UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JONATHAN VILMA,	*	CIVIL ACTION NO. 12-cv-1283
	*	Consolidated with 12-cv-1718
Plaintiff,	*	
	*	SECTION C, DIVISION 3
Versus	*	
	*	
ROGER GOODELL,	*	JUDGE HELEN G. BERRIGAN
	*	
Defendant.	*	
	*	MAGISTRATE DANIEL E. KNOWLES, III
* *		
THIS PLEADING RELATES TO	*	
CIVIL ACTION NO. 12-cv-1283	*	
* *		

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)

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INTRODUCTION

Mr. Vilma, an NFL football player, has asserted state-law tort claims alleging defamation and intentional infliction of emotional distress against NFL Commissioner Roger Goodell. The claims arise from statements made about the findings of an NFL investigation, led by Commissioner Goodell, into conduct detrimental to the integrity of, or public confidence in, the game of professional football. The conduct at issue stemmed from a pay-for-performance/bounty system at the New Orleans Saints during the 2009–2011 seasons. (*See*, *e.g.*, Compl. ¶¶ 7–33.)

The terms and conditions of Mr. Vilma's employment as an NFL player are governed by a Collective Bargaining Agreement ("CBA") negotiated between the NFL and the NFL Players Association ("NFLPA") and by the NFL Constitution and Bylaws, which are incorporated into the CBA. Under these collectively-bargained terms and conditions, Commissioner Goodell has exclusive authority to investigate conduct detrimental to the League, to suspend players for such conduct detrimental, and to hear appeals of such suspensions.

Each of Mr. Vilma's claims must be dismissed as preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Resolution of Mr. Vilma's claims necessarily requires interpretation of numerous collectively-bargained terms, including those vesting Commissioner Goodell with exclusive authority to investigate and impose discipline when a player has engaged in conduct that he deems detrimental to the League. The lawsuit is separately barred because its substance falls squarely within the scope of the CBA's mandatory dispute resolution procedures. The Complaint also fails adequately to plead "actual malice" or "outrageous" conduct, required elements of the claims asserted. Alternatively, all of the claims are subject to dismissal under Louisiana's Anti-SLAPP law, Louisiana Code of Civil Procedure Article 971.

BACKGROUND

All of Mr. Vilma's claims relate to an investigation, conducted at the direction of Commissioner Goodell pursuant to his authority under the CBA, into a pay-for-performance/bounty system at the New Orleans Saints during the 2009–11 seasons, and to the discipline imposed by the Commissioner upon Mr. Vilma, as well as the Saints franchise, Saints coaches and executives, and other players for conduct detrimental to the League.

The Allegedly Defamatory Statements

Mr. Vilma complains about a March 2, 2012 "Club Report." (Compl. ¶¶ 12–17.) On March 2, 2012, the NFL Security Department issued to the owners and presidents of the 32 NFL member clubs its "Report of NFL Security on Violations of 'Bounty' Rule by New Orleans Saints." (Attached as Ex. A to the accompanying Declaration of Dennis Curran, hereafter "Curran Declaration."[1]) The Report, summarizing the findings of a lengthy, in-depth investigation, observed that "[d]uring the latter part of the 2011 season, new and credible information became available suggesting that a bounty program had in fact been in place" at the Saints (*id.* at 2); that NFL Security had corroborated the new information through other facts and sources, retaining outside forensic experts; and that the cooperation of the club's owner had led to "full access to substantial additional material, which served both to corroborate the information previously received and to verify the scope of the improper activity." (*Id.*) As to Mr. Vilma, the Report found that, "prior to a Saints playoff game in January, 2010, defensive captain Jonathan Vilma offered

[1] Because Mr. Vilma referenced this document and others in his Complaint (*see, e.g.*, ¶¶ 7–11, 12–16, 20–24, 25–29, 32–33) and because these documents are central to his claims, the Court may consider them in connection with a motion to dismiss under Rule 12(b)(6). *See, e.g.*, *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011); *Kane Enters. v. MacGregor (USA) Inc.*, 322 F.3d 371, 374 (5th Cir. 2003).

$10,000 in cash to any player who knocked [Minnesota Vikings quarterback Brett] Favre out of the game." (*Id.* at 3.) The Report concluded that "the evidence appears to establish 'conduct detrimental.'" (*Id.* at 4.)[2]

Mr. Vilma also complains about a March 2, 2012 press release. (Compl. ¶¶ 7–11.) On March 2, 2012, the NFL Communications office, which reports ultimately to the Commissioner, issued a Press Release titled "NFL Discloses Findings of Investigation into Violations of 'Bounty Rule.'" (Curran Declaration, Ex. B.) The release announced that the NFL had conducted an in-depth investigation into the Saints pay-for-performance/bounty system. (*See id.*)

Mr. Vilma also complains about the Commissioner's "Memorandum of Decision" to the NFL clubs advising them of the suspensions and fines of various Saints coaches and officials. (Compl. ¶¶ 25–29.) On March 21, 2012, Commissioner Goodell issued to the 32 NFL clubs a "Memorandum of Decision In the Matter of Bounty Violations by New Orleans Saints." (Curran Declaration, Ex. C.) The Memorandum reported that in the weeks since the March 2 Security Report "our office has conducted further investigation, and I have met, sometimes on multiple occasions, with many of the key individuals involved. I have also discussed this matter with the leadership of the [NFLPA], as well as with individual players." (*Id.*) The Commissioner concluded that "[t]he additional investigation confirmed in all respects the findings set forth in the Security Department's report." (*Id.*) The Memorandum then set forth fifteen enumerated points that "[t]he investigation has conclusively established." (*Id.* at 2.) After setting out those findings, Commissioner Goodell observed that: "Taken as a whole, the record establishes the existence of

[2] The March 2 report discusses the fact that bounty payments of the kind at issue here have long been prohibited by NFL rules in order to maintain the integrity of competition on the football field and to protect player safety.

an active bounty program during the 2009, 2010, and 2011 seasons in clear violation of league rules and principles[.]" (*Id.* at 4.) The Commissioner then announced discipline that he had imposed on the Saints and certain Saints non-player employees, which included fines and suspen- suspensions, while stating that player discipline, "if any, … will be made in accordance with the procedures set forth in our Collective Bargaining Agreement with the NFLPA." (*Id.*)

Mr. Vilma also complains about a March 21, 2012 press release regarding the Memorandum of Decision. (Compl. ¶¶ 20–25.) On March 21, 2012, the NFL Communications office issued a press release titled "NFL Announces Management Discipline in New Orleans Saints 'Bounty' Matter." (Curran Declaration, Ex. D.) This release, which again referred to "[t]he NFL's extensive investigation," announced the discipline imposed on the New Orleans Saints club, current and former coaches, and team management. (*Id.* at 1–2.) The release observed that "[d]iscipline for individual players involved in the Saints' prohibited program continues to be under review with the [NFLPA] and will be addressed by Commissioner Goodell at a later date." (*Id.* at 1.)

On May 2, 2012, Commissioner Goodell issued notices of suspension to four current or former New Orleans Saints players, including Mr. Vilma. That same day, the NFL Communications office issued a press release, about which Mr. Vilma complains (Compl. ¶¶ 32–33), titled "Four Players Suspended for Participation in Saints' Pay-For-Performance/Bounty Program." (Curran Declaration, Ex. E.) The May 2 Press Release announced the Commissioner's suspension of four players under Article 46 of the CBA for "conduct detrimental to the NFL as a result of their leadership roles in the New Orleans Saints' pay-for-performance/bounty program that endangered player safety over three seasons from 2009-2011." (*Id.* at 1.) The May 2 Press Re-

lease stated that the player discipline "was determined by Commissioner Roger Goodell after a thorough review of extensive evidence corroborated by multiple independent sources." (*Id.* at 1.)

The Relevant Provisions of the CBA and the NFL Constitution and Bylaws

Mr. Vilma is an employee of the New Orleans Saints. (Compl. ¶ 5.) The standard NFL Player Contract, which governs the terms and conditions of Mr. Vilma's employment as an NFL player, is prescribed by the CBA.[3] *See* CBA (Curran Declaration, Ex. F) Art. 4, §§ 1, 4(a). That standard form contract provides in Paragraph 15:

> Player recognizes the detriment to the League and professional football that would result from impairment of *public confidence* in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that *if he … is guilty of any ... form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, ... to suspend Player* for a period certain or indefinitely ….

CBA App. A (emphasis added).

Article 3, Section 2 of the CBA contains a no-suit provision barring lawsuits against the NFL or any club raising any claim relating to the CBA or Constitution and Bylaws:

> The NFLPA agrees that neither it nor any of its members … *nor any member of its bargaining unit*, will sue, or support financially or administratively, or voluntarily provide testimony or affidavit in, *any suit* against the NFL or any Club *with respect to any claim relating to any conduct permitted by this Agreement, or any term of this Agreement* … . In addition, neither the NFLPA nor any of its members … *nor any member of its bargaining unit* will sue or support financially or

[3] The Court may consider the CBA and Constitution and Bylaws in resolving a motion to dismiss for LMRA preemption. *See, e.g., Smith v. Houston Oilers, Inc.*, 87 F.3d 717, 718–19 (5th Cir. 1996) (reviewing NFL CBA in connection with 12(b)(6) motion to dismiss state law claims as preempted); *Holmes v. NFL*, 939 F. Supp. 517, 520 n.2 (N.D. Tex. 1996) (same). *Accord, e.g., Quesnel v. Prudential Ins. Co.*, 66 F.3d 8, 11 n.4 (1st Cir. 1995). In the alternative, the Court may convert this Motion into a motion for summary judgment, as there is no surprise or prejudice to Mr. Vilma in responding to a preemption motion that rests on the terms of the CBA and Constitution and Bylaws. *See, e.g., Stringer v. NFL*, 474 F. Supp. 2d 894, 902 (S.D. Ohio 2007).

> administratively any suit against the NFL or any Club *relating to the provisions of the Constitution and Bylaws of the NFL* ….

In lieu of court proceedings, as with most collective bargaining agreements, the NFL CBA calls for final and binding dispute resolution. Article 43, Section 1 of the CBA provides that:

> *Any dispute* (hereinafter referred to as a "grievance") arising after the execution of this Agreement and *involving the interpretation of*, application of, or compliance with, *any provision of this Agreement, the NFL Player Contract …, or any applicable provision of the NFL Constitution and Bylaws* or NFL Rules pertaining to the terms and conditions of employment of NFL players, will be resolved *exclusively* in accordance with the procedure set forth in this Article, *except wherever another method of dispute resolution is set forth elsewhere in this Agreement*.

Article 46, Section 1 governs dispute resolution with respect to League Discipline:

> Notwithstanding anything stated in Article 43: *All disputes … involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football*, will be processed *exclusively* as follows: the Commissioner will promptly send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such written notification, the player affected thereby, or the NFLPA with the player's approval, may appeal in writing to the Commissioner.

The Constitution and Bylaws (Curran Declaration, Exs. G-1–G-5), the terms of which the players have agreed not to challenge in court, *see* CBA Art. 3, § 2, vest considerable authority in the Commissioner to:

- "have *full, complete, and final jurisdiction* and authority to arbitrate … [a]ny dispute involving … any players … that in the opinion of the Commissioner constitutes conduct detrimental to the best interests of the League or professional football" (Art. 8.3(E));

- to "*decide*[] that … any player … has either violated the Constitution and Bylaws of the League or *has been or is guilty of conduct detrimental to the welfare of the League or professional football*," in which case the Commissioner "shall have the complete authority to … [s]uspend .. .. such person" (Art. 8.13(A)(1);

- to "interpret and from time to time establish policy and procedure in respect to the provisions of the Constitution and Bylaws and any enforcement thereof" (Art. 8.5); and
- to "establish a Public Relations Department for the League, and such department shall be under his exclusive control and direction" (Art. 8.8).

Proceedings Under the CBA

In response to the discipline imposed by Commissioner Goodell, the players and the NFLPA initiated three dispute-resolution proceedings under the CBA: (1) they commenced an arbitration before the System Arbitrator, Stephen Burbank, arguing that he and not the Commissioner, had exclusive jurisdiction to address the challenged conduct and discipline the players ("the System Arbitration"); (2) they filed a grievance invoking arbitration under CBA Article 43 seeking, *inter alia*, a ruling that any discipline under the CBA was restricted to conduct occurring on or after the CBA's effective date of August 4, 2011 ("the Grievance Arbitration"); and (3) the players appealed their suspensions to Commissioner Goodell under CBA Article 46.

The System Arbitrator denied the NFLPA's request for relief on June 4, 2012. (Curran Declaration, Exs. H–I.) On June 8, 2012, the "Non-Injury Grievance Arbitrator" denied the NFLPA's request for a ruling barring discipline by the Commissioner for conduct occurring prior to August 4, 2011. (Curran Declaration, Ex. J.) And after hearing the appeals of the suspended players, Commissioner Goodell affirmed the suspensions on July 3, 2012. (Curran Declaration, Ex. K.) The Court can take judicial notice of these decisions. *See, e.g.*, *Funk*, 631 F.3d at 783; *Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 991 F.2d 244, 246 n.1 (5th Cir. 1993).

STANDARD OF REVIEW

The Court must dismiss a complaint if it does not and cannot state a claim upon which relief can be granted. Under Rule 12(b)(6), Mr. Vilma's Complaint should be construed liberally,

but "[i]n order to avoid dismissal for failure to state a claim, … [he] must plead specific facts, not mere conclusory allegations. We will thus not accept as true conclusory allegations or unwarranted deductions of fact." *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994); *see also Kane Enters. v. MacGregor (USA) Inc.*, 322 F.3d 371, 374 (5th Cir. 2003) ("[A] plaintiff must plead specific facts, not mere conclusional allegations, to avoid dismissal for failure to state a claim."); *Gaunt v. La. Citizens Prop. Ins. Corp.*, 512 F. Supp. 2d 493, 497 (E.D. La. 2007) (Berrigan, J.) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not defeat the motion.").

As the Supreme Court held in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. … Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."

ARGUMENT

I. Mr. Vilma's Claims Are Preempted By Section 301 of the Labor Management Relations Act.

When resolution of a state-law claim would require interpretation of a collective bargaining agreement, the claim is preempted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, and must be dismissed. The Supreme Court has repeatedly recognized this principle and the importance of uniform interpretation of collective bargaining agreements: "[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and federal labor-law principles—

necessarily uniform throughout the Nation—must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405–06 (1988).

The Supreme Court has also "ma[d]e clear that interpretation of collective bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective bargaining agreements." *Id.* at 411.

The same principles apply when resolution of state law claims would require interpretation of documents incorporated by reference into or addressed by a collective bargaining agreement. *See, e.g., Stafford v. True Temper Sports*, 123 F.3d 291, 296 (5th Cir. 1997) (finding preemption based in part on an "Employee Guide, which is incorporated by reference in the collective bargaining agreement"); *Garley v. Sandia Corp.*, 236 F.3d 1200, 1210–11 (10th Cir. 2001) (finding preemption based on a personnel policy "intended to be read in harmony with the CBA"); *Brown v. NFL*, 219 F. Supp. 2d 372, 386 (S.D.N.Y. 2002) (observing that the NFLPA's waiver of right to bargain over NFL Constitution and Bylaws and to have disputes regarding interpretation resolved via arbitration "indicate[s] that the Constitution was bargained over and included within the scope of the CBA").

The law is also well-settled that a party need not be a signatory to a collective bargaining agreement for claims against that party to be preempted by the LMRA. *See, e.g., Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 277, 282–84 (5th Cir. 1994) ("[C]ourts have governed their determinations on ... preemption by the necessity of referring to a CBA for resolution of the claim rather than by the individual status of the defendant … ."); *Smith v. Houston Oilers*, 87 F.3d 717, 721 (5th Cir. 1996) (finding state law claims against NFL team officials preempted).

Accord, e.g., *Atwater v. NFLPA*, 626 F.3d 1170, 1178–79 & n.12 (11th Cir. 2010) ("The relevant question for preemption purposes is [not whether defendant is a signatory, but], instead, whether Plaintiffs' state-law claims … would require the court to apply or interpret the CBA."); *Foy v. Giant Food, Inc.*, 298 F.3d 284, 287, 289 n.4 (4th Cir. 2002); *Stringer v. NFL*, 474 F. Supp. 2d 894, 898–99, 901–02 (S.D. Ohio 2007). (And here, of course, Commissioner Goodell is a signatory to the CBA: he signed it on behalf of the NFL. *See* CBA Art. 71.)

Application of these bedrock principles requires dismissal of Mr. Vilma's suit. Resolution of Mr. Vilma's state-law claims would require interpretation of numerous collectively-bargained provisions establishing terms and conditions of player employment. Mr. Vilma's lawsuit is also an improper attempt to circumvent the exclusive dispute resolution procedures of the CBA.

A. Mr. Vilma's claims are preempted because their resolution would require interpretation of the NFL CBA and incorporated Constitution and Bylaws.

"If the resolution of [Mr. Vilma]'s claims will require 'interpretation' of the CBA, then the state-law remedies upon which [Mr. Vilma] relies are preempted by § 301 of the LMRA." *Reece v. Houston Lighting & Pwr Co.*, 79 F.3d 485, 487 (5th Cir. 1996) (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988)); *see also Miranda v. Nat'l Postal Mail*, 219 Fed. Appx. 340, 344–45 (5th Cir. 2007) (confirming the resolution-will-require-interpretation test as the appropriate standard for LMRA preemption). As explained more fully below, resolution of every one of Mr. Vilma's state law claims would require interpretation of the CBA and the incorporated Constitution and Bylaws. Accordingly, those claims are preempted and the complaint must be dismissed.

1. The Court would have to interpret the CBA to resolve Mr. Vilma's defamation claims.

To succeed on any of his state law defamation claims (Counts I–X), Mr. Vilma would have to prove, *inter alia*, (a) an *unprivileged publication* of an allegedly defamatory statement to a *third party* and (b) *fault* on the part of the Commissioner**.** *See, e.g.*, *Trentecosta v. Beck*, 703 So. 2d 552, 559 (La. 1997); *Angio-Medical Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269, 272 (S.D.N.Y. 1989).[4]

To determine whether Mr. Vilma has satisfied either the unprivileged publication or fault elements, this Court would have to interpret numerous provisions of the CBA. Mr. Vilma alleges defamation in the context of a League investigation into conduct detrimental to professional football. The CBA and Constitution and Bylaw provisions cited above make clear that such an investigation is expressly authorized (and hence is "permitted," CBA Art. 3, § 2) by the CBA. *See* CBA Art. 46, § 1(a); *id.* App. A, at ¶ 15. The CBA and Constitution and Bylaws also make clear that the Commissioner is expressly authorized to suspend a player for conduct detrimental to the League. *See* Const. art. 8.3(E); 8.13(A)(1). And, under the CBA and Constitution and By-laws, the Commissioner is expressly authorized to take action to preserve "public confidence" in the game of professional football, as well as the integrity of the game, which necessarily includes providing some information to the public about the reasons for any disciplinary action taken.

[4] Because the relevant elements of claims for defamation and claims for intentional infliction of emotional distress are substantially similar under New York and Louisiana law, this Court need not engage in a conflict of laws analysis to resolve the issue of preemption.

More specifically, to establish that the statements complained of were "unprivileged" and published to "third parties," Mr. Vilma would have to establish that, *inter alia*, the Commissioner's Memoranda, sent to the 32 member Clubs of the NFL announcing the results of NFL Security's investigation and the discipline imposed on the Saints, were done outside the scope of the Commissioner's authority and constitute publication to a "third party." Mr. Vilma would also have to establish that a press release explaining the basis for the Commissioner's actions was not "permitted" as part of the Commissioner's mandate to preserve public confidence in the sport and to establish, direct and control the League's public relations department.

In addition, as a prominent professional football player who co-captained the Super Bowl Champion New Orleans Saints, Mr. Vilma is undeniably a "public figure" for purposes of defamation analysis. *See Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1251-52 (5th Cir. 1980); *see also Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1091 (D. Hi. 2007) (collecting authorities regarding the "public figure" status of professional athletes). Therefore, to establish "fault," Mr. Vilma would have to prove that the Commissioner made allegedly defamatory statements with "actual malice; *i.e.*, that the [Commissioner] either knew the statement was false or acted with reckless disregard for the truth." *Starr v. Boudreaux*, 978 So. 2d 384, 390 (La. Ct. App. 2007). *Accord*, *People ex rel. Spitzer v. Grasso*, 801 N.Y.S.2d 584, 586 (N.Y. App. Div. 2005).

Furthermore, because proof of both actual malice and unprivileged publication would require analysis of the Commissioner's obligations with respect to information obtained in the course of an investigation into conduct detrimental to the League and his mandate to ensure public confidence in the sport, at the very least this is a case in which "interpretation of the CBA is

made necessary by an employer defense," which requires preemption. *Reece*, 79 F.3d at 487 (internal quotation omitted).[5] While the parties may disagree about the scope of the Commissioner's authority under the CBA, the need for interpretation of the CBA to resolve such disagreements requires preemption of Mr. Vilma's defamation claims.

The Fifth Circuit's decision in *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985) is directly on point. In *Strachan*, the plaintiffs were suspended for suspected drug use. After their drug tests came back negative, the plaintiffs were restored to full duty. They then brought suit asserting, *inter alia*, state law claims of defamation arising from their suspensions. The Court of Appeals affirmed the grant of judgment for the company on preemption grounds, holding that "to hold the company guilty of defamation for making such inquiries [into potential drug use] … would simply mean that the company could never undertake to investigate a possible disciplinary situation in routine and proper ways. … It would have been impossible for the company to have moved ahead without making such explanations [of why it was pursuing the investigation]." *Id.* at 706. The Fifth Circuit further held that "[a]ny mistakes or improprieties which [the company] made were subject to the grievance procedure ending in binding arbitration under the collective bargaining agreement. There was simply no room for any independent tort claim against the company for these work connected and collective bargaining connected actions by the company." *Id.* at 706–07.

[5] As Mr. Vilma invoked the Court's jurisdiction on diversity grounds, any concerns that exist in some LMRA preemption cases about the "well-pleaded complaint" rule are not present here, and the Court has jurisdiction to consider Commissioner Goodell's preemption defense to the claims asserted against him. *See, e.g.*, *Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 769–70 (7th Cir. 1991); *Davis v. Kroger Co.*, 2010 WL 1267223, at *3–4 (N.D. Tex. Mar. 31, 2010), *aff'd*, 429 Fed. Appx. 376 (5th Cir. 2011).

Strachan is part of a long line of authority in the Fifth Circuit holding that state law defamation claims by unionized employees relating to workplace discipline are preempted. In *Bagby v. General Motors Corp.*, 976 F.2d 919, 921 (5th Cir. 1992), GM had accused its unionized employee Bagby of having pawned company equipment at a local pawnshop. The employee sued for defamation. The Court of Appeals affirmed judgment for GM on preemption grounds, holding that "Bagby … like the plaintiffs in *Strachan*, asserts that acts unquestionably taken in accordance with provisions of the CBA were nonetheless tortious. These claims will obviously require interpretation of the CBA. … As his tort claims are barred by the LMRA, and as he failed to follow the CBA's grievance procedure, the district court's grant of summary judgment, under which Bagby takes nothing, is affirmed." *Id.* at 921–22.

In *Stafford v. True Temper Sports*, 123 F.3d 291 (5th Cir. 1997), the Fifth Circuit affirmed summary judgment for an employer accused of defaming an employee by dismissing him for alleged "manipula[tion of] factory machinery in order to make it appear that he worked a greater amount of hours than he actually worked, for the purpose of receiving more pay." *Id.* at 293. Like Mr. Vilma, Stafford "claim[ed] that the reasons given for his termination [here, suspension] constitute defamation." *Id.* at 296. The Fifth Circuit affirmed the rejection of this claim, holding that "[t]he reasons given for his dismissal arose under the employment relationship between Stafford and True Temper, were a part of the investigation into the appropriateness of his dismissal, and were in accordance with the terms of the collective bargaining agreement. … Therefore … the matter is under the LMRA and preempted, and dismissed." *Id.*

In addition to the Fifth Circuit decisions in *Strachan*, *Bagby*, and *True Temper*, many decisions of district courts within the Fifth Circuit hold that defamation claims arising in the

context of a workplace disciplinary investigation are preempted. *See, e.g.*, *Davis v. Kroger Co.*, 2010 WL 1267223, at *5 (N.D. Tex. Mar. 31, 2010) (defamation claim preempted when CBA would need to be interpreted as a defense to claims of "falsity" and "without legal excuse" for alleged defamatory statement), *aff'd* 429 Fed. Appx. 376 (5th Cir. 2011); *Merchant v. Communications Workers of Am.*, 1993 WL 475480 (E.D. La. Nov. 4, 1993) (finding preempted a defamation claim against a labor union and one of its officers based on suspension of worker for alleged failure to follow safety procedures, holding that: (1) allegation of "publication" element of defamation claim would require "interpretation of the CBA" to determine if the actions of the union official alleged to have defamed the plaintiff "were in relation to his duties" under that CBA; and (2) that publication of the basis for the plaintiff's suspension was "necessary under the provisions of the CBA"); *Jackson v. UPS*, 1990 WL 182330, at *3 (E.D. La. Nov. 19, 1990) (holding defamation claim based on suspension for drug use preempted because, *inter alia*, "Under Louisiana law, Jackson had to prove that these statements [regarding drug use] were false. Since these statements were founded upon Jackson's company drug test … [which was] administered pursuant to the collective bargaining agreement, a challenge to the validity of the drug test involved an interpretation of the collective bargaining agreement."); *Chube v. Exxon Chemical Americas*, 760 F. Supp. 557, 561 (M.D. La. 1991) (finding that a defamation claim would "require[] a determination under the collective bargaining agreement whether the termination [for failing a drug test] was wrongful" and holding that the claim was "preempted by § 301 of the LMRA"); *Collins v. Bradley*, 962 F. Supp. 854, 856 (M.D. La. 1996) (finding defamation claim arising out of asserted wrongful termination preempted by section 301); *see also Weber v. Lockheed Martin Corp.*, 2001 WL 274518, at *7 (E.D. La. 2001) ("Typically, there is preemption of a

defamation claim where the claim challenges the propriety of the employer's conduct in connection with disciplinary actions under the collective bargaining agreement, where an employer's conduct was allegedly in accordance with its rights and obligations under the CBA, or where the defamatory conduct was alleged to have occurred in the context of a grievance or arbitration proceeding.").

The Tenth Circuit's decision in *Garley v. Sandia Corp.*, 236 F.3d 1200 (10th Cir. 2001), is also instructive on the preemption of defamation claims. In *Garley*, the plaintiff was terminated for suspected timecard fraud. An arbitrator later determined that the employer lacked just cause to support the termination, and ordered Garley reinstated. Garley then sued, asserting a state law claim of defamation and alleging that he had been "summarily fired for a trumped up alleged offense which had no basis in documented facts," *id.* at 1206, an allegation similar to Vilma's *assertions* that the Commissioner's findings, after a lengthy investigation, were contrary to the "truth."

The district court dismissed Garley's defamation claim as preempted. The Tenth Circuit affirmed, holding:

> Here, Garley bases his defamation claim on the theory that his termination for timecard fraud publicly branded him as dishonest. We believe that this is preempted by § 301. In [a prior case], after noting that plaintiff's defamation claim arose out of 'the manner' in which the defendant 'conducted its investigation of suspected employee misconduct, and the way in which it terminated several employees,' we held that determining whether the defendant 'acted properly or not will inevitably require an analysis of what the CBA permitted.' Likewise, here, in order to determine whether Garley was defamed by Sandia's actions, the court would inevitably have to examine Sandia's rights and obligations under the CBA to decide whether Sandia's actions were authorized; § 301, however, preempts state causes of action from permitting this sort of inquiry. Consequently, we hold the defamation claim to be preempted.

Id. at 1211 (quoting *Mock v. T.G. & Y. Stores, Co.*, 971 F.2d 522, 530 (10th Cir. 1992)).

The same result—preemption—should apply to Mr. Vilma's state-law claims asserting injury from statements relating to the Commissioner's investigation into the Saints' pay-for-performance/bounty system. Indeed, *Garley* holds that state law defamation claims are preempted even when a stated reason for workplace discipline is later rejected by an arbitrator under the collective bargaining agreement. *Garley* thus confirms the bedrock preemption principles of *Lingle*: uniformity of interpretation of CBAs and confining disputes about such agreements to "the arbitral realm"—that is, the dispute resolution procedures under the governing CBA.

2. The Court would have to interpret the CBA to resolve Mr. Vilma's intentional infliction of emotional distress claim.

To prevail on a state-law claim of intentional infliction of emotional distress, Mr. Vilma would have to prove, *inter alia*, that Commissioner Goodell's conduct was extreme and outrageous**.** *See, e.g., White v. Monsanto Co.*, 585 So.2d 1205, 1209 (La. 1991); *Howell v. New York Post Co., Inc.* 81 N.Y.2d 115, 121 (NY. Ct. App. 1993). But this Court could not resolve that issue without interpreting the myriad CBA and Constitution and Bylaw provisions cited above that expressly authorize the Commissioner to investigate conduct detrimental and to issue discipline when he finds that such conduct has occurred.

In *Burgos v. Southwestern Bell Tel. Co.*, 20 F.3d 633 (5th Cir. 1994), the Fifth Circuit, addressing a claim of intentional infliction of emotional distress case stemming from an employee's termination in a unionized workplace, squarely held that the claim was preempted by the LMRA. "In order to determine whether Southwestern Bell acted wrongfully in the way that it transferred Mr. Burgos from one section to another, required him to take different tests, and ul-

timately effectuated his termination, an analysis of [its] obligations under the collective bargaining agreement is necessary. Since an analysis of the [CBA] is necessary, the … intentional infliction of emotional distress claim is preempted by section 301 of the LMRA." *Id.* at 636.

This case is also on all fours with the Fifth Circuit's decision in *Smith v. Houston Oilers*, 87 F.3d 717 (5th Cir. 1996). In *Smith*, two players sued the Oilers and two members of the Oilers' staff, Floyd Reese and Steve Watterson, for, *inter alia*, intentional infliction of emotional distress stemming from allegedly "outrageous" conduct on the part of the team in having the players report for grueling and dangerous rehabilitation workouts in pre-dawn hours. *See id.* at 719. The Fifth Circuit held that such claims were preempted "since [it would be] necessary to refer to the CBA to determine the extent to which the Oilers' rehabilitation demands were *permissible*, it is likewise necessary to measure the *outrageousness* of their conduct by reference to what the CBA authorizes." *Id.* at 721; *see also Reece*, 79 F.3d at 487 (holding that intentional infliction of emotional distress claim was preempted because "to evaluate whether [the defendant's] conduct was 'outrageous,' the conduct must be measured against the CBA").

B. Mr. Vilma's claims are preempted because they are an improper attempt to evade the exclusive dispute resolution procedures of the CBA.

"The law is completely clear that employees may not resort to state tort … claims in substitution for their rights under the grievance procedure in a collective bargaining agreement." *Strachan*, 768 F.2d at 704. In place of lawsuits challenging conduct permitted by the CBA, which includes the Commissioner's authority to investigate and discipline for conduct detri-

mental, the CBA prescribes final and binding dispute resolution procedures. *See* CBA Art. 3, § 2; Art. 43; Art. 46, § 1(a).[6]

Accordingly, any claims of Mr. Vilma regarding the manner in which the Commissioner conducted the investigation or regarding any asserted injury to him resulting from that investigation must be resolved under the dispute resolution procedures prescribed by the CBA, not in court. *See Rep. Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965) ("A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend to it. … It would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances.").

* * * *

In short, Mr. Vilma's claims "demonstrate[] clearly an attempt to create major state [law] claims out of matters which are all part of a company claim of right under a collective bargaining agreement. … To hold otherwise in this case would subject thousands of grievance procedures involving disciplinary investigations and disciplinary actions … to lawsuits asserting state court claims. The conclusion that such claims are preempted by [the LMRA] … reveals the wisdom and necessity of the established legal principle." *Strachan*, 768 F.2d at 705.

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[6] Indeed, in Article 3, Section 2 of the CBA (quoted above on page 5), the parties agreed to bar player lawsuits against the NFL or any club raising any claim relating to the CBA or the NFL Constitution and Bylaws. That Mr. Vilma here sued the Commissioner, rather than "the NFL or any Club," is irrelevant to the no-suit bar given that the Commissioner was acting as the Chief Executive Officer of the NFL in connection with the challenged statements. In any event, if there were a question about that point, its resolution would also require interpretation of the CBA, thereby creating another ground for preemption, as noted above. Furthermore, there is no question that this dispute involves interpretation of various provisions of the CBA and Constitution and Bylaws, and hence it falls within the scope of, and should be resolved by, the CBA's dispute resolution procedures, not a lawsuit.

II. Each of the Claims Should be Dismissed for Failure To Plead More than Conclusory Allegations on Required Elements.

Even without regard to preemption and his evasion of the mandatory dispute resolution procedures prescribed by the CBA, Mr. Vilma's claims fail to state a claim for which relief could be granted. For both defamation and intentional infliction of emotional distress, the Complaint includes nothing other than conclusory allegations reciting the required elements of a claim. Such allegations are insufficient as a matter of law. That is an independent basis requiring dismissal.[7]

A. The Complaint fails properly to allege actual malice sufficient to state slander- or libel-based causes of action.

Under both New York and Louisiana law, a defamation plaintiff who is a "public figure" must prove not only that the challenged statements were false, but also that the defendant acted with "actual malice." *See Starr*, 978 So. 2d at 390; *People ex rel. Spitzer*, 801 N.Y.S.2d at 586**.** This "actual malice" element is common to all of Mr. Vilma's slander- and libel-based claims.

Put simply, the Complaint does not sufficiently plead actual malice. Without alleging any factual basis for his assertions, Mr. Vilma simply repeats in his first ten Claims for Relief the bare allegation that "Goodell's Statements were made with reckless disregard of their truth or falsity and/or with malice." (Compl. ¶¶ 48, 54, 60, 66, 72, 78, 84, 90, 96, 102.) Particularly in the wake of *Iqbal*, such conclusory pleading is insufficient to survive a Rule 12(b)(6) challenge. "[C]onclusory allegations regarding the [defendants'] intent … are insufficient to survive a motion to dismiss" when a "defamation claim requires a showing of actual malice." *See, e.g.*, *Besen*

[7] Again, because the elements of defamation and intentional emotional distress are similar under Louisiana and New York law, *see supra* note 4, there is no need for a conflict of laws analysis to find Mr. Vilma's pleading deficient for failure to assert claims with necessary specificity.

v. Parents & Friends of Ex-Gays, Inc., 2012 WL 1440183 *6 (E.D. Va. April 25, 2012) (finding insufficient to survive Rule 12(b)(6) the rote allegations that "[Defendant's] statements about [plaintiff] in all instances were false, [Defendant] knew the statements were false, [Defendant] had no reasonable grounds for believing such statements were true, and no facts existed that would have substantiated [Defendant's] defamatory statements."). *Accord, e.g., Themed Restaurants, Inc. v. Zagat Survey, LLC*, 781 N.Y.S. 2d 441, 449 (N.Y. Sup. Ct. 2004) ("[S]pecificity in the pleading of … actual malice is required."); *Williams v. Nexstar Broad., Inc.*, --- So.3d ----, 2012 WL 1192201, at *3 (La. App. 5 Cir. Apr. 10, 2012) (affirming dismissal of defamation claim for, *inter alia*, failure to "allege facts to support the element of actual malice"). Similarly, the Fourth Circuit recently addressed malice allegations almost identical to those raised by Mr. Vilma here and squarely rejected their sufficiency under Rule 12(b)(6):

> Rule 9(b) ensures there is no *heightened* pleading standard for malice, but malice must still be alleged in accordance with Rule 8—a 'plausible' claim for relief must be articulated. Applying the *Iqbal* standard to this case, we find that the Appellants have not stated a claim. To begin with, Appellants' assertion that [the] statements 'were known … to be false at the time they were made, were malicious or were made with reckless disregard as to their veracity' is entirely insufficient. This kind of conclusory allegation—a mere recitation of the legal standard—is precisely the sort of allegations that *Twombly* and *Iqbal* rejected.

Mayfield v. NASCAR, Inc., 674 F.3d 369, 377–78 (4th Cir. 2012).

In addition, here the conclusory assertions that the complained-of statements were made with actual malice cannot be squared with the statements themselves, which refer to the extensive investigation conducted by NFL Security as the basis for the actions taken. *See Young v. Meyer*, 527 So. 2d 391, 393 (La. App. 4 Cir. 1988) (citing *Schaefer v. Lynch*, 406 So. 2d 185, 187 (La. 1981)) (judgment for defendant on defamation claims when allegedly defamatory statements were made after investigation of the information prior to the publication); *see also*

Besen, 2012 WL 1440183 at *6 ("Plaintiff has not met his burden as a limited-purpose public figure to plausibly allege actual malice, and his defamation claims must be dismissed."); *Themed Restaurants*, 781 N.Y.S. 2d at 446 ("Typically, the use of multiple sources for collected information serves as its own protection against defamation claims.").[8]

B. The Complaint fails properly to allege outrageous conduct sufficient to state a cause of action for intentional infliction of emotional distress.

To state a claim for intentional infliction of emotional distress, the plaintiff must not only allege that the defendant's conduct was "extreme and outrageous," (Compl. ¶ 106), but must also plead facts to support that assertion. Mr. Vilma has failed to do so.

Conclusory pleading of "extreme and outrageous conduct" in support of a claim for intentional infliction of emotional distress, just like conclusory pleading of "actual malice" to support a claim for defamation, is insufficient to survive a motion to dismiss under Rule 12(b)(6). *See, e.g.*, *Jones v. Trump*, 971 F. Supp. 783, 787–88 (S.D.N.Y. 1997) (requiring more than a conclusory allegation that a defendant's actions were "reckless and in bad faith, constituting conduct that is so egregious as to shock the conscience"; holding that a complaint "must set forth, clearly and concisely, allegations of specific instances of each individual defendant's con-

[8] Mr. Vilma's failure to offer any basis for his bar assertions of "actual malice" should not be a surprise. As the March 2 Report and the March 21 Memorandum of Decision make clear, an extensive investigation of the bounty-related allegations was conducted before the challenged statements were issued. Those documents were issued only after a long, detailed and professional investigation was (a) conducted by NFL Security's experienced investigators and (b) reviewed and endorsed by a highly regarded outside counsel, former United States Attorney for the Southern District of New York Mary Jo White. It bears mention that the investigation included an invitation for Mr. Vilma to meet with NFL investigators and/or Commissioner Goodell; Mr. Vilma initially accepted that invitation but later refused to offer investigators his version of the relevant events. In these circumstances, it would be very difficult responsibly to make, much less to sustain, a credible allegation that the challenged statements were made with actual malice.

duct that rise to the level of 'extreme and outrageous' conduct"); *Lacey v. Carroll McEntee & McGinley, Inc.*, 1994 WL 592158, *5 (S.D.N.Y. Oct. 26, 1994) ("Plaintiff alleges these elements in a conclusory fashion but fails to mention any facts in support. Not only are there no facts supporting the physical effects of the distress, it is unclear which act constitutes the outrageous conduct complained of."); *Stallworth v. Singing River Health Sys.*, 2012 WL 1192816, at *2 (5th Cir. Apr. 10, 2012) (affirming dismissal of intentional infliction of emotional distress claim when the complaint made only a "bare assertion" of outrageous conduct that was "conclusory")

III. In the Alternative, the Claims Should Be Stricken Under the Louisiana Anti-SLAPP Statute, Louisiana Code of Civil Procedure Article 971.

In the alternative, Mr. Vilma's claims, all of which attack Commissioner Goodell and the NFL's statements on an issue of public importance, should be stricken under the Louisiana Anti-SLAPP Statute, La. C.C.P. art. 971.

Article 971 permits a defendant in a case "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue" to raise "a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim." La. C.C.P. art. 971(A)(1).[9] "Although most often used to challenge a lack of evidentiary support, a special motion to strike can also be utilized to dismiss a complaint based on legal deficiencies, in

[9] While there is no conflict of laws with regard to the pleading of "actual malice" and intentional infliction of emotional distress, there is arguably a conflict with regard to the scope of "anti-SLAPP" procedures allowed in New York and in Louisiana. Under the choice of law factors at Louisiana Civil Code article 3542, Louisiana law should apply to this issue: the place of the injury alleged by Mr. Vilma, his habitual residence as alleged in the complaint, the locus of public interest in the subject-matter of the suit, and the center of the relationship between Mr. Vilma and the Commissioner are all in New Orleans.

the same manner as a motion to dismiss under Rule 12," but with the benefits of an automatic stay of discovery. *La. Crisis Assistance Center v. Marzano-Lesnevich*, 827 F. Supp. 2d 668, 678 (E.D. La. 2011) (citing *Ruffino v. Tangipahoa Parish Council*, 965 So. 2d 414, 417–18 (La. App. 1 Cir. 2007)).

Although this special motion to strike is outlined in the Louisiana Code of Civil Procedure, it has been held applicable in federal proceedings based on diversity. *See e.g.*, *Henry v. Lake Charles American Press, LLC*, 566 F.3d 164 (5th Cir. 2009); *La. Crisis Assistance Center*, 827 F. Supp. 2d at 678; *Armington v. Fink*, 2010 WL 743524 (E.D. La. 2010).

> Essentially, the statute operates as a two-part burden-shifting framework. When a special motion to strike is filed, the court is required to stay all discovery in the proceedings, and the defendant must make a prima facie showing that the claims asserted against her arise from an act in furtherance of the exercise of her right of petition or free speech under the Louisiana or United States Constitution in connection with a public issue.[10] After the defendant makes this showing, the burden shifts to the plaintiff to demonstrate a probability of success on the merits of his claim. If the plaintiff fails to demonstrate a probability of success, his claims will be dismissed, and the prevailing defendant will be entitled to recover attorney's fees and costs. If the plaintiff successfully defeats the motion, however, he can recover his own attorney's fees and costs, and the court's ruling denying the motion is admissible as substantive evidence later in the proceeding.

La. Crisis Assistance Center, 827 F. Supp. 2d at 678 (citing *Carr v. Abel*, 64 So.3d 292, 297 (La. App. 5 Cir. 2011); La. C.C.P. art. 971(B) & (A)(3)). "In making its determination, the court shall

[10] Article 971 defines an "act in furtherance of a person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue" as broadly including but not limited to: 1) "Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest" and 2) "Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." La. C.C.P. art. 971(A)(2).

All discovery "shall be stayed upon the filing" of a motion to strike and the stay "shall remain in effect until notice of entry of the order ruling on the motion[.]" La. C.C.P. art. 971); *see also Aymond v. Dupree*, 928 So. 2d 721, 732 (La. App. 3 Cir. 4/12/06) (upholding trial court's granting of motion to strike before ruling upon defamation plaintiff's motion for discovery: "It is clear from the mandatory language of the statute that discovery is to be stayed once a special motion to strike under Article 971 is filed. Again, the purpose of the statute is to put an end to the litigation unless the plaintiff can demonstrate a probability of success on his claims. The permissive portion of the statute allows further discovery at the court's discretion. However, discovery is not required for the court to make its determination regarding the merit of a plaintiff's claims of defamation.").

Therefore, if this Court finds that there are inadequate bases for dismissal under Rule 12(b)(6), it should stay all further litigation unless and until it makes a determination after a La. C.C.P. art. 971 hearing that Mr. Vilma has a probability of success on his claims.

CONCLUSION

For these reasons, Mr. Goodell requests that this Court dismiss the claims of Mr. Vilma in their entirety and with prejudice. The claims are preempted under the CBA; they are barred by the mandatory dispute resolution procedures of the CBA; and they fail to state claims upon which relief can be granted. In the alternative, Mr. Vilma should be compelled to make a showing of probability of success on the merits of his claims under La. C.C.P. art. 971.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 5, 2012, a copy of the foregoing Memorandum in Support of Defendant's Motion To Dismiss Pursuant To Rule 12(b)(6), Or, Alternatively, To Strike Pursuant To the Louisiana Anti-SLAPP Statute, La. C.C.P. at. 971, was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

/s/ Lynn E. Swanson