, among other things, a loss of training and preparation time, which all other newly drafted players will have in the spring, and the potential loss of millions of dollars in compensation as a result of having far less leverage in negotiating player contracts. The NFL well knows that a supplemental draft is hardly equivalent to the real thing.

---

[4] ESPN.com recently reported that six high school players and one junior college defensive back joined Clarett and Williams on the list of applicants for the April 2004 draft; however, "none of the high school players is among the top 25 college prospects by position," and "[t]hey appear to be more suspect than prospect." The junior college defensive back, Ronnie McCrae, "had no interceptions for a team that went 0-10, according to The Washington Post." *List Also Includes Junior College Player*, at http://sports.espn.go.com/espn/print?id=1751956&type=story, attached as Exhibit A.

II. Argument

A. No Basis For A Stay or Expedited Appeal Exists.

As this Court has stated, "a party seeking a stay of a lower court's order bears a difficult burden."[5] The four factors to consider in determining whether to grant a stay are: "(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public interests that may be affected."[6] As explained below, each of these factors weighs heavily against issuing a stay.

Similarly, there is no time pressure warranting an expedited appeal. Clarett and Williams already have declared for the April 2004 draft, which will take place before this Court issues a ruling on the merits, even on an expedited basis. According to the NFL's own proposed briefing schedule, briefs would not be due until after the draft. Therefore, the only remaining time constraints are the February combines preceding the April *2005* draft, which leaves this Court ample time to consider the appeal on a non-expedited basis.

1. The NFL fails to demonstrate that it would suffer irreparable harm absent a stay.

The NFL cannot show that it would suffer harm absent a stay, let alone irreparable harm. Now that the NFL's March 1, 2004 deadline for draft declarations has come and gone, so too has the NFL's argument that young players would be harmed in the absence of a stay. So much for the NFL's speculation that scores of unqualified underclassmen would

---

5 *United States v. Private Sanitation Indus. Ass'n*, 44 F.3d 1082, 1084 (2d Cir. 1994).

6 *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994); *see also, e.g., Cooper v. Town of East Hampton,* 83 F.3d 31, 36 (2d Cir. 1996); *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1992).

imprudently declare for the draft and thus foolishly forego their college careers. Only *two* otherwise ineligible college players, Clarett and Williams, declared for the draft since the district court's ruling, and both players are undeniably qualified to play professional football.[7] Allowing teams to draft these two players into the league one year earlier does not present irreparable harm, which must be "actual and imminent," not "remote or speculative."[8]

The NFL's second concern that the controversy will become moot if Clarett is drafted is beside the point. As more than one court has stated, mootness alone does not constitute irreparable harm for purposes of a stay.[9] The NFL cites *Hirschfeld v. Bd. of Elections*[10] and *Providence Journal Co. v. FBI*[11] in support of its assertion that the NFL would be irreparably harmed if the case were to become moot. In *Hirschfeld*, however, this Court denied the stay in part because of the moving party's own delay in filing the motion and, in *Providence Journal*, the First Circuit granted the stay motion but did not do so on grounds that the case had

---

7 Williams, a sophomore All-American at USC, is a 6-foot-5, 230-pound wide receiver expected to be a first-round pick. *See Williams Hires Agent, So No Turning Back*, at http://sports.espn.go.com/ncf/news/story?id=1743943, attached as Exhibit A. And as the district court noted, "[w]hile sportswriters disagree about which team would draft him and in which round, there seems little doubt that Clarett is an NFL-caliber player who would be drafted if he were eligible to participate in the process." February 5, 2004 Opinion and Order, at 17 ("Order"), attached as Exhibit 8 to Affidavit of Benjamin C. Block in support of the NFL's motion ("Block Aff."). In contrast, sports commentators have suggested that the recent declarations by six high school players and one junior college player should not be taken seriously. *See supra* note 4.

8 *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995); *see also Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002); *Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 153 (2d Cir. 1999).

9 *See Moreau v. Beneficial Homeowner Serv. Corp.*, 135 B.R. 209, 215 (N.D.N.Y. 1992) (granting stay on other grounds but noting that "[i]t is clear that the danger of an appeal becoming moot is by itself never a sufficient ground to justify grant of a stay"); *In re Shenandoah Realty Partners, L.P.*, 248 B.R. 505, 510 (W.D. Va. 2000) ("It is well settled that an appeal being rendered moot does not itself constitute irreparable harm.").

10 984 F.2d 35, 39 (2d Cir. 1993).

11 595 F.2d 889, 890 (1st Cir. 1979).

become moot. Rather, the court reasoned that, if a stay were denied, documents would have to be surrendered and "confidentiality [would] be lost for all time."[12]

The NFL also argues that the district court's holding may introduce "considerable confusion" into labor-management relations in the NFL and other industries. Like the NFL's supposed concern for young players, this assertion amounts to nothing other than speculation. Moreover, because similar eligibility rules have been struck down as antitrust violations in the past, the district court's ruling would bring nothing new to the bargaining table.[13]

The NFL's last two arguments fare no better. The NFL suggests that, when the status quo ante is restored, the club drafting Clarett would forfeit the value of its draft selection and a veteran player would be irreparably harmed *if* he were displaced by Clarett. The NFL appears to be on a mission to keep Clarett -- and now Williams -- out of the April 2004 draft in the first instance or to discourage teams from drafting them by claiming that Clarett and Williams would be thrown off their teams if the NFL is successful on appeal before the start of the new season. Such a threat amounts to an impermissible – if not outrageous – attempt by the NFL to deter teams from drafting Clarett or Williams, since any team would be hesitant to waste a draft pick on any player whom it then might lose. This Court cannot permit the NFL to achieve indirectly what it cannot do directly: pressure member teams not to draft Clarett or Williams in order to penalize them for leaving the NCAA early.

---

12 *Id*.

13 *See, e.g.*, *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977) (WHA's minimum age requirement that players be twenty years old to be eligible struck down as unlawful restraint of trade); *Denver Rockets v. All-Pro Management, Inc.* (Spencer Haywood case), 325 F. Supp. 1049 (C.D. Cal. 1971), aff'd, 401 U.S. 1204 (1971) (NBA's requirement that players be four years out of high school struck down as unlawful).

2. Clarett will suffer substantial injury if a stay is granted.

The balance of equities tips heavily in favor of denying a stay that precludes Clarett from entering the April 2004 draft. As the district court noted, the hardship Clarett would suffer is a graver harm than the "substantial injury" standard this Circuit requires.[14] A stay issued by this Court would not simply delay the district court's order that Clarett be eligible for the April 2004 draft; it effectively would reverse it. The career of a professional football player is even shorter than that of other professional athletes. Any delay in playing time would be detrimental to the professional football careers of Clarett and Williams. In addition, both players would have lost their college eligibility, leaving them no place to play.[15]

Apparently recognizing the harm to Clarett, the NFL engages in sophistry when it offers to conduct a supplemental draft. First, the NFL has raised this issue too late in the game. Unless a claim involves a purely legal question, this Court generally will not consider arguments on appeal that have not been raised before the district court.[16] Second, the supplemental draft would by no means be a "win-win" for Clarett and Williams, as the NFL would like this Court to believe. On the contrary, it would be devastating to the start of their professional football careers if Clarett and Williams were forced to forego the April 2004 draft and enter a supplemental draft. Each would lose valuable training time and the opportunity to study playbooks well in advance of the NFL minicamps, which all other newly drafted players will have in the spring. In

---

[14] Order at 3.

[15] Courts have recognized the same threat of irreparable harm that Clarett and Williams face in cases involving anticompetitive professional sports league rules. *See, e.g., Jackson v. National Football League*, 802 F. Supp. 226, 231 (D. Minn. 1992); *Linseman*, 439 F. Supp. at 1319-20; *Bowman v. National Football League*, 402 F. Supp. 754, 756 (D. Minn. 1975); *Haywood,* 325 F. Supp. at 1057.

[16] *See Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP,* 322 F.3d 147, 159-60 (2d Cir. 2003); *Guzman v. Local 32B-32J*, 151 F.3d 86, 93 (2d Cir. 1998); *Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261, 265-66 (2d Cir. 1997).

addition, any NFL team that does draft Clarett or Williams would already have signed or allocated money for its regular draft picks and presumably would have little, if any, additional money under the salary cap. For that and other reasons, Clarett and Williams would have far less leverage in signing a contract with an NFL team and, therefore, could suffer a loss of millions of dollars in compensation.[17]

Contrary to the NFL's assertion, Clarett's complaint did *not* "recognize[] that his asserted injury could be remedied, and his interests protected, by a 'Supplemental Draft' …" In his prayer for relief, Clarett sought "an Order declaring the Rule unlawful and him eligible for a Supplemental Draft to be held within 10 days from the date of the [district court's] Order, or eligible for the next year's draft if a Supplemental Draft is impractical …"[18] Significantly, Clarett filed the Complaint on September 23, 2003, after the 2003 draft had come and gone, seeking to enter the NFL immediately so he could play professionally in this past season. The situation today is completely different. Clarett has declared for the principal draft to be held in mid-April and no supplemental draft would serve as an adequate substitute.

3. The NFL fails to demonstrate a substantial possibility of success on appeal.

The NFL cannot demonstrate a substantial possibility of success on appeal. Clarett prevailed on every legal point raised before the district court, which issued a

---

[17] *See* Williams' affidavit, Exhibit B. At the supplemental drafts, held at varying times during the year, but generally in the summer, only 32 players have been chosen in the previous 26 supplemental drafts. *See Texans Take Hollings in Supplemental Draft,* at http://www.nfl.com/news/story/6443862, attached as Exhibit A. Teams are free to choose not to make a pick in a supplemental draft if they so desire. If a team does make a pick, they forfeit their pick in the corresponding round at the regular draft the following April. For example, if a team selects a player in the first round of the supplemental draft, they lose their first round pick in the next April's draft. Only seven (7) players have been selected in the first round of all of the supplemental drafts combined. *See 2003 Supplemental Draft Preview*, at http://www.nfldraftworld.com/supplemental.htm, attached as Exhibit A.

[18] Complaint, attached as Exhibit 1 to Block Aff.

comprehensive and reasoned seventy-one page opinion. The district court examined the record, including all documentary evidence, and addressed virtually every case cited by the parties in their respective motions and briefs. The NFL is incorrect in its assertion that the district court relied on "extra-evidentiary matters" in reaching its conclusion. The court cited on-line articles only for background information on football statistics and the history of the NFL, among other things. Gaining insight into the world of professional football is not an easy task, and the district court did not err in using on-line resources to accomplish this.

a. Non-Statutory Labor Exemption

For the labor exemption to apply, the restraint at issue must: (1) affect only the parties to the collective bargaining relationship; (2) concern a mandatory subject of collective bargaining *and* (3) be the product of bona fide arm's-length bargaining.[19] Although Clarett prevails if the Rule fails to satisfy any *one* prong, the district court correctly concluded that the Rule fails *all three prongs* and is not protected from antitrust scrutiny.

Regarding the first prong of the *Mackey* test, the district court's finding that Clarett is a complete stranger to the bargaining relationship is hardly "remarkable," as the NFL asserts. Unlike the players in *Wood*, *Williams*, and *Caldwell*,[20] Clarett is not a party (or even eligible to become a party) to the NFL-NFLPA collective bargaining relationship because the Rule precludes him from even applying for employment. Clarett is not challenging the terms and

---

[19] *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976). The three-prong *Mackey* test set forth above remains good law in this Circuit. *Local 210, Laborers' Int'l Union of North America v. Labor Relations Div.*, 844 F.2d 69, 79 (2d Cir. 1988). In *Local 210*, this Court adopted the alternative, but consistent, *Jewel Tea* standard and cited the *Mackey* test approvingly. *See Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

[20] *Wood v. National Basketball Ass'n*, 809 F.2d 954, 959 (2d Cir. 1987); *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995); *Caldwell v. American Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995).

conditions of employment as in these three cases; indeed, his goal is to enter the draft and to become subject to those terms.

The NFL's reliance on this Circuit's decisions in *Wood*, *Williams*, and *Caldwell* is thus misplaced. As the district court properly noted, "[t]he point is not hard to grasp."[21] These three cases are easily distinguishable because each of the respective players was already a member of a professional team: Wood had been drafted by the Philadelphia 76ers and was challenging the NBA salary cap and draft provisions of the collective bargaining agreement; Williams was one of a group of NBA players challenging the provisions of a collective bargaining agreement; and Caldwell was a former ABA player claiming that he had been wrongfully discharged. The district court properly concluded that, "none of these cases involve job *eligibility*. The league provisions addressed [in these three cases] govern the terms by which those who *are drafted* are employed. The Rule, on the other hand, precludes players from entering the labor market altogether…"[22]

Nor can the NFL show a substantial possibility of success on the merits with respect to the second prong of the *Mackey* test, which requires that the restraint at issue concern a mandatory subject of bargaining. The Rule provides that college players seeking special eligibility must be three years out of high school. As the district court noted, this case is not about wages, hours, or conditions of employment. "Indeed, the Rule makes a class of potential

---

21 Order at 30.

22 *Id.* at 32-33. The NFL also cites *Powell v. National Football League*, 711 F. Supp. 959, 963 (D. Minn. 1989), *Zimmerman v. National Football League*, 632 F. Supp. 398, 405 (D.D.C. 1986), and *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738, 744 (D.D.C. 1976), for the proposition that Clarett is not a stranger to the NFL-NFLPA collective bargaining relationship. The plaintiffs in these cases, however, had either played professional football or been drafted.

players *unemployable*. Wages, hours, or working conditions affect only those who are employed or eligible for employment."[23]

Because Clarett is not an employee, or even eligible to become an employee by virtue of the Rule, the NFLPA does not and cannot represent him and the NFL's duty to bargain does not encompass matters involving him. We agree with the NFL that the draft itself is a mandatory subject of bargaining; however, this dispute has nothing at all to do with the legality of the draft. Unlike a draft, which allocates new employees among the teams, this Rule precludes certain non-employees from *applying* for employment. Thus, it does not follow *a fortiori* that, because the draft constitutes a mandatory subject, the Rule also is sheltered. In fact, the very cases cited by the NFL illustrate the distinction.[24]

The United States Supreme Court and the NLRB have long held that matters involving prospective, as well as former, employees are *not* mandatory subjects of bargaining.[25] Only matters that concern current employees' terms and conditions of employment, or matters which "vitally affect" those terms, are mandatory subjects.[26] "Applicants … are not 'employees' within the collective-bargaining obligations of the [National Labor Relations] Act," because "unlike the intermittent employment situation that gives rise to the need … for hiring halls, there is no economic relationship between the employer and an applicant, and the possibility that such

---

[23] Order at 28-29.

[24] *See Wood*, 809 F.2d at 959; *White v. National Football League*, 836 F. Supp. 1458 (D. Minn. 1993); *Powell*, 711 F. Supp. at 962.

[25] *See, e.g., Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Star Tribune v. The Newspaper Guild of the Twin Cities*, 295 NLRB 543, 546 (1989).

[26] *Pittsburgh Plate Glass*, 404 U.S. at 179-80.

a relationship may arise is speculative."[27] In Clarett's case, if the Rule stands, it is a certainty, not mere speculation, that an employment relationship will not arise. Those who are challenging a rule that makes them ineligible for consideration are one step below an applicant.

Furthermore, application (or non-application) of the Rule does not "vitally affect" terms and conditions of employment. The NLRB defines this concept as:

> An indirect or incidental impact on unit employees is not sufficient to establish a matter as a mandatory subject. Rather, mandatory subjects include only those matters that materially or significantly affect unit employees' terms and conditions of employment. Similarly, the phrase 'terms and conditions of employment' is to be construed in a limited sense and does not include all subjects that may merely be of interest or concern to the parties.[28]

In *Star Tribune*, the NLRB held that the drug-testing rule for applicants did not vitally affect terms and conditions of employment for unit members and was, therefore, not a mandatory subject of bargaining. The NLRB reasoned: "The judge's observation that applicant testing will to some degree affect the composition of the bargaining unit does not, standing alone, support the conclusion that it vitally affects the terms and conditions of employment of unit employees."[29] This same analysis applies to the NFL's argument that Clarett's eligibility vitally affects veteran players or team rosters. His eligibility affects only the composition of the bargaining unit if he makes a team. In no way does it affect the terms and conditions of employment of bargaining unit members.

Finally, with respect to the third prong of the *Mackey* test, the NFL has not, and *obviously cannot*, show that the Rule is the product of arm's length collective bargaining. After

---

[27] *Star Tribune*, 295 NLRB at 546-7 (concluding that drug testing was not a mandatory subject of bargaining when applied to job applicants).

[28] *United Techs. Corp.*, 274 NLRB 1069, 1070 (1985), *enforced*, 789 F.2d 121 (2d Cir. 1986).

[29] 295 NLRB at 547-48.

examining the record, the district court noted that it "is peculiarly sparse in establishing the evolution of the Rule. Indeed, what the record omits speaks louder than what it contains."[30] The NFL quotes Peter Ruocco's *ipse dixit* conclusion that "the eligibility rule itself was the subject of collective bargaining"[31] without offering *any* supporting facts. Of course there is "a very limited record," because the NFL failed to meet its burden of presenting evidence that it engaged in "serious, intensive, arm's-length collective bargaining."[32]

As this Court has explained, agreements between a union and an employer are exempt from antitrust scrutiny only if they are:

> so intimately related to wages, hours and working conditions that the union['s] successful attempt to obtain th[e] provision[s] through *bona fide, arm's length bargaining* in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.[33]

Absent here is evidence of bona fide, arm's-length bargaining.

On more than one occasion, the NFL misleadingly suggests that the Rule itself is incorporated into the NFL-NFLPA collective bargaining agreement; yet the district court correctly found that this simply is not true. The NFL also cites *Brown v. National Football League*,[34] for the proposition that the NFL Constitution and Bylaws are incorporated by

---

30 Order at 35.

31 Second Declaration of Peter Ruocco, attached as Exhibit 5 to Block Aff.

32 *Philadelphia World Hockey Club v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 499 (E.D. Pa. 1972) (no exemption in absence of arm's-length bargaining where rules had originally been inserted in individual player contracts before advent of the players' union). The NFL cites only one case on the "arm's-length bargaining" requirement, *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1202-1203 (6th Cir. 1979), but misses the point that the exemption applied in this case because the NHLPA "bargained against [the NHLPA bylaw at issue], vigorously." *Id.* at 1203.

33 *Local 210*, 844 F.2d at 79 (quoting *Jewel Tea*, 381 U.S. at 689-90) (emphasis added).

34 219 F. Supp. 2d 372 (S.D.N.Y. 2002).

reference into the CBA. Significantly, *Brown* is a negligence case, not an antitrust action, and the issue was whether the matter properly had been removed to federal court by the NFL. *Brown* has nothing at all to do with the non-statutory labor exemption. Moreover, the Rule is not in either the Constitution or the Bylaws, but in a memorandum issued by the Commissioner.

The NFL contends that the district court "struck down a long-standing NFL rule … even though the union representing present and future NFL players had agreed to the challenged rule in collective bargaining." The NFL appears to suggest that the parties had bargained over the Rule; yet again this simply is not the case. Before the district court, the NFL claimed that the parties "discussed" the Rule and that the NFLPA "*agreed … not to challenge – and it waived its right to bargain over* – the then-existing terms of the NFL Constitution and [1992] Bylaws," which include NFL governance provisions that are totally unrelated to wages, hours and working conditions. As the district court concluded, this position demonstrated that such terms were *specifically excluded* from the parties' collective bargaining negotiations and were not the product of bona fide arm's-length bargaining.

b. Antitrust Violation

The NFL argues that the district court's finding of antitrust injury "cannot be reconciled" with this Circuit's decision in *Virgin Atlantic Airways, Ltd. v. British Airways PLC*[35] and that Clarett has no antitrust injury because the Rule does not impact price (which it defines as player salaries) or output (which it defines as number of jobs).

Notwithstanding the NFL's dramatic rhetoric and disparagement of the district court's decision, the conclusion that the NFL eligibility Rule had an adverse effect on competition is unremarkable and in accord with well settled case law. As demonstrated below,

[35] 257 F.3d 256 (2d Cir. 2001).

the district court correctly found "antitrust injury." Moreover, the NFL's arguments, based on mischaracterizations of the court's opinion and misleading partial quotes, are insupportable.

The core facts of this case are not in dispute.[36] The NFL has a buyer's monopoly in the market for player services in the league. The member teams have agreed not to compete for any players less than three years removed from their high school graduation. This anti-competitive agreement to exclude totally a class of potential players, notwithstanding their ability to perform in the market and compete for positions in the League, is memorialized in the NFL eligibility Rule and the teams adhere to it.

The Supreme Court has long held that antitrust injury, an element of antitrust standing, is (1) "injury of the type the antitrust laws were intended to prevent" and (2) injury "that flows from that which makes defendants' acts unlawful."[37] And the Supreme Court stated that the antitrust laws "were enacted for 'the protection of competition not competitors.'"[38]

The district court properly found that the Rule, which functions as a barrier to market entry, is "a naked restraint on competition for player services because it excludes a class of players from entering the market. It harms competition because some players are simply not permitted to compete. Clarett's injury – his exclusion from the NFL – flows directly from the anticompetitive effects of the Rule, and thus constitutes antitrust injury."[39]

---

[36] The NFL's continued refrain about the absence of a Rule 56 statement of facts is thus beside the point. In any event, plaintiff did file a Rule 56 statement of facts with respect to his own motion before the district court, and the facts are no different with respect to the NFL's motion. Furthermore, any disputed facts, if they existed, would be construed against Clarett on a motion for summary judgment.

[37] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

[38] *Id.* at 488.

[39] Order at 39-40. The NFL's brief is replete with distortions of the lower court ruling. For example, defendant states that the district court broadly concluded that "eligibility restrictions" are anticompetitive. NFL's Memorandum, at 7. In actuality, the district court referred to "age-based" eligibility restrictions. Order at 60. The NFL suggests that the decision below made the "classic error" of misapprehending the

(continued...)

This Circuit has long recognized that a monopsony's exercise of its power to bar a class of sellers from the marketplace causes injury of the type the antitrust laws were intended to prevent. As Learned Hand stated, "whatever other conduct the Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids anyone to practice his calling."[40]

This principle applies even absent an effect on price or output. As the district court noted:

> In other words, an effect on price or output is a sufficient but not a necessary element of antitrust injury. Antitrust injury may arise from other anticompetitive effects, including barriers to market entry. The Supreme Court has long held that group boycotts are injurious to competition – and thus may give rise to a plaintiff's antitrust injury – when those barriers do *not* affect price or output, or even when they affect price or output in a way that is beneficial to competition.[41]

The district court correctly pointed out that changes in price or output are measures of the effect on consumers of a questioned practice. Therefore, in the context of a labor (as opposed to product) market, "where the consumers of labor are also usually the antitrust defendants -- it makes little sense to require harm to consumers as a prerequisite for antitrust standing."[42]

(...continued)

difference between injury to a single competitor and injury to competition. It claims that the district court held that "preventing a single person" from entering the market, without regard to its impact on competition, is a violation. *See* NFL's Memorandum, at 10. However, the district court clearly analyzed the Rule in the context of its exclusion of a broad class of sellers. *See, e.g.,* Order at 39.

40 *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949).

41 Order at 43 (citation omitted).

42 *Id.* at 42; *see also Intellective v. Mass. Life Ins. Co.*, 190 F. Supp. 2d 600, 613 (S.D.N.Y. 2002) (defendant's systematic exclusion of other firms from market place causes injury of type antitrust laws were designed to prevent); *Les Shockley Racing Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir.

(continued...)

The NFL wrongly suggests that the *Virgin Airways* decision permits agreements to bar a group of sellers from the marketplace as here and, thus, assures reversal of the district court decision. *Virgin Airways*, however, which the NFL raises now for the first time, does not so hold and, in any event, is inapposite. In that case, one competitor, Virgin Atlantic Airways, sued another larger competitor, British Airways, for allegedly using anti-competitive incentive agreements with travel agents to control the market for travel between London and certain U.S. cities. This Circuit held that Virgin had to show that the incentive agreements had "an actual adverse effect" on the relevant market.[43] The NFL seized on a sentence stating that one competitor's actions that prevent another competitor from competing in a market, standing alone, is not enough to show harm to competition.[44] In the context of this case, the NFL's argument misses the point. In fact, this Court stated that, had Virgin shown that British Airways "had sufficient market power to cause an adverse effect on competition," like the NFL plainly has here, Virgin would have satisfied its initial burden under a rule of reason analysis.[45]

The NFL's other arguments, that the district court erred by applying the *per se* rule to this case and "relied *exclusively* on three discredited district court decisions," are equally unavailing. First, the district court did not apply a *per se* rule; rather it explicitly employed the rule of reason analysis. The court stated:

> Under this test plaintiff bears the initial burden of showing that the challenged action has had an *actual* adverse effect of competition

---

(...continued)

1989) (a violation of Sherman Act is threatened when restraining force of agreement disrupts market functions such as market entry).

43 257 F.3d at 264.

44 NFL's Memorandum, at 8.

45 257 F.3d at 265 (citation omitted).

> as a whole in the relevant market ... After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of pro-competitive "redeeming virtues" of their combination. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objective proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole.[46]

The district court clearly followed this approach.

In connection with Clarett's initial burden, the district court properly determined that a full-blown detailed market analysis was not necessary. Indeed, it is indisputable that the NFL has control of the market for player services in its league and that its rule is an explicit limitation on competition for such services. Relying on *Cal. Dental Ass'n v. F.T.C.*,[47] the district court stated: "Such a 'quick look' analysis, as the Supreme Court has recently explained, is appropriate where 'the great likelihood of anticompetitive effects can easily be ascertained,' and 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect.'"[48]

The NFL mischaracterizes *Cal. Dental* as "warning" against use of this "quick look" analysis. Indeed, while the competitive impact of the challenged restrictions there were quite complicated and far less clear than here, the case made clear that a quick look approach is perfectly appropriate where the obvious anticompetitive effect that triggers the abbreviated analysis has been shown.[49]

---

[46] Order at 58 (citation omitted).

[47] 526 U.S. 756, 770 (1999).

[48] Order at 62-63.

[49] *See* 526 U.S. at 779.

Finally, the three prior decisions involving age-based sports eligibility rules, all of which struck down such rules, were not "effectively overruled" by *NCAA v. Board of Regents*.[50] *NCAA* determined that antitrust challenges in industries with products that require some restraints on competition if the product is to be offered at all, such as sports leagues, should be analyzed under a rule of reason. Not only did the Supreme Court use a "quick look" analysis in *NCAA*, nothing in that decision undermined the vitality of the prior draft eligibility cases. Moreover, the district court's decision thoroughly analyzed a wealth of sources and cannot credibly be described as "relying exclusively" on the *Boris*, *Linseman* and *Haywood* cases. Indeed, the decision was well reasoned and in accord with well-established precedent.

4. Issuance of a stay would harm the public interest.

A stay of the district court's ruling would harm the public interest by seriously undermining federal antitrust policies. Section 1 of the Sherman Act prohibits unreasonable restraints of trade for the fundamental purpose of preserving a competitive business economy.[51] It is in the public's interest to prevent the "[e]xclusion of traders from the market by means of combination or conspiracy," which "is so inconsistent with the free-market principles embodied in the Sherman Act …"[52] Indeed, "[p]rofessional sports and the public are better served by open unfettered competition for playing positions."[53]

---

[50] 468 U.S. 85 (1984). The three cases are: *Boris v. United States Football League*, No. 83-Civ-4980, 1984 WL 894 (C.D. Cal. Feb. 28, 1984), *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977), and *Haywood*, 325 F. Supp. 1049 (C.D Cal. 1971).

[51] *See* 15 U.S.C. § 1; *United States v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *see also Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945).

[52] *Linseman*, 439 F. Supp. at 1322 (quoting *United States v. Gen. Motors Corp.*, 384 U.S. 127, 146 (1966)).

[53] *Bowman v. National Football League*, 402 F. Supp. 754, 756 (D. Minn. 1975).

On the other hand, issuance of a stay would do nothing to advance federal labor policy favoring collective bargaining for the simple reason that the parties never bargained over the Rule. As the district court explained, the non-statutory labor exemption was "designed to favor labor law over antitrust law by permitting collective bargaining between union and employers over wages, hours and working conditions."[54] The non-statutory labor exemption does not shield the NFL's Rule from antitrust scrutiny because it is not a mandatory subject of bargaining, it affects only strangers to the collective bargaining relationship, and it is not the product of collective bargaining. While certain restraints on competition must be shielded from the antitrust laws, the NFL's Rule is not one of them.

Moreover, issuance of a stay would cause irreparable harm to Mike Williams, an innocent third party to this litigation. Mr. Williams did not make the difficult decision of giving up his college eligibility so that he could, at best, participate in a supplemental draft or, at worst, be excluded from both professional and collegiate ranks. Instead, relying on statements and public representations by the NFL itself, Mr. Williams hired an agent and declared he was ready and able to compete for a place on an NFL team. Issuance of a stay would cause him grievous and irreparable harm.

IV. Conclusion

For the above stated reasons, Maurice Clarett respectfully requests that this Court deny the NFL's Motion for Stay Pending Appeal and Expedited Appeal.

---

[54] Order at 23. *See also Home Box Office v. Directors Guild of America*, 531 F. Supp. 578, 591 (S.D.N.Y. 1982) (quoting *Jewel Tea*) (purpose of nonstatutory exemption is "to reconcile [the] conflicting national policies [inherent in the labor and antitrust laws]--one protecting business competition, the other encouraging collective bargaining").

Respectfully submitted,

Sherman, Silverstein, Kohl,
Rose & Podolsky

BY: _____

Alan C. Milstein (AM 2759)
Jeffrey P. Resnick (JR 4175)
Fairway Corporate Center
4300 Haddonfield Road - Suite 311
Pennsauken, New Jersey 08109
Telephone: (856) 662-0700
Facsimile: (856) 488-4744

John B. Langel
Burt M. Rublin
Amy L. Weiss
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street
Philadelphia, Pennsylvania 19103

Robert A. Skirnick (RS 2636)
Daniel B. Allanoff
Meredith Cohen Greenfogel & Skirnick
One Liberty Plaza
35th Floor
New York, New York 10006

Robert A. McCormick
Michigan State University
Detroit College of Law
435 Law College Bldg.
East Lansing, Michigan 48824-1300

DATED: March 9, 2004

CERTIFICATE OF SERVICE

I, Amy L. Weiss, Esquire, hereby certify that on this 9th day of March 2004, I caused a true and correct copy of the foregoing Memorandum in Opposition to the National Football League's Motion for Stay Pending Appeal and Expedited Appeal to be served via first-class mail upon:

Gregg H. Levy, Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

_____
Amy L. Weiss