TABLE OF CONTENTS

PAGE

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

Maurice Clarett,	:	
	:	**CIVIL ACTION NO.: 03-CV-7441 (SAS)**
Plaintiff	:	
	:	
v.	:	
	:	
National Football League, Inc.,	:	
	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Maurice Clarett is a uniquely talented football player who is ready and able to compete at the highest level of his profession. The teams in the National Football League ("NFL"), however, have unlawfully agreed with one another to refuse to allow Clarett into the League by way of an arbitrary rule restricting players from entering the player draft until three NFL seasons have elapsed since they graduated from high school (the "Rule"). The Rule has no lawful justification; indeed, contrary to the League's professed concern over protecting the health of younger players such as Clarett, a number of players younger or smaller than Clarett have enjoyed success in the League. In fact, the Rule exists solely to perpetuate the NCAA college football system, which serves as a free "farm" system for the NFL, saving the League tens of millions of dollars in development and training expense.

As every court that has considered the legality of similar professional sports eligibility rules has found over the past 25 years, the Rule is a clear violation of the Sherman Act's

prohibition against agreements in restraint of trade.[1] In addition, the Rule is not shielded from antitrust scrutiny by the non-statutory labor exemption for a number of reasons, foremost of which is that it is not, and never has been, part of the Collective Bargaining Agreement between the NFL and the players' union. In any event, applying the Rule as written, Clarett is in fact eligible to be in the 2004 player draft. Accordingly, Clarett moves this Court for an Order entering summary judgment in his favor, finding the Rule invalid as a matter of law and allowing Clarett to compete in the marketplace of professional football.

II. STATEMENT OF FACTS

A. MAURICE CLARETT

Maurice Clarett was born on October 29, 1983. While in high school, he became a nationally known football player, receiving many accolades, including being named the USA Today Offensive Player of the Year as a senior and chosen as Mr. Football by the Associated Press. Clarett graduated high school on December 11, 2001, two-thirds of the way through the 2001 NFL season, and enrolled in classes at Ohio State University ("Ohio State") in January 2002.[2]

On August 24, 2002, Clarett became the first true freshman tailback to start a football game for Ohio State since 1943. Ohio State beat Texas Tech that day by a score of 45 to 21, and Clarett rushed for 175 yards and scored 3 touchdowns. Texas Tech Free Safety Ryan Aycock, commenting on a particular play, stated: "He might have been 18 but he knew what he was

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1 15 U.S.C. § 1 (2000).

2 Affidavit of Maurice Clarett ("Clarett Affidavit"), attached as Exhibit A.

doing … That's when you knew he'd be great. Not many guys his age have the heart to keep fighting once they're stopped."[3]

With Clarett leading the way, Ohio State achieved a rousing success during the 2002-2003 college football season. Clarett rushed for an Ohio State freshman record 1,237 yards and scored 18 touchdowns. Ohio State went undefeated during the regular season, winning 13 games. It then defeated the University of Miami in the Fiesta Bowl and won the undisputed national championship, Ohio State's first national championship in 34 years.

Clarett was named to several 2003 preseason All-America teams, voted the No. 1 running back in college football by the Sporting News, named a first-team All-Big Ten pick, and was named the Big Ten Freshman of the Year.

After that first season, Clarett wanted to pursue his dream of an NFL career and participate in the April 2003 player draft but was prevented from doing so by the Rule. With respect to the next season's draft, Clarett's mother and his counsel met with the NFL's general counsel and labor counsel on September 22, 2003 to discuss Clarett's participation in the April 2004 player draft, which will be held after three NFL seasons have elapsed since Clarett's high school graduation. (The first season, which had begun when Clarett started his senior year, ended on February 4, 2002, fifty-five days after Clarett's graduation; the other two seasons were played out in full). At the meeting, the NFL was advised that Clarett had graduated high school in December 2001. The NFL representatives responded that the Rule required three years to pass

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[3] Luke Cyphers, Call Waiting, ESPN Magazine, September 15, 2003, at 62-66, a copy of which is attached as Exhibit B.

after the player's class, as opposed to the player, graduated from high school.[4] The precise language of the Rule was not a matter of public record.

B. THE NFL, ITS DRAFT AND ELIGIBILITY RULE

The NFL enjoys a monopoly over professional football in the United States. The League and its member teams generate billions of dollars in revenue each year from various sources, including ticket sales, television broadcasting contracts and merchandising. NFL franchises are extremely valuable, selling for hundreds of millions of dollars. Likewise, NFL players are compensated handsomely for their services, often earning millions of dollars, not just in salary and bonuses, but in endorsements and appearances as well.

The League began operating in 1920 as the American Professional Football Association, an unincorporated association comprised of member clubs, which owned and operated professional football teams. At present, the NFL is comprised of thirty-two separately incorporated clubs in cities throughout the United States. Representatives of each of the clubs form the NFL Management Committee, which performs various administrative functions such as organizing and scheduling games and promulgating rules. The clubs appoint a Commissioner who is responsible for the day-to-day operations of the NFL.

At issue in this case is the NFL's concerted refusal to allow a player to sign with an NFL team or be eligible for the draft unless three NFL seasons have elapsed since that player's high school graduation. The Rule appears in the Constitution and Bylaws of the NFL (the "Bylaws"), a document drafted and approved only by the NFL member teams. Section 12.1(E) of the Bylaws provides as follows:

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[4] Affidavit of Michelle Clarett, attached as Exhibit C.

> For college football players seeking special eligibility, at least *three NFL seasons* must have elapsed since the player was graduated from high school.[5]

As represented by counsel for the NFL at the initial scheduling conference, the Rule "has been in existence … for fifty years,"[6] although it originally required the player either to complete four years of college or have five NFL seasons elapse since his high school graduation. The NFL announced a different version of the Rule to the public in a February 16, 1990 press release, whereby the NFL Commissioner quoted the Rule as providing:

> Applications for eligibility will be accepted only from college players as to whom *three full college seasons* have elapsed since their high school graduation.[7]

The NFL also issued a memorandum dated February 16, 1990 to Club Presidents, General Managers and Head Coaches, which stated that "[a]pplications for special eligibility for the 1990 draft will be accepted only from college players as to whom *three full college seasons* have elapsed since their high school graduations."[8] The Rule as stated in the Bylaws, however, references "NFL seasons," not "college seasons" and does not include the word "full."[9] In 1997, Greg Aiello, director of communications for the NFL, expressed yet another version of the Rule:

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5 A copy of the Bylaws is attached as Exhibit D (emphasis added). The NFL provided a copy of this document in response to Clarett's initial Request to Produce.

6 Transcript at 11, a copy of which is attached as Exhibit E.

7 See Akron Beacon Journal, NFL Draft Eligibility Policy, at www.ohio.com/mld/beaconjournal/news/state/6843042.html (emphasis added).

8 A copy of the February 16, 1990 memorandum is attached as Exhibit F.

9 Another memorandum dated October 1992 and issued to Club Owners, Presidents, and General Managers indicates that the Rule was revised to reflect the change from the four-year requirement to the current requirement of "three NFL seasons" in October 1992. This memorandum is attached to the Bylaws and attached here as Exhibit G.

"The rule is this: to be eligible for the NFL, a player has to have been out of high school for three years."[10]

In addition, the NFL has not enforced the Rule in a consistent manner. In 1964, for example, Andy Livingston, a nineteen-year-old running back, signed a contract with the Chicago Bears after only one season of junior college football.[11] In 1988, the NFL allowed Craig "Ironhead" Heyward into the draft even though he had not yet graduated from college (four-year requirement at the time). In 1989, the NFL allowed Barry Sanders into the draft after he suggested he would challenge the Rule, although he was a true junior with only three NFL seasons having elapsed since his high school graduation (four-year requirement). In 1991, the Arizona Cardinals selected Eric Swann at the sixth pick of the first round of the draft. Swann had never played college football and, at the time, only two NFL seasons had elapsed since his high school graduation.[12]

C. THE PLAYERS' UNION AND THE COLLECTIVE BARGAINING AGREEMENT

Although the Rule has been in effect since at least 1953, it was not until 1968 that the NFL recognized the National Football League Players Association ("NFLPA") as the players' collective bargaining representative. 1968 was also the year of the first Collective Bargaining Agreement ("CBA") negotiated between the NFL and its players. Nowhere in that first

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10 Tim May, Two Years and Out? (May 1997), at www.dispatch.com/football/97/news/katz0504.html.

11 See web posting of the Edge Talent Advisory Board Members at www.edgetalent.com/advisoryboard.

12 See Bob Carroll, et al., Total Football II, The Official Encyclopedia of the National Football League, Player Register, at 1322 (1999), attached as Exhibit H.

Agreement did the Rule appear. The current CBA,[13] which has been extended three times, was negotiated in 1993 and will not expire until the 2007 season. This agreement comprises 292 pages, 61 articles, appendices from A through N, and 357 sections; but, like its predecessors, it does not contain the Rule. Moreover, in Article III, Section I, titled "Scope of Agreement," the CBA contains an integration clause, stating: "This Agreement represents the complete understanding of the parties on all subjects covered herein, and there will be no change in the terms and conditions of this Agreement without mutual consent." Plainly, then, the CBA between the NFL and the NFLPA does not now contain, and has never contained, the Rule.

The NFL suggested at the scheduling conference in this case that the NFLPA had nevertheless expressly agreed to the Rule by virtue of "a side letter." Asked to produce this document in discovery, the NFL delivered a letter dated May 6, 1993,[14] written by its counsel and addressed to counsel for the NFLPA. That letter, which attaches the Bylaws containing the Rule, states: "This letter confirms that the attached documents are the presently existing provisions of the Constitution and Bylaws of the NFL referenced in Article IV, Section 2, of the Collective Bargaining Agreement." The referenced CBA Article is entitled "No Suit" and provides, in pertinent part, simply that "neither the NFLPA nor any of its members . . . will sue . . . the NFL . . . relating to the presently existing provisions of the . . . Bylaws." [15] There is no express or implied agreement concerning the Rule.

Thus, rather than demonstrating that the Rule was somehow expressly bargained over, the so-called "side letter" merely provides a copy of the Bylaws as to which the NFLPA had agreed

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13 A copy of the current CBA is attached as Exhibit I.

14 A copy of the May 6, 1993 letter is attached as Exhibit J.

15 Exhibit I at 11.

that neither it nor any of its members would bring suit. Obviously, Clarett is not a member of the NFLPA, nor is he represented by that labor organization.

D. THE EFFECTS OF THE RULE

The NFL is the only major sport organization that prohibits players from entering its draft until a prescribed period after high school graduation. The National Basketball Association, Major League Baseball and the National Hockey League have no such restrictions. By virtue of the Rule, the NFL member teams have agreed with one another not to hire players until three NFL seasons have elapsed since the players graduated from high school. Because of the NFL teams' concerted refusal to deal with this segment of the talent pool, these players are absolutely and unreasonably restricted from competing for positions in the League and are unlawfully delayed or prevented from earning a livelihood in their chosen profession.

By forcing prospective players to wait until three NFL seasons have elapsed before becoming eligible for its draft, the NFL is able to maintain a free and efficient "farm" system for developing players. College football acts in effect as a minor league, for which the NFL incurs no expenses. While Major League Baseball teams each spend an average of nine million dollars annually for the minor league system, the NFL teams spend virtually nothing on a player development system;[16] instead, the only such costs incurred by NFL teams are for their scouts, to whom the NCAA grants easy and ready access. Under the current system, NFL teams take no financial risks of investing in players while they are in college. Indeed, if a player suffers an injury while in the NCAA, or does not develop as expected, which reduces his value or renders him unable to play professionally, the NFL teams lose nothing. College football is a willing

[16] Andrew Zimbalist, Unpaid Professionals: Commercialism and Conflict in Big-Time College Sports at 192 (Princeton University Press 1999), relevant portions of which are attached as Exhibit K.

partner in this cozy arrangement as it generates millions of dollars for the colleges without their having to incur the expense of player salaries. Players who are otherwise able to compete with the best in their profession must bide their time on the farm working for nothing.

For extremely talented players like Maurice Clarett, who are otherwise able to compete for a position at the professional level, there are no comparable options. Not only are members of this segment of the talent pool arbitrarily foreclosed from plying their trade for three seasons, they are also prevented during that time from enjoying the opportunity to reap other financial rewards attendant upon becoming a professional athlete, such as endorsement and appearance income. As one respected sports economist has estimated, valuing the cost of tuition and board and dividing it by the estimated number of hours dedicated to the sport, the median hourly wage for a college football athlete is just $7.69.[17] Moreover, if these players suffer career-ending injury while playing at the college level, their opportunity for financial rewards in football will be forever lost.

Clarett's predicament is even more dire than that of the typical college player. He is currently suspended from playing college football for his entire sophomore season because of alleged NCAA violations, which he is vigorously contesting. Moreover, Clarett has no guarantee the suspension will not carry into his junior season. Thus, Clarett cannot now play either as an amateur in the NCAA or as a professional in the NFL. He is a football player without a game.

E. MAURICE CLARETT COMPARED TO OTHER NFL PLAYERS

Clarett, who is 6 feet tall and weighs 230 pounds, will be about eight weeks shy of his 21st birthday at the start of the 2004 NFL season. In the last few years, there have been several players in the NFL who were as young or younger than Clarett will be at the start of the 2004

[17] See id. at 51.

NFL season. When the 2000 NFL season began, five players were 21 years old.[18] During the 2001 NFL season, seven NFL players were 21 years old.[19] At the start of the 2002 NFL season, eight NFL players were 20 years old.[20] Clinton Portis, the great running back with the Denver Broncos, turned 21 at the start of the 2002 NFL season.[21]

Clarett is as tall or taller and weighs as much or more than NFL running back legends Walter Payton, Barry Sanders, and Gale Sayers when they played football.[22] Of the top 20 rushing leaders after the 5th week of the 2003 NFL season, Clarett weighed as much as or more than 17 of them and was as tall or taller than 15 of them.[23] In addition, Emmitt Smith, who has rushed for more yards than any player in the history of the NFL, was 20 years old when drafted in 1990, and weighs less and is shorter than Clarett.[24]

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18 Players who were 21 during the 2000 NFL season include Jacoby Shephard (birthday August 31, 1979), Jamal Lewis (birthday August 26, 1979), Dez White (birthday August 23, 1979), Kwame Cavil (birthday May 3, 1979), and Deon Grant (birthday March 14, 1979). See www.nfl.com/players and si.cnn.com/football.

19 Hakim Akbar, Kendrell Bell, Michael Vick, Koren Robinson, Todd Heap, Dennis Norman, and Brandon Manumaleuna. See id.

20 Toniu Fonoti, Trev Faulk, Albert Haynesworth, Saleem Rasheed, Lito Sheppard, Antonio Bryant, T.J. Duckett, and Josh Robinson. See id.

21 See www.nfl.com/players/playerpage/302215.

22 See Total Football II, Exhibit H at 1167, 1243, 1258.

23 The top 20 rushing leaders after the 5th week of the 2003 NFL season, with their height and weight are: (1) Jamal Lewis, 5'11", 240 lbs.; (2) Stephen Davis, 6'0", 230 lbs.; (3) Ahman Green, 6'0", 217 lbs.; (4) Priest Holmes, 5'9", 213 lbs.; (5) LaDainian Tomlinson, 5'10", 221 lbs.; (6) Clinton Portis, 5'11", 205 lbs.; (7) Deuce McAllister, 6'1", 221 lbs.; (8) Fred Taylor, 6'1", 234; (9) Moe Williams, 6'1", 205 lbs.; (10) Ricky Williams, 5'10", 226 lbs.; (11) Tiki Barber, 5'10", 200 lbs.; (12) William Green, 6'0", 215 lbs.; (13) Shaun Alexander, 5'11", 225 lbs.; (14) Anthony Thomas, 6'2", 228 lbs.; (15) Troy Hambrick, 6'1", 233 lbs.; (16) Garrison Hearst, 5'11", 215 lbs.; (17) Trung Canidate, 5'11", 215 lbs.; (18) Edgerrin James, 6'0", 214 lbs.; (19) Amos Zereoue, 5'8", 212 lbs.; (20) Michael Pittman, 6'0", 218 lbs.

24 See Total Football II, Exhibit H at 1284.

III. ARGUMENT

A. LEGAL STANDARD ON SUMMARY JUDGMENT

Pursuant to Fed.R.Civ.P. 56, summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Once the moving party establishes that no genuine issue of material fact exists and under the undisputed facts that party is entitled to judgment as a matter of law, the burden shifts to the nonmoving party to establish a genuine issue exists for trial.[25]

Both the United States Supreme Court and the Second Circuit have encouraged summary judgment motions in antitrust litigation.[26] As the Second Circuit has stated, "[S]ummary judgment remains a vital procedural tool … and may be particularly important in antitrust litigation."[27]

B. THE NFL'S DRAFT ELIGIBILITY RULE VIOLATES THE SHERMAN ACT'S PROHIBITION AGAINST CONTRACTS, COMBINATIONS AND CONSPIRACIES IN RESTRAINT OF TRADE.

The NFL's eligibility Rule is arbitrary and anticompetitive. The Rule's purpose and effects are: to eliminate a major area of competition between the teams; to exclude players like Clarett from competing with other players for a place on the roster of an NFL team and the opportunity to earn substantial income; to limit the total years such players can compete

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[25] See Jeffreys v. Rossi, 275 F. Supp. 2d 463, 473-74 (S.D.N.Y. 2003) (to meet its burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts" and "may not rely on conclusory allegations or unsubstantiated speculation") (citations omitted).

[26] Apex Oil Co. v. DiMauro, 822 F.2d 246, 252 (2d Cir.), cert. denied, 484 U.S. 977 (1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987).

[27] Capital Imaging Assocs. P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 541 (2d Cir.), cert. denied, 510 U.S. 947 (1993).

professionally; and to perpetuate the free farm system known as the NCAA. As demonstrated below, the Rule is an unreasonable restraint of trade in clear violation of the antitrust laws. Accordingly, it should be struck down summarily, and Clarett should be permitted to enter the draft and pursue his calling as a professional football player.

1. THE RULE IS A CONCERTED REFUSAL TO DEAL WITH A PARTICULAR GROUP OF PLAYERS AND REPRESENTS THE KIND OF ANTICOMPETITIVE BEHAVIOR CONDEMNED AS A PER SE VIOLATION OF THE SHERMAN ACT.

Section 1 of the Sherman Act ("the Act") prohibits "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states."[28] Since all contracts theoretically restrain trade or commerce to a degree, the Act was interpreted to forbid "unreasonable" restraints and a rule of reason analysis was employed to evaluate the surrounding circumstances and determine reasonableness.[29] As the courts gained experience with anticompetitive behavior, they recognized that certain types of agreements are so plainly unlawful that they are condemned on their face as per se violations.[30] In such cases, courts need not consider a defendant's justifications for the restraint. Typical per se violations include horizontal agreements to fix prices, group boycotts and concerted refusals to deal.

In this case, the restraint in question, a horizontal agreement among the NFL teams not to compete for a particular group of players, is the type of conduct traditionally condemned as a per se violation of the Act. Indeed, the teams have unfettered control over the market for player

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28 15 U.S.C. § 1 (2000).

29 See Standard Oil Co. v. United States, 221 U.S. 1 (1911).

30 See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211 (1959); State Oil Co. v. Kahn, 522 U.S. 3, 10 (1997) (per se treatment appropriate once experience with particular kind of restraint enables the court to predict with confidence that rule of reason will condemn it); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982).

services and have wielded their monopolistic market power to effectively preclude younger players from plying their trade. The courts have long had experience with this very class of restraints and have repeatedly struck them down as per se violations. In *Denver Rockets v. All-Pro Management, Inc.*[31] ("*Haywood*"), for example, the court held that professional basketball's four-year eligibility rule "constitute[d] a 'primary' concerted refusal to deal wherein the actors at one level or a trade pattern (NBA team members) refuse to deal with an actor at another level (those ineligible under the NBA's four-year college rule)."[32] Similarly, in *Boris v. USFL*[33] and in *Linseman v. WHA*, [34] the courts struck down as anticompetitive eligibility rules in the former United States Football League and World Hockey League, respectively.

Subsequent to these draft eligibility cases, the Supreme Court decided *NCAA v. Board of Regents of the University of Oklahoma*,[35] holding that the NCAA's limitation of television broadcasts of college football games constituted an unreasonable restraint of trade. Finding that college football is an industry in which certain restraints on competition are necessary in order to define the manner in which the member institutions compete, the Supreme Court used a "rule of reason" analysis in order to consider the NCAA's purported justifications, which it then rejected.

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31 325 F. Supp. 1049 (C.D. Cal. 1971), aff'd, 401 U.S. 1204 (1971).

32 Id. at 1061.

33 1984 WL 894 (C.D. Cal. 1984) (rule provided that "no person shall be eligible to play … unless (1) all college football eligibility of such player has expired, or (2) at least five (5) years shall have elapsed since the player first entered or attended a recognized junior college, college or university or (3) such player received a diploma from a recognized college or university").

34 439 F. Supp. 1315 (D. Conn. 1977) (rule declared players younger than twenty not eligible for hockey league draft).

35 468 U.S. 85 (1984).

In this case, the undisputed facts support the conclusion that the Rule violates the Act, regardless of whether the Court applies a per se or a rule of reason analysis. Ultimately, the focus of the inquiry is the same under each approach, which is "to form a judgment about the competitive significance of the restraint."[36] Indeed, per se rules simply implement the overarching rule of reason.

The restraint at issue here is so clearly anticompetitive that, under either the per se or rule of reason approach, it may be disposed of on a motion for summary judgment. As the Supreme Court stated in *NCAA*, "*[t]he essential point is that the rule of reason can sometimes be applied in the twinkling of an eye.*"[37] Similarly, in *Valley Drug Company v. Geneva Pharmaceuticals, Inc.*, the Eleventh Circuit just recently stated: "We note, however, that the application of the rule of reason is not synonymous with exhaustive factual inquiry. '[S]ome rule-of-reason cases can be disposed of merely on the basis of the parties' arguments and, more often, on the basis of a limited summary judgment record.'"[38]

2. UNDER A RULE OF REASON ANALYSIS, THE UNDISPUTED FACTS DEMONSTRATE THAT THE RULE IS AN UNREASONABLE RESTRAINT OF TRADE.

Under the rule of reason, the court must "weigh" all of the circumstances of the case and decide "whether the challenged agreement is one that promotes competition or one that

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36 NCAA, 468 U.S. at 103 (quoting Nat'l Soc'y of Prof' Engrs v. United States, 435 U.S. 679, 692 (1978)).

37 468 U.S. at 109-110 n.39 (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues, at 37-38 (Federal Judicial Center, June 1981)) (emphasis added).

38 2003 WL 22120130, at *16 n.30 (11th Cir. Sept. 15, 2003) (quoting H. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, at ¶1508); see also PSC, Inc. v. Symbol Techns., Inc., 26 F. Supp. 2d 505, 511 (W.D.N.Y. 1998) (application of the rule of reason often erroneously assumed to require refined fact finding and balancing); Barry v. Blue Cross of California, 805 F.2d 866, 871 (9th Cir. 1986) (occasionally conduct so clearly either reasonable or unreasonable that court can dispose of issue on summary judgment).

suppresses competition."[39] If plaintiff makes a threshold showing of an explicit restraint on trade, a prima facie case is established, and "these hallmarks of anticompetitive behavior place upon [defendant] a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market."[40] If the prima facie case is unrebutted, plaintiff is entitled to judgment.[41] If, on the other hand, defendant is able to overcome its "heavy burden," plaintiff may still prevail by demonstrating "that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole."[42]

The Rule on its face constitutes an explicit restraint on the operation of the free market for professional football player services, and the anticompetitive effects of this unlawful agreement are apparent without an elaborate or exhaustive analysis of the industry. Clarett and the other players similarly affected by the Rule have been robbed of their freedom to compete in the marketplace. There are no comparable options. The NFL has utterly stripped these players of their ability to market their talents and practice their calling during the three-year waiting period. Additionally, Clarett and the other members of this segment of the talent pool have been unduly delayed in, or prevented from, enjoying the opportunity to reap other financial rewards attendant upon becoming a professional athlete, such as endorsement and appearance income. If these players suffer career-ending injury while playing as amateurs at the college level, their economic opportunity will be forever lost.

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39 Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 691.

40 NCAA, 468 U.S. at 113 (naked restriction on price or output requires some competitive justification even in absence of detailed market analysis).

41 See Capital Imaging, 996 F.2d at 543.

42 Id.

Deeply rooted in American antitrust jurisprudence is the core principle that restraints such as those imposed by the Rule shall not be tolerated. As Judge Learned Hand eloquently stated in a case involving an antitrust challenge to professional baseball's reserve clause, "[W]hatever 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 one to practice his calling.*"[43] It is thus undeniable that competition in the market for employment as an NFL player has been severely harmed by the Rule.

It is equally apparent that competition among the NFL member teams for the services of players like Clarett has been eliminated. The identification and drafting of talented players is the only real area in which the teams compete. Simply put, the Rule is nothing more than an agreement to eliminate competition for players in what they have identified as the riskiest segment of the talent pool. Without question, in the absence of the Rule, teams would draft talented players like Clarett. This naked restraint cannot be justified.

There have been three other challenges to major professional sports leagues' draft eligibility rules like the Rule under challenge here and, in each one, the courts held that these collusive agreements violate the antitrust laws. In each case, the member teams colluded to eliminate competition and risk, and in each case the eligibility rules were held unlawful.[44] The same result is warranted here.

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[43] Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949), *quoted in* Mackey v. NFL, 543 F.2d 606, 621 n.32 (8th Cir. 1976) (emphasis added).

[44] *Haywood*, *Linseman*, and *Boris*, all discussed below, were decided before *NCAA* and, thus, utilized a per se analysis. Nonetheless, these decisions remain applicable and clearly establish that the Rule is an explicit restraint on trade or commerce.

The first case, *Haywood*,[45] involved the NBA's bylaw prohibiting players from entering the draft until four years after their high school class had graduated. Spencer Haywood, a star player who was precluded from entering the draft, and who did not desire or was not eligible to play college basketball, sued to enjoin the league from enforcing the rule against him. The district court granted Haywood's motion for preliminary injunction. The injunction was vacated by the Ninth Circuit, but thereafter reinstated by the Supreme Court.[46] Subsequently, the district court granted summary judgment to Haywood.

In *Haywood*, the NBA, like the NFL here, sought to have prospective players play at the college level before joining the league because, as Haywood suggested, "collegiate athletics provides a more efficient and less expensive way of training young professional basketball players than the so-called 'farm team' system, which is the primary alternative."[47] The court recognized that "participating in professional basketball as a player against the best competition which the sport has to offer is as necessary to the mental and physical well being of Haywood as breathing, eating and sleeping," and it rejected the NBA's various arguments purporting to justify the restraint.[48] Holding that the rule was "a 'primary' concerted refusal to deal," the court found the resulting anticompetitive harm was plain:

> First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by

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45 325 F. Supp. 1049 (C.D. Cal. 1971).

46 See Haywood v. NBA, 401 U.S. 1204 (1971).

47 325 F. Supp. at 1066.

48 Id. at 1057.

> pooling their economic power, the individual members of the NBA have, in effect, established their own private government.[49]

The same is true here.

Six years after *Haywood*, a similar case was brought by Ken Linseman, challenging the validity of the World Hockey Association's ("WHA") minimum age requirement that players be at least twenty years old to be eligible.[50] Linseman was four months shy of his twentieth birthday at the time he sought to enter the league. The court found the league's eligibility rule to be an "illegal agreement to restrain trade" and granted Linseman's preliminary injunction.[51]

The WHA's attempts to justify the rule were flatly rejected. Significantly, and particularly applicable here, the court stated:

> [E]ven though it may be necessary for the WHA to adopt restrictions with respect to the number of players each team may employ, there is no need for concerted action as to which specific players will be employed. That determination, under our free market system, ought to be left up to each individual team.

The court added: "[I]f the WHA needs a training ground for its prospective players, the principles of the free market system dictate that it bear the cost of that need by establishing its own farm system."[52]

In the third case, Robert Boris was precluded from competing for a position in the now-defunct United States Football League ("USFL") as a result of that league's rule, which imposed "an absolute exclusion on all persons who still [had] theoretical collegiate athletic eligibility

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49 Id. at 1061.

50 See Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977).

51 Id. at 1322.

52 Id. at 1321-2.

remaining."[53] As in *Haywood* and *Linseman*, the USFL teams tried to justify their agreement with a laundry list of justifications, which mirror those proffered here by the NFL:

> The Eligibility Rule promotes on-field competitive balance among USFL teams; very few college athletes are physically, mentally, or emotionally mature enough for professional football; abolition of the Eligibility Rule will not benefit the college athlete; the Eligibility rule promotes the importance of a college education; the Eligibility rule promotes the efficient operation of the USFL by strengthening the sport at the college level so that the USFL does not have to develop players at that level; the Eligibility Rule is not inflexible; since 1983 was the USFL's first season of play, competitive conditions required it to adopt and enforce the same Eligibility Rule previously adopted and enforced by the two powerful and established existent major professional leagues (the National Football League and the Canadian Football League); if it cannot enforce the Eligibility Rule, its very existence will be threatened; and the best chance that college football players have for increased remuneration (viz, interleague competition) will be gone.[54]

The court was not persuaded and granted partial summary judgment for Boris, holding that the rule violated the antitrust laws. It found that the principal reason for the restraint was "to respond to apparent demands made by college football programs and thereby gain better access to these programs towards the end of selecting the best college players available." Thus, in the context of the antitrust laws, the rule "involved combining for the primary purpose of coercing or excluding third parties, and did in fact have the effect of coercing or excluding those third party individuals deemed ineligible by the Rule."[55]

In this case, as in the prior draft eligibility cases, the harm to competition is obvious, and the undisputed facts establish that the Rule is an unreasonable restraint of trade. Given that there

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53 Boris v. USFL, 1984 WL 894, at *3 (C.D. Cal. Feb. 28, 1984).

54 Id. at *2.

55 Id. at *3 (citation omitted).

are and have been many players in the NFL younger, shorter and lighter than Clarett, the Rule has no reasonable basis. Legitimate pro-competitive justifications plainly do not exist, let alone "outweigh" the Rule's overwhelming anti-competitive effects. Accordingly, Clarett should be permitted to enter the draft.

The NFL, in its letter brief of October 7, 2003, argues that although Clarett has been harmed, competition itself has not. The NFL suggests that, because of its "salary cap" (itself a restraint on trade, albeit one possibly immunized by the labor exemption), the teams are already paying to NFL players the maximum in compensation under the CBA. This argument is legally and factually unsupportable for several reasons.

First, the harmful effects on competition (1) among prospective players for the opportunity to sell their services and (2) between the teams for players are self-evident. The NFL's argument ignores the former altogether. Yet, the "most persuasive evidence of harm to competition is the total exclusion" of players like Clarett from the market for player services.[56] As the Second Circuit recently stated:

> In the market for network services, where the four networks are sellers and issuing banks and merchants are buyers, the exclusionary rules enforced by Visa and MasterCard have absolutely prevented Amex and Discover from selling their products at all.
>
> Without a doubt the exclusionary rules in question harm competitors. The fact that they harm competitors does not, however, mean that they do not also harm competition.[57]

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[56] United States v. VISA U.S.A., Inc., 344 F.3d 229, 240 (2d Cir. 2003).

[57] Id. at 243 (emphasis omitted); see also Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996) (proof that athletic conference excluded plaintiff from bowl game sufficed to establish prima facie case under rule of reason); H. Hovenkamp, Federal Antitrust Policy, at 256-57 n.25 (1999) (detrimental effects include exclusion from the market of firms that seem to be competitive entrants).

The NFL draft itself is a restraint on competition. In *Smith v. Pro Football, Inc.*, the D.C. Court of Appeals struck down the draft, holding that it was "significantly anticompetitive in its effect."[58] In response to *Smith*, the draft was made part of the CBA so as to shield it from antitrust scrutiny under the labor exemption. Here, there is no such exemption for the NFL draft eligibility Rule, which is even more restrictive. The injury to competition is even greater than in *Smith*, as Clarett and others similarly situated have been excluded from the draft altogether.

Second, with respect to the competition between NFL teams for players made ineligible by the Rule, there is none. The suggestion that the League does not benefit economically from this scheme is silly. Putting aside that the "salary cap" does not operate as the NFL implies, by forcing prospective players to wait before becoming eligible for the draft, the NFL is able to maintain a free and efficient "farm system" for developing players. College football acts as a minor league, for which the NFL does not have to pay. As a direct result of the restraint imposed by the Rule, member teams can, *inter alia*, significantly limit their scouting and player development costs. Further, the NFL saves itself the financial risks of investing in players while they are in college. Should a player suffer an injury while in college, which reduces his value or renders him unable to play professionally, the NFL teams lose nothing, while the player loses everything.

Taking the NFL's argument to its logical extreme, the League would be at liberty to agree, for any reason whatsoever, to exclude arbitrarily any group or individual from competing for a position. Even the most egregious behavior would be insulated by merely citing the salary cap and invoking the "familiar mantra that the 'antitrust laws protect competition, not

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[58] 593 F.2d 1173, 1185 (D.C. Cir. 1978). The Court further explained, "[t]he draft inescapably forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power." Id.

competitors.'"[59] Such unfettered monopolistic behavior is the very evil that the antitrust laws were enacted to protect against.

The NFL's draft eligibility Rule constitutes a clear violation of the Act. It should be invalidated, and Clarett should be permitted to enter the 2004 draft.

C. THE NON-STATUTORY LABOR EXEMPTION TO THE ANTITRUST LAWS DOES NOT APPLY TO THE NFL DRAFT ELIGIBILITY RULE.

The remaining question is whether the Rule is immune from antitrust scrutiny by virtue of the non-statutory labor exemption to the antitrust laws.[60] It is not. First and foremost, the Rule does not appear in the parties' Collective Bargaining Agreement, nor is it incorporated into the Agreement by reference. The Rule has never been the subject of any negotiations between the NFL and NFLPA, and the NFLPA has never otherwise agreed to the Rule. Inasmuch as the non-statutory labor exemption shelters only labor-management agreements from antitrust examination, the fact that this Rule has never been the subject of arm's length collective bargaining between the parties automatically removes it from the labor exemption.[61]

Second, the Rule is not a mandatory subject of bargaining, as it does not constitute "wages, hours and other terms and conditions of employment" within the meaning of the National Labor Relations Act ("NLRA").[62] Thus, even if the matter had been negotiated

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59 VISA U.S.A., 344 F.3d at 241 (quoting Clorox Co. v. Sterling Winthrop, Inc. 117 F.3d 50, 57 (2d Cir. 1997)).

60 Because many labor-management agreements constitute contracts in restraint of trade within the literal language of the Sherman Act, the United States Supreme Court has fashioned a judicially created exemption to the antitrust laws, which attempts to accommodate inherent conflicts between national antitrust and labor policy and to shield certain labor-management agreements from antitrust scrutiny. See Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945).

61 Mackey v. NFL, 543 F.2d 606, 621 n.32 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

62 29 U.S.C. § 158(d) (2000). See also NLRB v. Borg-Warner Corp., 356 U.S. 343 (1958).

between the NFL and NFLPA, the labor exemption would not apply. Finally, the Rule harms the interests of players like Maurice Clarett, a stranger to the NFL-NFLPA collective bargaining relationship, by totally foreclosing him from eligibility for employment.

Under *Mackey v. National Football League,*[63] later endorsed in *McCourt v. California Sports, Inc.,*[64] the labor exemption for player restraints would shelter an anticompetitive labor-management agreement only if each of the following elements were met: (1) the agreement is the product of bona fide arm's-length bargaining; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the restraint on trade affects only the parties to the collective bargaining relationship.[65] Clarett prevails if the Rule fails to satisfy any one prong but, as the undisputed facts demonstrate, the Rule fails all three and, therefore, is not exempt from antitrust scrutiny.

1. The NFL Draft Eligibility Rule is Not the Product of Arm's-Length Collective Bargaining.

The non-statutory labor exemption cannot, as a matter of law, afford the Rule immunity from antitrust scrutiny because the Rule is not the product of arm's length bargaining. The NFL admits that the Rule appears nowhere in the NFL-NFLPA CBA and that the Rule is not incorporated by reference into that agreement.

In a desperate attempt to salvage the Rule, the NFL points to a "side letter" that refers to a section of the CBA in which the NFLPA agreed not to sue the NFL on issues relating to the Bylaws. Attached to this so-called "side letter" is a copy of the NFL Bylaws, which contain the

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63 Mackey, 543 F.2d at 606.

64 600 F.2d 1193 (6th Cir. 1979).

65 Mackey, 543 F.2d at 614-15 (citations omitted).

Rule. Counsel for the NFL explained at the scheduling conference, "there is a reference, in effect, to the rule indirectly."[66] Such a reference is nonexistent. The letter makes no mention of the Rule or any other issues relating to the college draft. At most, the NFLPA agreed not to sue the NFL over all issues addressed by the Bylaws. To argue otherwise would require the NFL to bargain with the NLFPA over *all* items contained in the Bylaws such as "Name and Principal Office" and "Meetings of the League." In other words, if the Bylaws were incorporated by reference into the CBA, the NFL would be prohibited from making any unilateral changes with regard to any item contained in the Bylaws.[67]

Even assuming *arguendo* that the NFLPA did agree to the Rule by virtue of the letter, this would still not establish that the Rule is the product of arm's length negotiations. For the labor exemption to apply, the NFL would have to demonstrate that *actual bargaining* took place and that the union considered and approved the restraint under challenge.[68] Of course, the NFLPA could not have considered or approved the Rule because, at the time the Rule was first implemented, about fifty years ago, the NFLPA was not even in existence.[69] Nor is there any evidence that the NFL bargained with the NFLPA over any change in the Rule.

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66 Transcript, Exhibit E at 5.

67 See NLRB v. Katz, 369 U.S. 736 (1962).

68 See Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 895 (S.D.N.Y. 1975); Philadelphia World Hockey Club v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 498-99 (E.D. Pa. 1972).

69 See Smith v. Pro-Football, 420 F. Supp. 738, 742 (1976) (labor exemption inapplicable because NFLPA did not become players' exclusive bargaining agent until after restraints of draft were imposed on plaintiff), rev'd on other grounds, 593 F.2d 1173 (D.C. Cir. 1978); Philadelphia World Hockey Club, 351 F. Supp. at 498-9 (labor exemption inapplicable where reserve clause was created by the NHL before Player's Association came into existence).

In both *Mackey* and *McCourt*, the critical factor was the extent to which the free agent indemnity rule under challenge was the product of actual bargaining. In *Mackey*, the rule under scrutiny had been made part of the collective bargaining contract between the NFL and the NFLPA through incorporation by reference, and the League argued that this incorporation immunized it from antitrust scrutiny. The Court of Appeals disagreed, however, and held that the rule was not the product of "bona fide arm's length bargaining."[70] The court reviewed the bargaining history, found that the rule remained unchanged since its unilateral implementation prior to collective bargaining, and affirmed the district court's finding that the union had received no *quid pro quo* for the rule's inclusion in the collective bargaining contract.[71]

In *Philadelphia World Hockey Club*,[72] the court found that certain league agreements designed to limit player mobility violated the antitrust laws. The court paid careful attention to the extent of actual bargaining over the rules at issue between the NHL and the Players' Association and refused to conclude that the rules were a product of collective bargaining because they had originally been inserted in individual player contracts before the advent of the players' union.[73] In the absence of "[s]erious, intensive, arm's-length bargaining," the challenged rules were not exempt from the antitrust laws.[74]

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70 543 F.2d at 613, 616.

71 Id.

72 351 F. Supp. 462 (E.D. Pa. 1972).

73 Id. at 484-86. Like the situation here, "when the [NHL] Player's Association was recognized in 1967, some variation of the reserve system had existed for probably 16 years prior thereto." Id. at 499.

74 Id.

Like the league rules in *Philadelphia World Hockey club*, the NFL eligibility Rule at issue here is not the product of actual bargaining but is, instead, merely the continuation of a rule unilaterally promulgated by the League some fifteen years before the NFLPA even came into existence as the players' collective bargaining representative. This fact alone places the Rule beyond the standard for immunity established in *Mackey*. Moreover, because the NFL Rule is not incorporated into any agreement between the parties and there was no collective bargaining over the Rule, federal labor policy does not justify shielding it from the antitrust laws.

2. The NFL Draft Eligibility Rule Is Not a Mandatory Subject of Bargaining Under the NLRA.

The Rule also fails under the second prong of the *Mackey* test as a matter of law, as it is not a mandatory subject of bargaining within the meaning of the NLRA.[75] As the Supreme Court has observed, "employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects."[76] The labor exemption does not protect anticompetitive agreements that relate to subjects other than wages, hours or working conditions.[77]

The NFL Rule cannot as a matter of law be deemed a mandatory subject of bargaining, as it does not concern wages, hours, or other terms and conditions of employment of players

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[75] See Mackey, 543 F.2d at 615; see also 29 U.S.C. §§ 158(d), 159(a) (the NLRA obligates employers to bargain collectively over "wages, hours, and other terms and conditions of employment" with their employees' representative, which has been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes . . .").

[76] Local Union No. 189 v. Jewel Tea Co., 381 U.S. 676, 689 (1965).

[77] See, e.g., Mackey, 543 F.2d at 614; Robertson, 389 F. Supp. at 890.

currently employed by NFL teams.[78] Clarett is not an employee of any team in the NFL. The NFLPA does not, and cannot, represent him, and the NFL's duty to bargain does not encompass any matters involving Clarett. Indeed, matters exclusively concerning prospective or former employees have expressly been held not to constitute mandatory subjects of bargaining.[79]

3. The NFL Draft Eligibility Rule Primarily Affects Only Strangers to the NFL-NFLPA Collective Bargaining Relationship.

For an agreement to be considered exempt from antitrust review, it also must primarily affect the contracting parties, not strangers to their relationship. Where the primary effect of an agreement is to restrain third parties who are strangers to the collective bargaining agreement, the Supreme Court refuses to grant antitrust immunity to the agreement even if it involves a mandatory subject of bargaining and is of central concern to the employees and their union.[80]

In *Pennington*, for example, the United Mine Workers Union agreed with major coal mine operators not to oppose rapid mechanization in their operations. In return, the employers compensated the union for the resulting reduction in the labor force by increasing remaining employees' wages. The union also promised the major operators that it would seek to impose the increased wage scale upon smaller, competing companies. The Court concluded that this agreement, although directly concerning the wages of employees and thus a mandatory subject of

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78 See Robertson, 389 F. Supp. at 889-90 (finding that the reserve clause, player draft, and non-competition agreement were not mandatory subjects of bargaining).

79 See Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971); see also NLRB v. USPS, 18 F.3d 1089, 1098 (3d Cir. 1994) (holding that an employer generally has no duty to bargain over practices that involve non-unit employees); Star Tribune, 295 NLRB 543, 546 (1989) (employer did not breach its duty to bargain when it unilaterally implemented a drug-screening plan for job applicants, who are not "employees" within the meaning of the NLRA).

80 See United Mine Workers v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. Local 3. IBEW, 325 U.S 797 (1945); Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975).

bargaining, was not within the labor exemption to the antitrust laws because it sought "to prescribe labor standards outside the bargaining unit."[81]

In *Allen-Bradley*, a group of electrical contractors in New York City agreed with the union that the contractors would purchase equipment only from manufacturers that recognized the local union. Electrical equipment manufacturers, in turn, agreed to limit their sales only to contractors who recognized the local union. The effect of this arrangement was a concerted refusal to deal with non-signatory electrical equipment manufacturers, such as the plaintiff. The agreement also excluded electrical contractors whose employees were not members of that union from competition for the New York City area business. The Court concluded that the labor exemption would not save the obvious restraint on competition even though the union's purpose was to increase members' wages and employment opportunities.[82]

In *Connell* as well, the Court refused to apply the non-statutory labor exemption because the agreement at issue imposed restraints on strangers to the collective bargaining relationship. There, the union sought agreements from general contractors that those contractors would select as subcontractors only firms that were signatory to collective bargaining contracts with the union. In return, the union disavowed any interest in organizing the employees of the general contractors. The effect of this arrangement was to preclude non-union subcontractors from competing for jobs. Consequently, firms that might offer important price or quality advantages were precluded from marketing their services to the general contractor. The labor exemption

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81 381 U.S. at 665-68.

82 325 U.S. at 809.

was unavailable even though the goal of the union was to expand employment opportunities for its members.[83]

The NFL Rule precludes *prospective* players from entering the NFL draft pool until three NFL seasons have elapsed since their high school graduation. The primary effect of the Rule falls upon players who, like Clarett, are complete strangers to the NFL-NFLPA collective bargaining relationship. Like the small mine operators in *Pennington*, the non-New York City manufacturers in *Allen-Bradley*, and the non-union subcontractors in *Connell*, Clarett and other similarly situated young athletes, strangers to the bargaining relationship, are the direct and only object of the restraint. Thus, the NFL's effort to shield its anticompetitive agreement from antitrust scrutiny must fail as a matter of law.

D. CLARETT IS IN FACT ELIGIBLE FOR THE 2004 DRAFT UNDER THE NFL BYLAWS.

Under the language of the NFL Rule, Clarett is, in fact, eligible for the 2004 Draft. The NFL is misinterpreting its own Rule to bar Clarett from the marketplace, thereby underscoring the arbitrary manner in which the NFL applies its restraint.

The Rule states: "For college football players seeking special eligibility, at least three NFL seasons must have elapsed since the player was graduated from high school." Clarett graduated from high school on December 11, 2001, with eight weeks remaining in the NFL season, including playoffs. By the time of the April 2004 Draft, three NFL seasons will have elapsed since Clarett graduated from high school.

In other words, the 2001-2002 regular season ended on January 7, 2002, with the Super Bowl occurring on February 3, 2002. This was the first NFL season to elapse since Clarett

[83] 421 U.S. at 625-26.

graduated from high school. The second NFL season to elapse was the 2002-2003 season. In that year, the last regular season game was played on December 30, 2002, and the Super Bowl was played on January 26, 2003. The third NFL season to elapse since Clarett graduated high school will be the 2003-2004 season. The last regular season game will be played on December 28, 2003, and the Super Bowl will be played on February 1, 2004.

Prior to filing this lawsuit, Clarett's mother and his counsel met with two counsel representing the NFL. During that meeting, the NFL was advised that Clarett had graduated high school in December 2001 and sought entry into the 2004 Draft. The NFL responded that the Rule, which was not a matter of public record, required three years to pass from the time the player's class graduated from high school. This was yet another version of the Rule as explained by NFL representatives such as that of Greg Aiello, director of communications for the NFL, who said in 1997: "The rule is this: to be eligible for the NFL, a player has to have been out of high school for three years."[84]

Moreover, in the statements the NFL released to the teams and to the media in 1990 when it first announced a change in the Rule, the Commissioner explained the Rule as requiring "three full college seasons" to elapse since the player's high school graduation.[85] This announcement simply did not describe the Rule as it was actually drafted in the Bylaws. Indeed, it reflects the purpose of the Rule – to require players to stay in the NCAA farm system for three seasons – while it ignores the Rule's actual wording. Certainly, the statement reflects that the NFL understood the difference between using the words "full" and "college seasons" and referencing

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84 Supra. at pp. 5-6.

85 See Exhibits F and G.

"NFL seasons." In Clarett's case, he would be ineligible under the press release rule but eligible under the Rule as actually drafted by the NFL.

This issue may be the definition of the word "elapsed." The NFL may argue that, in drafting its Rule, it meant that three full seasons had to pass after the player graduated from high school. This position is contrary to the ordinary use and meaning of the word "elapse" and contrary to well settled law.

A court may consult a dictionary to determine the meaning of a word.[86] To that end, "[i]t is well settled that dictionaries provide evidence of a … term's ordinary meaning."[87] The Oxford English Dictionary, the authoritative text in all such matters, defines "elapse" as "of time, a period of time: to slip by, pass away, expire." Further, "expire" means "to come to an end … to reach its close; to terminate … elapse …"[88]

While the language of the Rule, under these authoritative definitions, clearly permits Clarett to enter the 2004 Draft, the NFL may argue for a different definition of the word "elapsed," raising a question of ambiguity. Questions of ambiguity in a document are legal questions.[89] Language is ambiguous if it is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as

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86 See AT & T Corp. v. Microsoft Corp., 2003 WL 21459573, at *3 (S.D.N.Y. June 24, 2003).

87 Id. at *8 (citing Inverness Med. Switzerland GmbH v. Princeton Biomeditech Corp., 309 F.3d 1365, 1369 (Fed. Cir. 2002).

88 Oxford English Dictionary (2d Ed.), relevant pages of which are attached as Exhibit L.

89 Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 425 (2d Cir. 1992).

generally understood in the particular trade or business."[90] Conversely, a contract term is unambiguous if it has "a definite and precise meaning, unattended by danger of misconception in the purpose of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion."[91]

Extrinsic evidence may be considered as a factor in determining a party's intent to use a certain word or phrase.[92] In this case, the NFL's 1990 press release reflects an intent to say one thing in the Rule and to tell the public and prospective players quite another. Even if no extrinsic evidence exists, or if that evidence proves inconclusive, then ambiguities are construed against the drafter of the document in question.[93]

Simply put, Clarett is eligible for the 2004 Draft under the language used by NFL to state its Rule. By construing the language of the Rule to reflect its true unlawful purpose, the NFL has violated the Act.

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90 Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp., 818 F.2d 260, 263 (2d Cir. 1987) (quoting Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 284 F. Supp. 987, 994 (S.D.N.Y. 1968)).

91 Chiquita Int'l Ltd. v. Liverpool and London Steamship Prot. and Indem. Ass'n Ltd., 124 F. Supp. 2d 158 (S.D.N.Y. 2000) (citing Sayers v. Rochester Tel. Corp., 7 F.3d 1091, 1095 (2d Cir. 1993)).

92 Seiden Assocs., 959 F.2d at 429.

93 In re Saranac Cent. Sch. Dist., 686 N.Y.S.2d 869, 870-71 (3d Dep't 1998); Chiquita Int'l Ltd., 124 F. Supp. 2d at 164.

IV. CONCLUSION

WHEREFORE, for the above stated reasons, it is respectfully requested this Court grant Clarett's Motion for Summary Judgment.

Respectfully submitted,

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