IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

REGGIE WHITE, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	No. 4:92-cv-00906-MJD
vs.	:	
	:	
NATIONAL FOOTBALL LEAGUE, *et al.*,	:	
	:	
Defendants.	:	
	:	

THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF RULE 60(b) MOTION

I. PRELIMINARY STATEMENT[1]

The NFL's Response (Dkt. 798) confirms there is no dispute that the League never—not once during over six months of negotiations—[redacted] Nor is there any dispute that the NFL withheld from the Players all evidence that could have revealed the secret salary cap during the RFA/Option Bonus proceeding and otherwise. There is also no dispute that the NFL [redacted] And, for all of its volume and stridence, the NFL offers ***no*** answer to any of the following questions:

- Why did the NFL's own "highly skilled and accomplished" counsel [redacted]
- And, why—if the League was not seeking protection for its secret salary cap—[redacted]
- Why, in the RFA/Option Bonus proceeding before this Court, did the NFL frontload production of "filler" documents already in the Players' possession while running out the clock on producing documents from the League office and owners who we now know had evidence of the secret salary cap?
- Why did the SSA's express requirements of "*best efforts* and *cooperation* . . . to implement the provisions of the [SSA] in a manner consistent with *good faith and fair dealing*"—which permeated every aspect of the NFL's relationship with the Players, including the NFL's litigation conduct against

[1] Defined terms have the same meaning herein as in the NFLPA's Memorandum (Dkt. 791) ("Memorandum"). Emphasis is added, and quotations and citations are omitted, unless otherwise indicated.

> the Players—not impose upon the NFL a duty to reveal the "unknown" claim it specifically sought to dismiss?

The NFL's Response is all *ad hominem* accusation with no ***evidence***. Most strikingly, the NFL asserts—without citation—that "the Union inferred (incorrectly) that the NFL clubs had colluded in 2010." (Response at 11.) Where, however, are declarations from, *e.g.*, John Mara and other NFL owners explaining what they meant by their public statements in March 2012 about player spending "rules" and attesting that there was nothing to disclose to players in connection with the SOD?

The NFL assails the integrity of the NFLPA and its lawyers, asking the Court to discredit (without discovery or an evidentiary hearing) the five declarations submitted by the Players. But the Players came forward with evidence to meet their burden; the NFL's failure, in response, to present witnesses to attest to its lawyers' arguments speaks volumes.

Such reliance on argument—not evidence—dooms the NFL's opposition to Rule 60 relief. The Eighth Circuit remanded these proceedings despite the NFL's protestations that the NFLPA's "allegations" were "far from sufficient to satisfy the requirements of Rule 60(b),"[2] instead ordering that the Players "be given the opportunity to meet" the "heavy burden" of establishing their right to Rule 60(b) relief. *White*, 756 F.3d at 596. The Panel would not have remanded this Rule 60 motion if it agreed with the NFL that the Players' "allegations" were legally deficient. To the contrary, the Panel directed this

[2] *White v. NFL*, 756 F.3d 585 (8th Cir. 2014), Br. for Appellees at 50-52 (No. 13-1251), Amoona Declaration (filed concurrently herewith), Ex. A.

Court to assess the ***evidence*** to determine if the Players have sufficiently supported their allegations to entitle them to Rule 60(b) relief.

That evidence, which stands unrebutted, establishes that the NFL engaged in orchestrated litigation misconduct—including the concerted concealment of the true purpose of the SOD—designed to "force" the Players to accept it. And the NFL cannot justify that plan as mere hard bargaining in the face of evidence that such misconduct served to conceal the true motive behind forcing the SOD upon the Players despite special SSA duties of "good faith," "cooperation" and "best efforts."

II. ARGUMENT

A. The SOD Was Forced On The Players Through Litigation Misconduct.

1. The NFL's Last-Minute Demand.

Nowhere in the NFL's 36-page Response or the 13-page Block Declaration is there any explanation about why [redacted]

Instead, the NFL argues—without ***evidence***—that when finally presented with the SOD, [redacted]

[redacted] at which point, with the end of the lockout imminent and the object of the SOD hidden, the Players relented. This is precisely the type of forced assent for which Rule 60 affords relief. *E.g.*, *In re Malden Mills Indus.*, 361 B.R. 1, 7-9 (Bankr. D. Mass. 2007) (vacating final decree under Rule 60(b)(3) where debtor obtained assent from creditor based on "lack of candor" and "false pretenses").

The NFL argues that the Players should not have been surprised at the last-minute demand because the League "repeatedly made clear" that as part of any deal "litigation will be dismissed . . . disputes will be resolved." (Response at 21.) [redacted][3]

Moreover, the NFLPA was not the only party represented by "sophisticated counsel, highly skilled and accomplished lawyers [with] decades of experience negotiating collective bargaining agreements in this industry." (Response at 18.) It is thus inconceivable that [redacted] The absence of ***any*** NFL explanation or

[3] The NFL cites Pash's public statement in arguing that the Players should have known the NFL would seek dismissal of unknown claims. (Response at 21.) Not only does Pash's statement say nothing about unknown claims (as opposed to live disputes), it was not made until ***July 22***, *i.e.*, the end of the negotiations.

evidence to dispute this point is glaring. It is not the Players' declarations that are "not credible"—an accusation that could not be adjudicated without discovery and an evidentiary hearing—but the NFL's brazen claim that its SOD tactics should be summarily accepted as benign when not a single NFL negotiator has submitted a declaration offering any explanation for the NFL's conduct.[4]

As the unrebutted record establishes: the NFL lay-in-wait until the end of the lockout, when cratering a deal for 1,500 Players to return to work over the NFL's sudden SOD demand was not a realistic option given the League's continued concealment of their secret salary cap. It is "not credible" for the NFL to now deny that its SOD demand presented the Players with anything other than a Hobson's choice when that is exactly why [redacted].[5]

Nor is there any basis for the NFL's tired claim that the Players knew about the secret salary cap when they agreed to the SOD, based on statements from past NFLPA Presidents Foxworth and Mawae. The NFL principally relies on Mr. Foxworth's statements in a magazine interview that the Players had "speculation" but "no evidence" of "some sort of colluding-like activity," and that giving up such speculative claims to end the lockout "was the right thing to do and looking back on it, I still feel it was the

[4] The NFL's "gotcha!" assertion about the Quinn Declaration is hot air. (Response at n.3.) Mr. Quinn's declaration does not address the last-minute SOD negotiations for the simple reason that he was not involved. (Second Declaration of James W. Quinn.)

[5] The NFL claims the NFLPA could have continued to negotiate the SOD over the ten days between the announcement of the end of the lockout on July 24 and the August 4 filing of the SOD. (Response at n.4.) [redacted]

right thing to do." (Response at 1, 31; Block Decl., Ex. 1.) But even these selective excerpts cannot make those statements inconsistent with what the Players argue here. Because the NFL concealed the secret salary cap from the Players, they "***didn't know*** [their] choice was to pursue this [speculative collusion] without any hard evidence or to go forward with the season," and therefore it made sense to agree to the SOD under the circumstances. (Block Decl., Ex. 1.) The Players now submit Foxworth and Mawae Declarations to confirm that, in 2011, they had no knowledge of the secret salary cap and there would have been no SOD if not for the deceit of the NFL. This ***evidence*** underscores why the League's reliance upon ***argument*** cannot provide a basis for opposing Rule 60 relief.

The NFL's argument that its lockout was a "legitimate tactic under the labor laws to bring economic pressure to bear on the players as part of the bargaining process" is beside the point. (Response at 18.) The issue before the Court is not the NFL's use of a lockout to extract concessions as part of the collective bargaining process. Rather, the Rule 60 issue is the NFL's use of litigation misconduct and concealment to "force" the Players to agree to a "get-out-of-jail-free" card (*i.e.*, the SOD) for a massive violation of the Court-ordered SSA.

Finally, the NFL misstates the Rule 60(b) standard, which provides equitable relief from "fraud . . . , misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). It does not require "that the NFL held a gun to the Players' head to force them to agree." (Response at 17.) Rather, because the Players have established that the NFL used litigation misconduct and misrepresentations to coercively obtain SOD

protection for its secret salary cap, equity warrants Rule 60 relief. *E.g.*, *Malden Mills*, 361 B.R. at 9 (granting Rule 60(b)(3) relief where conduct, "[e]ven if not outright fraud, [] clearly rises to the level of something approaching deceit").

2. The NFL Wrongfully Concealed the Secret Salary Cap in the RFA/Option Bonus Proceeding.

Public and private statements of NFL owners now confirm the existence of a secret salary cap, yet none of that information made its way into the NFL's document production in the RFA/Option Bonus proceeding. This is undisputed. (Mem. at 8-10.)

Attempting to explain this away, the Block Declaration touts that the League "made six productions of documents . . . including over 2,500 pages of documents from the League office." (Block Decl. ¶ 29.) But the declaration is silent on *what* those pages contained. As detailed in the Amoona Declaration, it was a meaningless paper dump. The League office documents were largely comprised of player contracts, RFA offer sheets, and other administrative filings, like daily NFL transaction logs, that the NFL knew the NFLPA *already possessed.* (Amoona Decl. ¶ 6.)

By contrast, the NFL's production contained few, if any, documents from the files of critical, agreed-upon NFL custodians like Commissioner Goodell, General Counsel Pash, or Vice President of Labor Relations Ruocco, which could—and most likely would—have revealed the secret salary cap. (*Id.* ¶ 7.) For some Clubs—like the New England Patriots, whose owner (Kraft) serves on the NFL's labor committee—not a single document was produced. (*Id.* ¶¶ 8-9.) Neither the Response nor Block

Declaration explains why documents were produced in this dilatory order, with key documents from key custodians withheld.

Instead, the NFL harps on the fact that the Players did not file a motion to compel. (Response at 25-27.) But this argument ignores the fact that the Players did not learn about the secret salary cap until March 2012, and had no reason, in 2011, to believe that information about an "unknown" salary cap was being withheld. Only in hindsight do (or could) the Players realize the NFL abused the discovery process to conceal their collusion until after the SOD was obtained.

3. [redacted]

The NFL gives the back-of-the-hand to its litigation misconduct in [redacted] That the Eighth Circuit would rule—three years later—that Rule 23 approval of the SOD was not legally required is of no moment. (Response at 27-28.) The NFL presents no evidence that it opposed submission of the SOD to Judge Doty solely because of its legal interpretation of Rule 23. [redacted] As a result, the NFL prevented Judge Doty from focusing on the fact

that unknown claims were being dismissed under the Court-supervised SSA. (Mem. at 15 (Judge Doty's Order dismissing only "pending" claims).)[6]

4. Judge Nelson's Mediation Order Does Not Prevent the Court from Considering the NFL's Litigation Misconduct Under Rule 60.

The NFL argues that Judge Nelson's mediation order provides it with Rule 60 immunity from its misconduct during the mediation process. But mediation confidentiality "cannot afford blanket protection" for misconduct; "[w]here the settlement negotiations and terms explain and are part of another dispute they must often be admitted if the trier is to understand the case." *BPI Energy, Inc. v. IEC (MONTGOMERY), LLC*, No. 07-186-DRH, 2007 WL 3355363, at *2 (S.D. Ill. Nov. 13, 2007) (denying motion to strike). This is especially true under Rule 60, where the inquiry is whether a party has engaged in litigation misconduct (which necessarily includes court-ordered mediation).

This position is on all fours with what the NFLPA argued in *Eller v. NFLPA*, where the Union moved to dismiss tort claims by retired players who sought to use the *Brady* mediation discussions not as evidence of litigation misconduct under Rule 60, but as evidence of their merits claim that the NFLPA failed to negotiate an appropriate level

[6] The Players acknowledge the Court's statement—prior to the submission of evidence—that the NFLPA's assertions that "the NFL's insistence on a private stipulation for dismissal, without review by Judge Doty . . . only demonstrate that the NFL wanted to quickly end the *White* litigation." (Dkt. 785 at 6.) However, the Players respectfully submit that in view of the evidence since presented, it is clear that the NFL was motivated by something other than expedition. Insisting upon scripted "talking points," for example, served only to restrict—not expedite—the limited disclosure made to Judge Doty about the dismissal of *White* to minimize the risk that he would inquire about the dismissal of unknown claims.

of benefits for retirees. 872 F. Supp. 2d 823 (D. Minn. 2012). Here, in contrast, evidence relating to the *Brady* mediation talks concerns the NFL's *litigation misconduct* in procuring the SOD and has nothing to do with the underlying collusion claim. As we explained in *Eller*:

> [Plaintiffs'] claim is not based on some unrelated tort that occurred during the mediation process. You know, I have no doubt that if somebody had stolen somebody's wallet or something like that during the mediation process, your order would not prevent someone from saying this person stole my wallet.

Eller, Tr. of Oral Argument at 15:13-21 (No. 0:11-cv-02623) (Dkt. 62).

The confidentiality of the *Brady* mediation talks was clearly not intended by Judge Nelson to be a license for litigation misconduct. And, unlike the NFL,[7] the Players complied with Judge Nelson's order by moving to seal all references to the *Brady* mediation record in submissions to this Court, while also presenting that evidence of litigation misconduct as part of their Rule 60(b) request for equitable relief.

B. The NFL's Violation Of Legal Duties Arising Out Of Its Special Relationship With The Players Underscores The Need For Rule 60 Relief.

If there were any doubt about whether equity warrants relief from the NFL's litigation misconduct in procuring the SOD, that doubt should be put to rest because of the additional duties of "good faith," "cooperation," "best efforts" and candor that the NFL owed to the Players as a result of their special legal relationship, as set forth in the

[7] The NFL's publicly-filed Response contains numerous quotations and descriptions of confidential information that the Players filed under seal. (Response at 20, 21-22, 23, 24, 27, and 28.)

SSA. (Mem. at 20-27.) Significantly, the NFL does not dispute its SSA duties (or even discuss them) in its Response.

Unable to deny that it expressly agreed to special obligations of "***best efforts*** and ***cooperation*** . . . to implement the provisions of the [SSA] in a manner consistent with ***good faith and fair dealing***" (Kessler Decl., Ex. B at Art. XIX § 6), the NFL's rejoinder is that "the SSA was a collective bargaining agreement," and CBAs are forged by antagonistic parties and thus do not give rise to any special duties. (Response at 28-30.) This is a straw man.

Putting aside the fact that the SSA was a class action settlement agreement approved by the Court at a time when the NFLPA was not a union, even treating the SSA as the equivalent of a CBA would not change the fact that the NFL *expressly agreed* to implement the SSA with "best efforts and cooperation" and "good faith and fair dealing." The NFL is correct that the Players did not always trust the owners—which is why these special duties were imposed. But there can be no dispute as to their existence. Indeed, as the NFL knows, it was in March 2011—at the same time the NFL was concealing its secret salary cap—that Judge Doty held in the *TV Revenues* proceeding that the NFL had breached these very SSA duties. *White v. NFL*, 766 F. Supp. 2d 941, 951 (D. Minn. 2011).

The NFL's special duties of good faith, cooperation and best efforts to implement—not violate—the terms of the SSA, at a minimum, required the NFL to refrain from engaging in a continuous process of litigation deceit and concealment, and to disclose its true reason for seeking dismissal of unknown claims through the SOD, the

vehicle through which the NFL sought to ensure non-implementation of the SSA's provisions. The NFL violated these duties from the moment it decided to conceal the existence of its salary cap through the moment it secured the SOD. Non-disclosure is not a "best effort," it is "no effort"; concealment is the opposite of "cooperation"; and deceit is the antithesis of "good faith."[8]

In this regard, it is the NFL that "continues wrongly to conflate the merits of the NFLPA's underlying collusion claim with the issue of Rule 60(b) relief." (Response at 30.) Non-disclosure and concealment of the secret salary cap is irrelevant to the merits of the Players' claim—collusion is collusion, whether secret or not. Rather, it goes to the NFL's litigation misconduct in procuring the SOD—which is the issue in this Rule 60 proceeding. As the numerous, unrebutted declarations from the Players' negotiators confirm, the Players would not have signed the SOD had the NFL not wrongfully concealed the existence of the secret salary cap. (Mem. at 14, 20.) The NFL's SSA and common law duties to the Players underscore the equitable case under Rule 60 for granting relief from the SOD.

C. The NFL's Alternative Grounds For Opposing Rule 60 Relief Should Be Rejected—Again.

The NFL already argued to the Eighth Circuit that even if the Players could prevail under Rule 60, the Petition should be dismissed on the "alternative grounds" the NFL

[8] The parties' "special relationship" under New York common law is not undermined by the fact that *Apple Records* concerned an unusual dynamic between the Beatles and their record producer. (Response at n.12.) The SSA transformed would-be adversaries into partners in growing the League and sharing in its revenues—a point clearly recognized by Judge Doty in his *TV Revenues* decision. *White*, 766 F. Supp. 2d at 953-54. This too creates a "special relationship" under New York law.

presents again here. (*See* Amoona Decl., Ex. A at 53-57.) The Eighth Circuit rejected those alternative grounds by remanding for Rule 60 proceedings and this Court should reject them again. (*See also* Dkt. 771 at 7-9 (detailing why each of the purported alternative arguments have no merit).)

III. CONCLUSION

The Players respectfully request that the Court grant their Rule 60 Motion and set aside the SOD. Alternatively, if the Court wishes to consider any of the numerous "credibility" arguments upon which the NFL has premised its Response, it should, at a minimum, find that the Players have now presented a colorable claim and order the previously requested discovery and hold an evidentiary hearing.

Dated: April 3, 2015

Respectfully submitted,

By: s/Barbara P. Berens

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