UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, on its own behalf and on behalf of EZEKIEL ELLIOTT,	§	
	§	CASE NO. 4:17-cv-00615
Petitioner,	§	
v.	§	
NATIONAL FOOTBALL LEAGUE and NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,	§	
Respondents.		

DECLARATION OF JEFFREY L. KESSLER

I, JEFFREY L. KESSLER, declare as follows:

1. I am a partner at Winston & Strawn LLP, and counsel for Petitioner National Football League Players Association ("NFLPA") and Ezekiel Elliott in the above-captioned matter. I make this declaration based on my personal knowledge. If called upon to do so, I will testify competently to the facts set forth herein.

2. Attached is a true and correct copy of Petitioner's proposed Second Supplemental Brief in support of Petitioner's Emergency Motion for Temporary Restraining Order or Preliminary Injunction.

3. Counsel has complied with the meet and confer requirement in Local Rule CV-7(h). Jonathan Amoona, counsel for Petitioner National Football League Players Association and Ezekiel Elliott, conferred with Daniel L. Nash, counsel for Respondents National Football League and National Football League Management Council, via telephone on September 7, 2017

regarding Petitioner's Motion to Strike or Alternatively for Leave to File Second Supplemental Brief in support of Petitioner's Emergency Motion for Temporary Restraining Order or Preliminary Injunction. Counsel for Respondents stated that Respondents opposed the requested relief and requested that the Court be notified that:

> Respondents object to Petitioner's request to file a motion to strike or for further briefing. Respondents' brief was fully consistent with the court's instructions that the parties could file further briefing on Petitioner's TRO motion by 5 pm yesterday. Even accepting Petitioner's position that the court intended to limit briefing only to the impact of the Arbitrator's award, Respondents' brief, including the sections that Petitioners seek to strike, does exactly that. Respondents also oppose Petitioner's alternative request for a sur-reply, which would constitute the fourth brief that Petitioner has filed in support of its TRO motion and would deprive Respondents of a fair opportunity to respond sufficiently in advance of the Court's intention to issue a ruling tomorrow.

The discussions ended at an impasse, leaving an open issue for the court to resolve under Local Rule CV-7(i).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 7th day of September 2017 at New York, New York.

By: /s/ *Jeffrey L. Kessler*

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, on its own behalf and on behalf of EZEKIEL ELLIOTT,	§	
Petitioner,	§	CASE NO. 4:17-cv-00615
v.	§	
NATIONAL FOOTBALL LEAGUE and NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,	§	SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONER'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION
Respondents.		

Petitioner National Football League Players Association, on its own behalf and on behalf of Dallas Cowboys Running Back Ezekiel Elliott, hereby submits this Second Supplemental Brief in Support of its Emergency Motion for Temporary Restraining Order or Preliminary Injunction (Doc. No. 5) ("TRO Motion"). With the Court's permission, Petitioner will respond to Section I of Respondents' Supplemental Brief (Doc. No. 23) ("NFL Supplemental Brief"), insofar as it presents unauthorized and belated arguments in opposition to Petitioner's TRO Motion.

PRELIMINARY STATEMENT[1]

There are two reasons why the NFL waited to present its unauthorized, additional arguments and case law about exhaustion-of-remedies and standing until *after* it filed its Opposition to the TRO Motion (Doc. No. 8), *after* it filed its Motion to Dismiss (Doc. No. 7), and *after* the TRO hearing (Doc. No. 14). The first is to inflict further delay and to further frustrate

[1] Defined terms herein have the same meaning as Petitioner's prior submissions in support of its TRO Motion (Doc Nos. 5, 13, and 24).

the Court's ability to issue timely, equitable relief. The second is to deny Petitioner the opportunity to respond and point out the disingenuousness of the NFL's "new" "authorities." The NFL's persistent efforts to tell this Court how it is powerless should be rejected out of hand.

First, by sleight of hand, the NFL conflates exhaustion-of-remedies with waiting for a final arbitral decision on the merits as though they mean the same thing. They do not. The NFL cites ***one*** "new" Supreme Court case—from 1963, *General Drivers, Warehousemen & Helpers, Local Union No. 89 v. Riss & Co.*—that supposedly "squarely held" that "no action under § 301 will lie" "until" there is a "final and binding grievance award." NFL Supp. Br. at 1, 3. In fact, the case stands for no such thing. The NFL takes the decision totally out of context—it dealt with whether the challenged decision was an arbitration award at all. *See* 372 U.S. 517, 520 (1963). And, for good measure, the NFL supplies two sets of ellipses, a couple sets of brackets, and flips a negative ("is not") to an affirmative ("[is]") to distort the meaning of the "quoted" language. *Id.* The NFL's remaining citations either concern "exhaustion of remedies," which the NFLPA and Elliott did before filing the Petition, or stand for the opposite proposition for which they are cited: "The complete arbitration rule, while a cardinal and salutary rule of judicial administration, *is not a limitation on a district court's jurisdiction*." *Union Switch & Signal Div. Am. Standard Inc. v. United Elec., Radio & Mach. Workers of Am., Local 610*, 900 F.2d 608, 612 (3d Cir. 1990) (emphasis added).

Second, the NFL's standing argument fails on multiple levels. At the threshold, the NFL's Supplemental Brief declines to acknowledge—much less engage—the point that before the Petition was filed, Elliott *already* was suffering reputational harm because of pending discipline over conduct he categorically denies, and *already* had suffered harm because Henderson had

denied him a fundamentally fair opportunity to defend himself against those accusations.[2] Further, despite conceding that "imminence is [] a somewhat elastic concept," (NFL Supp. Br. at 6 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)), the NFL tries to argue with a straight face that it was nonetheless "too speculative for Article III purposes" for Petitioner to sue over an adverse decision expected imminently after filing the Petition. NFL Supp. Br. at 6. Perhaps if Henderson had not conducted a sham arbitration denying Elliott the most fundamental evidence necessary to defend himself, and perhaps if Henderson had not served for 16 years as the head of Respondent NFL Management Council with continued economic ties to the NFL, and perhaps if the NFL had not engaged in a conspiracy to suppress the exculpatory conclusions of its Director of Investigations, and perhaps if Henderson had not indicated that his ruling was imminent, the NFL would have a viable argument. But those are the undisputed facts; the outcome in the Award was not only "certainly impending," it was inevitable. The NFL's argument rests on ignoring these facts and distorting Supreme Court and Fifth Circuit case law.

Finally, the NFL's first-to-file argument fails because its necessary premise is that the Petition lacked jurisdiction when it was filed, but that premise is wrong. Accordingly, there can be no dispute that *this* action was first-filed. And even if the NFL were to nonetheless seek transfer to the Southern District of New York, any such motion would fail for multiple reasons, including the considerable weight given to plaintiff's (*i.e.*, the NFLPA and Elliott's) choice of forum, judicial economy (*e.g.*, this Court's substantial investment of time to date), and Elliott's and his team's presence in this District. In other words, even if Petitioner had not been the first to file, the Court

[2] Notably, the NFL previously acknowledged that "reputational harm" to Elliott "ha[d] already occurred" at the time of the Petition (Doc. No. 8 at 2).

should still reject the NFL's persistent efforts to escape judicial review from the District where the harm is inflicted.

ARGUMENT

Petitioner does not concede or agree with the NFL's position that the issuance of the Award has not rendered its jurisdictional arguments moot. (Notably, the NFL has now abandoned its ripeness arguments.)[3] Regardless, the Court had subject matter jurisdiction, and Petitioner had standing, from the inception of this action.

A. The Court Had Subject Matter Jurisdiction Over The Petition From The Moment It Was Filed

By its plain statutory text, Section 301 confers jurisdiction for "[s]uits for violation of contracts between an employer and a labor organization." LMRA, § 301. Henderson's *final* procedural rulings denying Petitioner fundamental fairness and critical evidence constituted CBA and labor law violations prior to Petitioner filing suit. This should be the end of the matter, but Petitioner responds below to the NFL's last-minute submission of *ten* new cases (all but one) in connection with its position that "Federal Courts Lack Authority Under The LMRA To Review Non-Final Arbitration Awards." NFL Supp. Br. at § I.A.2.

1. The NFL's Principal Authority That Petitioner Was Required To Wait For Henderson's Final Award Rests Upon Distortions Of The Case

The NFL presents ***one*** case to support its claim that the Supreme Court has "squarely held" that courts lack jurisdiction over a "petition to vacate an arbitration decision that has not yet issued." NFL Supp. Br. at 1, 3. The NFL asserts that *General Drivers, Warehousemen & Helpers,*

[3] "Since ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the [initial filing] that must govern." *Roman Catholic Diocese of Dallas v. Sebelius*, 927 F. Supp. 2d 406, 424 (N.D. Tex. 2013) (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974)).

Local Union No. 89 v. Riss & Co. "could not be clearer" in decreeing that, "[u]ntil a 'grievance award *** [is] final and binding under the collective bargaining agreement, *no action under § 301 [of the LMRA] *** will lie*.'" *Id.* (quoting 372 U.S. 517, 520 (1963)). If the Court finds the gaggle of brackets and asterisks mystifying, it is for good reason.

General Drivers actually concerned a dispute about *whether the committee decision at issue was an arbitration award at all*, and whether it was "the parties' chosen instrument for the definitive settlement of grievances under the [CBA]," 372 U.S. at 519, and *that* dispute—which needed to be tried—is what the NFL's purported quote actually addresses. Stripped of its contortions, the language actually states:

> Of course, if it should be decided after trial that the grievance award involved here is not final and binding under the collective bargaining agreement, no action under [Section] 301 to enforce it will lie. Then, should petitioners seek to pursue the action as a [Section] 301 suit for breach of contract, there may have to be considered questions unresolved by our prior decisions.

Id. at 520. This is clearly not the principle for which the NFL represented this case to the Court. Moreover, not only was *General Drivers* based on disagreements not present between the parties here, the lower courts' dismissal for lack of jurisdiction (reversed by the Supreme Court) was *not* on any grounds that the award was not yet final, but it was based on a case that had been overruled for erroneously holding that "Section 301 did not give the federal courts jurisdiction over a suit brought by a union to enforce employee rights . . . because in their view [Section] 301 was procedural only, not substantive." *Smith v. Evening News Ass'n*, 371 U.S. 195, 198 (1962), *overruling in relevant part Ass'n of Westinghouse Salaried Emps. v. Westinghouse Elec. Corp.*, 348 U.S. 437, 460 (1955); *see also Gen. Drivers*, 372 U.S. at 520 ("its holding is no longer authoritative as a precedent").

2. The NFL's Cases About "Exhaustion of Remedies" *Support* The Court's Jurisdiction Over The Petition

Respondents cite authority applying the exhaustion of remedies doctrine in connection with their contention that Petitioner failed to exhaust its remedies prior to filing this suit, a contention which the NFL continues to recite without reference to the actual facts of this case. Having filed an appeal, submitted to arbitration, completed a three-day arbitral hearing, requested in the first instance that Henderson resolve their motion to compel critical evidence, and received a final decision from the Arbitrator on those evidentiary issues, Petitioner was left with no other recourse under the CBA. The arbitral record was closed.

Thus, unlike all of the petitioners in the cases cited in the NFL's Supplemental Brief, there was nothing left for the Union and Elliott to do to exhaust their remedies under the CBA. Notably, every case the NFL cites is consistent with Petitioner's position that exhaustion of remedies was therefore satisfied. *Compare* NFL cited cases (in order of appearance): *Meredith v. La. Fed'n of Teachers*, 209 F.3d 398, 402-403 (5th Cir. 2000) (holding employer repudiated grievance procedure such that plaintiff justifiably did not even seek to compel arbitration); *Vaca v. Sipes*, 386 U.S. 171, 184-85 (1967) (noting the exhaustion standard is an "employee must at least *attempt* to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement") (emphasis added); *Espinoza v. Cargill Meat Sols. Corp.*, 622 F.3d 432, 437, 444-45 (5th Cir. 2010) (plaintiff failed to initiate even the administrative claims procedure available to her, which was the first step in the applicable grievance process and a prerequisite to arbitration under the governing CBA); *Richter v. Merchants Fast Motor Lines, Inc.*, 83 F.3d 96, 97-98 (5th Cir. 1996) (plaintiff made no attempt to utilize grievance procedures mandated by the CBA before filing suit in state court); *Baker v. Farmers Elec. Co-op, Inc.*, 34 F.3d 274, 278, 284-85 (5th Cir. 1994) (same).

3. The "Nonfinal" Award Cases The NFL Cites Further Underscore the Court's Jurisdiction to Adjudicate the Petition

The NFL also cites several inapposite cases—all out-of-Circuit—concerning situations where an arbitrator issued a partial decision which expressly retained an open issue—usually damages—and remanded that issue to the parties for attempted resolution, while specifically retaining jurisdiction over the arbitration in the event there was no agreement. *See, e.g., Local 36, Sheet Metal Workers Int'l Ass'n v. Pevely Sheet Metal Co.*, 951 F.2d 947, 949-50 (8th Cir. 1992) (holding that, for statute of limitations purposes, clock started upon issuance of damages award and not earlier liability award, where parties were unable to resolve damages after liability award issued and had to reconvene panel); *Millmen Local 550, United Bhd. of Carpenters & Joiners of Am. v. Wells Exterior Trim*, 828 F.2d 1373, 1374-75 (9th Cir. 1987) (parties unable to resolve remanded issue of damages; plaintiff moved to enforce liability award before reverting to arbitrator on open issue of damages). But these types of cases plainly are not the circumstances here, where there was nothing left for the arbitral parties to do once the hearing closed.

That said, the NFL's cases eviscerate the NFL's position: "The complete arbitration rule, while a cardinal and salutary rule of judicial administration, *is not a limitation on a district court's jurisdiction*." *Union Switch & Signal Div. Am. Standard Inc. v. United Elec., Radio & Mach. Workers of Am., Local 610*, 900 F.2d 608, 612 (3d Cir. 1990) (emphasis added). *Millmen*, another one of the NFL's cases, also made clear that "[e]ven if the arbitrator's determination of liability in this case is not a final and binding award, review of the determination *might nevertheless be available should the circumstances warrant*. . . . [Plaintiff,] however, has not offered any compelling reasons for allowing immediate review." 828 F.2d at 1377 (emphasis added); *see also id.* at 1375 (in certain cases, "judicial review of a nonfinal award [will] be proper").

In *Union Switch*, the Court came to the exact opposite of the NFL's conclusion on the Section 1291 finality analogy it cites. In holding that the district court had jurisdiction to confirm or vacate a nonfinal liability award under Section 301, the Third Circuit explained:

> *This court's jurisdiction under 28 U.S.C. § 1291 is limited to review of final judgments of the district court because that statute confers jurisdiction only with respect to "final judgments." A district court's jurisdiction under § 301 is not similarly limited, however. No reference to "final awards" or any similar concept is to be found there and we believe this is the short and complete answer to the Company's contention. Once Congress creates federal jurisdiction over a class of cases, we are powerless to remove that jurisdiction, although we may establish prudential doctrines restricting the exercise of jurisdiction. . . .* Not surprisingly, the case law of this Circuit and others reflects a recognition that the complete arbitration rule, while a cardinal and salutary rule of judicial administration, *is not a limitation on a district court's jurisdiction. As the Ninth Circuit in Millmen recognized, there are a number of cases where courts have reviewed incomplete arbitration awards very similar to the one currently at hand*.

900 F.2d 608 at 612-13 (emphases added); *contra* NFL Supp. Br. at 5. The Seventh Circuit is in accord:

> [T]he analogy between a suit to set aside an arbitration award and an appeal from a regular judgment is just an analogy, and not an identity, and it breaks down on the issue of finality. A suit to set aside an arbitration award under section 301 of the Taft–Hartley Act is a suit for breach of contract, the contract being the arbitration clause of the collective bargaining agreement; and *the suit is ripe as soon as the breach is definitive*.

Dreis & Krump Mfg. Co. v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 8, 802 F.2d 247, 251 (7th Cir. 1986) (Posner, J.) (emphasis added), *cited in Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Shopmen's Local Union 501 v. Burtman Iron Works, Inc.*, 928 F. Supp. 83, 86 (D. Mass. 1996).

Thus, even to the extent the Court looks to the NFL's out-of-Circuit authorities about arbitration challenges distinguishable from the present dispute, they conclusively support exercising jurisdiction here—where there was nothing left for Petitioner to exhaust, and Elliott faced (and faces) the threat of imminent and irreparable harm if Petitioner did not take quick action to bring his LMRA claim before this Court.

4. The FAA Is No Obstacle To The Court Exercising Jurisdiction

Finally, it bears noting that the NFL has abandoned its (previous) lead argument (NFL Mot. to Dismiss at 5-8 (Doc. No. 7)) that the FAA precludes jurisdiction. The NFL is correct to do so, for the reasons stated in the NFLPA's Reply Brief in Support of its TRO Motion (at 1-3 (Doc. No. 13)).

B. The NFL Misstates The Law on Standing—Which Petitioner Possessed At The Time This Action Was Initiated

The NFL contends that Elliott lacks standing because he had not yet lost the arbitration at the time the Petition was filed. NFL Supp. Br. at 6-7. But this argument—like the NFL's Supplemental Brief as a whole—ignores that Elliott had *already* suffered injury to his reputation from the unlawful and looming six-game suspension based on accusations that he had categorically denied; Henderson had *already* violated the LMRA and CBA by making *final* procedural rulings that denied Petitioner access to critical evidence and deprived Elliott of a fundamentally fair hearing; and Elliott was *already* imminently threatened by a pending suspension that was the product of a fundamentally unfair hearing and the NFL suppressing evidence in violation of the CBA.

And even *if* Elliott could only attain standing in the event an adverse arbitration decision were "certainly impending," he still had standing to sue when the Petition was filed. NFL Supp. Br. at 7 (citing *Clapper*, 568 U.S. at 409). As the NFL acknowledges, the Supreme Court reiterated in *Clapper* that "imminence is concededly a somewhat elastic concept." *Id.* at 6. What the NFL declines to inform the Court, however, is that in *Clapper*, where respondents challenged new international surveillance power granted to the executive branch, the nexus between the lawsuit and the purported injury rested on respondents':

> *highly speculative fear* that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing

> so, the Government will choose to invoke its authority under [50 U.S.C.] § 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts.

Clapper, 568 U.S. at 410 (emphasis added). This "highly attenuated chain of possibilities" (*id.*) bears no resemblance to the immediate threat of an adverse decision in the arbitration proceedings below. What's more, the Supreme Court in *Clapper* cabined its analysis by first explaining that its "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id.* at 408 (citation omitted). The NFL neglects this too.

It is sheer fantasy for the NFL to argue that the Petition was filed on the basis of some sort of paranoid and highly speculative concern that Elliott would lose the arbitration at some unknown time in the distant future. Consider the undisputed facts that: the arbitration was presided over by the NFL's unilaterally-designated, partial arbitrator with long-standing professional and economic ties to the League as the former head of Respondent NFL Management Council; Henderson then denied the most essential evidentiary requests made by Petitioner, including its request for access to critical and exculpatory witnesses and documents; the League was exposed for trying to suppress Roberts' conclusion, after reviewing all of the evidence and interviewing Thompson six times, that the League's investigation had accumulated insufficient evidence to overcome Thompson's credibility problems and discipline Elliott; Henderson has never, in his history, completely overturned a Commissioner suspension; and at the conclusion of the arbitration, Henderson indicated he would issue his decision shortly, which could have been as soon as the

next day. If there could be any remaining question that there was a "certainly impending" threat of an imminent and adverse outcome, one simply need read Henderson's Award.

The Fifth Circuit has previously relied upon *Clapper* to find standing where a plaintiff's "threatened injury" was "certainly imminent," not actual. In *McCardell v. U.S. Dept. of Housing and Urban Development*, 794 F.3d 510, 520-21 (5th Cir. 2015)—not cited by the NFL—the Fifth Circuit "h[e]ld that McCardell ha[d] Article III standing" to bring a claim that a planned neighborhood redevelopment would "deprive her of the social and economic benefits that result from living in an integrated community." *Id.* The Court acknowledged that "McCardell's asserted injury [was] inescapably 'speculative' in the sense that it [was] not yet felt. But unlike in *Clapper*, where the alleged injury depended on a long and tenuous chain of contingent events," the chain of events in *McCardell* "involve[d] fewer steps and no 'unfounded assumptions.' McCardell's asserted injury would be concretely felt in the logical course of probable events flowing from an unfavorable decision by this court . . . ." *Id.* *McCardell* thus reinforces the unremarkable conclusion that a litigant need not wait until he has suffered irreversible harm to file a lawsuit—he can do so when his "asserted injury would be concretely felt in the logical course of probable events." *Id.*; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("injury in fact" that qualifies for relief may be "actual *or imminent*") (emphasis added). The Petition rests on no "unfounded assumptions" about the imminent threat to Elliott's career.

The NFL's remaining standing authorities suffer from similar defects and misrepresentations. *Whitmore v. Arkansas* has little to do with this case other than a shared use of the word "standing." In *Whitmore*, a case brought by a death-row inmate premised on how the treatment of another inmate could affect a prospective new death sentence in the future, the Court ruled that because "[i]t is just not possible for a litigant to prove in advance that the judicial system

will lead to any particular result in his case," "no amount of evidence" could establish standing. 495 U.S. 149, 159-60 (1990). As recited by the Supreme Court, the petitioner in *Whitmore* had already "been convicted of murder and sentenced to death," "exhausted his direct appellate review," and denied state post-conviction relief, yet he suggested "that he might in the future obtain federal habeas corpus relief that would entitle him to a new trial," and in that new trial, were he again sentenced to death, his rights might be affected by the treatment of the other inmate. *Id.* at 156-57.

Likewise, the NFL has no sound basis to rely on *Davis v. FEC*, 554 U.S. 724, 732 (2008), to argue that this case must be dismissed because "a party must demonstrate Article III standing at the 'commencement of the litigation.'" NFL Supp. Br. at 6. Not only is this argument irrelevant, because Elliott had suffered actual injury at the time this case was initiated (s*upra*), but the *Davis* court found that because Davis was facing a likely harm to be inflicted by a federal election statute, he *did* possess standing: "A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Id.* at 734 (citation omitted). No less is true of Elliott's circumstance at the time of the Petition.[4]

Were this Court to credit the NFL's erroneous argument that Elliott could not act on well-founded beliefs about the highly likely outcome in an arbitration that was fundamentally unfair from beginning to end, litigants like the NFLPA and Elliott would forever have their hands tied, forced to suffer irreversible harm before they could even *commence* a lawsuit, much less obtain timely relief.

[4] *Cotton v. Certain Underwriters at Lloyd's of London*, 831 F.3d 592, 595 (5th Cir. 2016), is inapplicable for the same reason.

C. *This* Court—Not the SDNY—Is The Proper Venue

As established above, there was subject matter jurisdiction and standing from the moment the Petition was filed. Accordingly, *this* action is the first-filed; it was the NFL's Southern District of New York Complaint ("SDNY Action") that came second. There is thus no conceivable basis for this Court to defer to the SDNY Action, and even if somehow this case were deemed second-filed, there would remain ample reason to maintain venue here.

"[C]ourts generally agree that the forum of the first-filed case is favored[.]" *SynQor, Inc. v. Ericsson, Inc.*, 2011 WL 13159975, at *1 (E.D. Tex. Mar. 7, 2011) (citations and quotations omitted). In assessing whether the first-to-file rule applies, Fifth Circuit courts consider whether (1) "the two pending actions [are] duplicative or . . . involve such substantially similar issues that one court should decide the subject matter of both actions, and if so, (2) which of the two courts should take the case." *Kambala v. Signal Int'l L.L.C.*, 2014 WL 11512236, at *2 (E.D. Tex. July 16, 2014).

The NFL's entire first-to-file argument is premised on the erroneous assertion (*supra*) that the Petition was defective when filed for want of subject matter jurisdiction. If, however, the Court rejects the NFL's exhaustion-of-remedies and standing arguments, it appears that even the NFL would not dispute that the Eastern District of Texas action was first-filed and therefore the appropriate forum. Indeed, the NFL's SDNY Action to confirm the Award is just the converse of the Petition to Vacate the Arbitration Award in this Court.[5]

[5] The NFL's reliance on *Nat'l Football League Players Ass'n v. Nat'l Football League*, Civ. No. 15-3168 (RHK/HB), 2015 WL 7596934 (D. Minn. July 30, 2015) ("*Brady*") underscores the Petitioner's point here. There, the District Court of Minnesota held that since the NFLPA's Petition to Vacate the Arbitration Award was filed one day after the NFL had filed its Motion to Confirm the Arbitration Award in the Southern District of New York, and the competing suits alleged the "converse" of one another, "the New York action trigger[ed] application of the first-

Although the NFL's remaining arguments in favor of the SDNY Action will become moot if the Court determines it has subject matter jurisdiction and Petitioner has standing, we preview why this District is nonetheless the appropriate forum, and why any transfer motion by the NFL would be meritless.

First, there can be no dispute that the NFLPA and Elliott are the natural plaintiffs here. In considering the appropriate forum, a "plaintiff's choice of forum is given significant weight[.]" *Robertson v. Kiamichi R. Co., L.L.C.*, 42 F. Supp. 2d 651, 656 (E.D. Tex. 1999); *see also Schexnider v. McDermott Int'l, Inc.*, 817 F.2d 1159, 1163 (5th Cir.) ("plaintiff's choice of forum should rarely be disturbed") *cert. denied* 484 U.S. 977 (1987). Petitioner filed this action because the *NFLPA* and *Elliott* were denied fundamental fairness, and because *Elliott* is enduring harm to his reputation, season, and career. The NFL faces no harm whatsoever—indeed, its SDNY Action does not allege any breach of the CBA by the NFLPA or Elliott. Considering that the NFL can self-effectuate the Award and enforce Elliott's suspension, without the need for any judicial intervention, it is obvious that the only reason for the NFL to move to confirm was to escape an NFLPA-filed vacatur petition before this Court.[6]

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filed rule," and therefore the court transferred the NFLPA's action to the Southern District of New York. *Id.* at *2.

[6] To the extent the NFL argues that Petitioner is an anticipatory plaintiff in order to advocate for an exception to the first-to-file rule, the NFL is plainly incorrect. An action is anticipatory when it is "filed in anticipation of a subsequent suit brought by *the defendant* to the first action" as "a forum-shopping maneuver." *Florida Marine Transporters v. Lawson & Lawson Towing Co.*, 2001 WL 1018364, at *3 (E.D. La. Aug. 31, 2001) (emphasis added) (citing *Pac. Empl. Ins. Co. v. M/V Capt. W.D. Cargill*, 751 F.2d 801, 804 (5th Cir. 1985)). Not only are the NFLPA and Elliott not defendants in any sense, this narrow exception to the first-to-file rule applies only when the plaintiff in the first-filed action had specific notice that it would be sued. *See, e.g., Bedrock Logistics, LLC v. Braintree Labs., Inc.*, 2017 WL 1547013, at *5 (N.D. Tex. Apr. 28, 2017) ("In determining whether a suit is anticipatory, courts scrutinize the parties' activities prior to the filing of a suit"; finding suit was anticipatory when plaintiff was given eleven days to consider settlement offer and during that period filed suit based on the same transactions referenced in the settlement);

Second, judicial economy supports keeping this matter in the Eastern District of Texas. The Court has already spent considerable time reviewing numerous briefs and the arbitral record submitted by the parties. The TRO Motion has already been heard and argued. To now start from square one, in the SDNY, would not only impose a needless burden on that court and render this Court's investment of time and resources wasted, it would yet further delay—perhaps significantly—the availability of injunctive relief for Elliott, who continues to suffer irreparable harm. *See Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (courts consider whether a transfer would avoid duplicative litigation and prevent waste of time and money).

Third, Elliott resides and works as an NFL employee in this District; his team, the Dallas Cowboys, are headquartered here; and this District is where the irreparable harm resulting from the fundamentally unfair arbitration proceedings will be felt by both Elliott and the Cowboys if the Award is not vacated. This District is a logical and convenient forum for the dispute. In fact, the U.S. District Court for the team whose player faces discipline has routinely served as the venue for vacatur proceedings between the NFLPA and NFL. *See, e.g.*, *NFLPA v. NFL* ("*Peterson*"), No. 14-4990 (D. Minn.) (Minnesota Vikings player); *Vilma v. Goodell* ("*Bounty*"), No 12-CV-1718 (E.D. La.) (New Orleans Saints player); *NFLPA v. NFL* ("*Starcaps*"), No. 08-6254 (D. Minn.) (Minnesota Vikings players); *Holmes v. NFL*, No. 3:95-CV-2704 (N.D. Tex.) (Dallas Cowboys player).[7]

Murray v. Wilson, 2008 WL 3498226, at *4 (E.D. La. Aug. 8, 2008) (suit was not anticipatory since second-filer's letter to first-filer "did not threaten *imminent* legal action against [the first-filer]") (emphasis in original). Here, the NFL has not—and cannot—make any showing that Petitioner had specific notice that the NFL was going to commence suit against the Union.

[7] The NFLPA sought transfer in *Johnson v. NFLPA*, 2017 WL 2882119 (N.D. Ohio July 6, 2017) because the player/plaintiff did *not* reside or play in the Northern District of Ohio; the *only* connection to that district was the location of his counsel.

In sum, the NFL's first-to-file argument fails at the threshold, and in any event, this Court would remain the proper venue should the NFL seek a transfer as yet another measure to escape this Court's authority.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically on September 7, 2017, in compliance with Local Rule CV-5(a).

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