Nos. 13-1251 & 13-1480

In the

United States Court of Appeals

for the

Eighth Circuit

Reggie White, *et al.*,

Plaintiffs-Appellants,

vs.

National Football League, *et al.*,

Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Civ. No. 92-906-DSD
Judge David S. Doty

BRIEF FOR APPELLEES

Daniel J. Connolly
Aaron D. Van Oort
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh St.
Minneapolis, MN 55402-3901
(612) 766-7806
(612) 766-1600 (fax)

Gregg H. Levy
Benjamin C. Block
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, NW
Washington, DC 20004-2401
(202) 662-6000
(202) 662-6291 (fax)

Counsel for Appellees

June 17, 2013

RESPONSE TO APPELLANTS' SUMMARY OF THE CASE

In the summer of 2011, the NFL Players Association and the NFL ended one era of labor relations and began a new one. They executed a new Collective Bargaining Agreement ("CBA") to govern the terms and conditions of player employment and they put an end to the expired Stipulation and Settlement Agreement ("SSA") that had governed their relationship from 1993 to 2010. As part of that comprehensive, global peace, they agreed in two separate documents to dismiss with prejudice and to release all claims—known and unknown, pending or not—regarding the expired SSA.

In the spring of 2012, Appellants tried to renege on that deal, seeking leave to reopen the SSA to assert a claim for breach, during the 2010 season, of its anti-collusion provisions. Appellants' claim is barred because: (1) it was dismissed and released by a stipulation of dismissal; (2) it was separately released in the CBA; and (3) it was untimely.

The District Court (Doty, J.) ruled that the stipulation of dismissal released the claim, making it unnecessary to address the other independent reasons. The District Court's Orders should be affirmed; oral argument is unnecessary.

CORPORATE DISCLOSURE STATEMENT

Appellee National Football League ("NFL") is an unincorporated association, organized under the laws of New York, of 32 member clubs. The member clubs of the NFL are:

1. Arizona Cardinals Football Club LLC
2. Atlanta Falcons Football Club, LLC
3. Baltimore Ravens Limited Partnership
4. Buffalo Bills, Inc.
5. Panthers Football, LLC
6. The Chicago Bears Football Club, Inc.
7. Cincinnati Bengals, Inc.
8. Cleveland Browns Football Company LLC
9. Dallas Cowboys Football Club, Ltd
10. PDB Sports, Ltd. (d/b/a The Denver Broncos Football Club, Ltd.)
11. The Detroit Lions, Inc.
12. Green Bay Packers, Inc.
13. Houston NFL Holdings, L.P.
14. Indianapolis Colts, Inc.
15. Jacksonville Jaguars, LLC

16. Kansas City Chiefs Football Club, Inc.

17. Miami Dolphins, Ltd.

18. Minnesota Vikings Football, LLC

19. New England Patriots LLC

20. New Orleans Louisiana Saints, L.L.C.

21. New York Football Giants, Inc.

22. New York Jets LLC

23. The Oakland Raiders, a California Limited Partnership

24. Philadelphia Eagles, LLC

25. Pittsburgh Steelers LLC

26. The St. Louis Rams, LLC

27. Chargers Football Company, LLC

28. Forty Niners Football Company LLC

29. Football Northwest LLC

30. Buccaneers Limited Partnership

31. Tennessee Football, Inc.

32. Pro-Football, Inc.

Three of the NFL clubs have parent corporations: Pittsburgh Steelers Sports, Inc. (which is a majority owner of Pittsburgh Steelers Sports

Holdco LLC, which owns Pittsburgh Steelers LLC); KSA Industries, Inc. (Tennessee Football, Inc.); Washington Football, Inc. and WFI Group, Inc. (Pro-Football, Inc.).

No publicly-held corporation owns 10 percent or more of any of the above-listed Appellees' stock.

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the *White* action under 28 U.S.C. § 1331 because the complaint in *White*, filed in 1992, asserted breaches of the Sherman Act, 15 U.S.C. § 1. The District Court had jurisdiction over this action because it retained jurisdiction under the Final Consent Judgment in *White* to effectuate and enforce the terms of the Stipulation and Settlement Agreement ("SSA"). (JA 1115, 1999.)

This Court has appellate jurisdiction under 28 U.S.C. § 1291 over the District Court's Orders of December 31, 2012 and February 22, 2013, because each constituted a final order.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Appellants may bring an action asserting a breach of the SSA when they stipulated to the dismissal with prejudice of any such action?

- 29 U.S.C. § 159(a)
- 28 U.S.C. § 2072(b)
- *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983)
- *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999)

2. Whether the self-executing Stipulation of Dismissal is subject to challenge under Rule 60(b) when it is not a "final judgment, order, or proceeding," and when Appellants cannot allege any proper ground for Rule 60(b) relief?

- Fed. R. Civ. P. 60(b)
- *Ajiwoju v. Cottrell*, 245 Fed. App'x 564 (8th Cir. 2007) (per curiam) (unpublished)
- *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800 (8th Cir. 2004)
- *Roger Edwards, LLC v. Fiddes & Son Ltd.*, 427 F.3d 129 (1st Cir. 2005)

3. Whether Appellants' Petition for Leave to Reopen and their Rule 60(b) Motion were both futile because any action alleging collusion in the 2010 League Year was separately released in the 2011 CBA and was also untimely under the express terms of the SSA?

- 2011 CBA Art. 3, § 3(a)
- SSA Art. XIII, § 17
- *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118 (1907)
- *Garza v. U.S. Bureau of Prisons*, 284 F.3d 930 (8th Cir. 2002)

STATEMENT OF THE CASE

This case arises out of Appellants' request for leave to bring an action against the NFL for breach of the expired SSA that had settled the 1992 *White* antitrust case and governed the terms and conditions of NFL player employment from 1993 through the 2010 League Year.

The SSA expired on March 11, 2011, triggering extensive labor turmoil. On the same day, the National Football League Players Association ("NFLPA") purported to disclaim its role as the collective bargaining representative of NFL players, and its lawyers (who are also designated "Class Counsel" by the SSA) filed a putative class action antitrust suit against the NFL—the *Brady* case—in the District of Minnesota; soon thereafter, the NFL clubs exercised their labor law right to lock out the players. *See, e.g.*, *Brady v. NFL*, 640 F.3d 784, 788–89 (8th Cir. 2011).

In the late summer of 2011, after this Court had vacated an injunction against the lockout, *see Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011), and the NFLPA had re-acknowledged its status as the players' sole and exclusive bargaining representative, the parties resolved all of their disputes in a comprehensive agreement that included a new, ten-year

CBA that assures NFL players billions of dollars in compensation and benefits through the 2020 League Year. (JA 2179–2204 (CBA excerpts).)

As part of their comprehensive agreement to end one labor era and begin a new one, the parties agreed to resolve not only the *Brady* case but also any and all claims (with only one minor exception) arising out of the SSA. As one of part of this agreement, Appellants stipulated to the dismissal with prejudice of "all claims, known and unknown, whether pending or not, regarding" the expired SSA, specifically including claims asserting "collusion with respect to the 2010 League Year." (JA 2208.)

As another, on its own behalf and on behalf of all of its members, the NFLPA released and covenanted not to bring any claim "regarding" the expired SSA, specifically including any claim of "collusion with respect to any League Year prior to 2011." (JA 2200–01.)

In short, in multiple respects and in multiple documents, the parties closed the door on disputes and litigation—including specifically any claims of collusion—related to their prior relationship and the expired SSA. They did so in favor of a new, comprehensive, ten-year CBA providing labor peace and substantial benefits to both sides.

Nonetheless, on May 23, 2012, Appellants filed in the District Court a "Petition to Reopen and Enforce the Stipulation and Settlement Agreement"; they sought leave to bring an action, under the expired SSA, asserting collusion two years earlier, *i.e.*, during the 2010 League Year. (JA 73–92.)

Recognizing that the NFLPA had "released the claims it attempts to assert," the District Court denied the Petition on December 31, 2012. (Add. 10.)

Appellants then sought a ruling on a Rule 60(b) Motion, asking the District Court to set aside the Stipulation of Dismissal on the ground that the NFL had fraudulently concealed the bases for assertedly "unknown" claims that Appellants had expressly agreed to dismiss. Concluding that "declining to reopen the matter achieves the appropriate balance between bringing litigation to a close and satisfying the equitable principles of Rule 60(b)," the District Court denied that Motion on February 22, 2013. (Add. 18, 22)

Appellants appealed each Order, and this Court consolidated the two appeals.

STATEMENT OF FACTS

Appellants. There are two Appellants—the National Football League Players Association ("NFLPA" or "Union") and "Class Counsel." (*See* JA 2400, JA 2406) (Notices of Appeal).)

The NFLPA is the "sole and exclusive collective bargaining representative of present and future employee players in the NFL." (JA 2193; *see* 29 U.S.C. § 159(a) (the union is "the exclusive representative[] of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment"); *see also* Add. 4.)

The term "Class Counsel" is used in the SSA to refer to certain law firms that may bring actions on behalf of individual players or groups of players to enforce the SSA. (*See* JA 1771 (SSA Art. I(c)).) The firms designated as "Class Counsel" also represent the NFLPA. Thus, the lawyer who signed Appellants' Brief to this Court also signed the Stipulation of Dismissal as "Class Counsel and Counsel for the NFLPA." (JA 2159; *see also* JA 92 (Petition To Reopen, listing "Attorneys for the NFLPA and Class Counsel").)

The *White* Claims. Filed in 1992 by Reggie White and several other players, all of whom retired years ago, *White* was an antitrust action challenging certain terms and conditions of NFL player employment during the 1987–92 seasons, specifically "Plan B," under which each NFL team could restrict the free agency contracting rights of at least 37 players (JA 138 (Compl. ¶ 37)), and asserted agreements among the NFL clubs relating to the NFL Draft, the standard NFL Player Contract, medical insurance benefits, and preseason pay. (JA 121–25.)

The *White* Class. In 1993, the District Court certified a class consisting of: "(i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987, to the date of final judgment in this action and determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, to the date of final judgment in this action and the determination of any appeal therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team." (JA 128 (Compl. ¶ 13); JA 1771 (SSA Art. I(d)).) On June 12, 1995, the Supreme Court denied a petition for a writ of certiorari regarding the final

judgment in *White*. Thus, the last players to join the *White* class were those whose high school class graduated in 1991.[1]

Because membership in the *White* class was limited by time, by 2010 the number of *White* class members employed or seeking employment in the NFL had dwindled from several thousand to little more than a dozen, all with fourteen or more years of seniority. *See White v. NFL*, 585 F.3d 1129, 1138 (8th Cir. 2009) (noting "the gradual retirement of class members").

The 1993 SSA That Settled the *White* Case. "Prior to a decision on the merits in *White*, the parties settled … . As a result, the NFLPA became the exclusive bargaining authority for football players and the NFLPA and the NFL entered into the SSA." (Add. 4.) The terms and conditions of employment in the SSA were "mirrored" in a Collective Bargaining Agreement. (*Id.*)

After notice and hearing, on August 20, 1993, the District Court approved the SSA and entered a Final Consent Judgment providing "that the claims and counterclaims set forth in this action be, and they here-

[1] A player is not eligible to play football as a rookie for an NFL team until at least three football seasons have elapsed since his high school class graduated. *See Clarett v. NFL*, 369 F.3d 124, 127 (2d Cir. 2004).

by are, dismissed on the merits, with prejudice … .” (JA 1115); *see White v. NFL*, 41 F.3d 402, 405 (8th Cir. 1994).

The SSA was subsequently extended on four occasions (1996, 2000, 2002, and 2006). (Add. 8–9 n.7.) Even though the SSA provided that it could be changed, altered or amended by written agreement signed by the parties (SSA Art. XXX § 7), on each occasion Class Counsel, who also represented the NFLPA, filed a motion seeking District Court approval of the amendments.

On each such occasion: (1) the NFLPA stated that it supported the amendments (*e.g.*, Doc. Nos. 400, 449, 498 & 520 (Declarations of Eugene Upshaw, Executive Director of the NFLPA)); (2) Class Counsel's moving papers observed that "only those class members who continue to play professional football for an NFL Club will likely be affected by the proposed amendments" (*e.g.*, Doc. No. 398, at 19; Doc. No. 497, at 29; Doc. No. 519, at ¶ 71 (Declaration of Jeffrey Kessler)); (3) no class member (or anyone else) raised any objection (JA 1532, 1623, 1688, & 2087); and (4) the approval "hearings" were uncontested formalities (*e.g.*, JA 2089–2112).

The Anti-Collusion Provisions of the SSA. The SSA barred certain kinds of agreements among NFL clubs relating to terms and conditions of player employment. (JA 1962 (SSA Art. XIII, § 1).)

The SSA provided that "[a]ny player, Class Counsel, or any Players Union acting on that player's or any number of players' behalf, may bring an action" under the SSA alleging a violation of those "anti-collusion" provisions. (JA 1964 (SSA Art. XIII, § 5).)

The SSA further provided that any action alleging collusion "must be brought within ninety (90) days of the time when the player knows or reasonably should have known with the exercise of due diligence that he had a claim, or within ninety (90) days of the first scheduled regular season game in which a violation of Section 1 of this Article is claimed, whichever is later." (JA 1971 (SSA Art. XIII, § 17).)

The SSA also required the parties, before any action was filed, "to confer in person or by telephone to attempt to negotiate a resolution of [any] dispute" involving alleged collusion. (JA 1972 (SSA Art. XIII, §18).) There was no provision requiring judicial approval of any such resolution.

Appellants' Collusion Claim Regarding the 2010 League Year. As the parties entered the final year of the SSA and the CBA, Appellants sought to increase the NFLPA's bargaining leverage by threatening, and ultimately bringing, an action against the NFL alleging breach of the SSA anti-collusion provisions during the 2010 League Year, which did not have a Salary Cap. (JA 1959 (SSA Art. XI, § 1).)

Beginning in March 2010, NFLPA executives publicly complained about Club spending levels on players during the 2010 League Year, asserting that such allegedly depressed spending could be explained only by collusion. NFLPA Executive Director DeMaurice Smith, for example, stated in March 2010: "[Y]ou see almost a uniform decrease (in payrolls) … . Virtually all of them are down … . That's something you wouldn't expect in a completely free market." (JA 2214.)

Certified agents of the NFLPA also publicly asserted collusion throughout the 2010 League Year. For example, prominent agent Ralph Cindrich remarked in March 2010: "It's almost like everybody got a memorandum for how things would go. … I know that's not legal. But that's been the pattern." (JA 2213.) NFLPA agent Peter Schaffer was similarly explicit: "I see contracts being done as if there is a cap." (JA

2216); *see also* JA 2225–27 (October 10, 2010, *Washington Post* article reporting that "The [NFLPA] is preparing a possible collusion case accusing teams of improperly conspiring to restrict players' salaries last offseason … . [T]he union's collusion case would cite decreased spending by teams on free agent players …." and quoting the NFLPA's director of communications that "[t]he players continue to gather evidence on possible collusion").)

In January 2011, with the SSA limitations deadline approaching, Appellants followed through on their threats and initiated an SSA action alleging collusion during the 2010 League Year. The initiation letter asserted that the "the full scope of the collusion at issue will be demonstrated at trial after full discovery is completed." (JA 2241.)

Appellants' broad discovery requests sought, among other things, "[a]ll documents regarding any and all communications between or among the NFLMC, the NFL, and/or any Clubs, regarding the structure or terms of 2010 player contracts" and all documents regarding any and all communications within the NFL or between the NFL and any Club discussing "player contract negotiations [or] player contract analyses or evaluations." (JA 2254–59, at Doc. Reqs. 12, 16 & 17.)

The Post-Expiration Labor Dispute. The SSA and CBA both expired on March 11, 2011. *Brady*, 644 F.3d at 663. Shortly before expiration, the NFLPA purported to disclaim its role as the collective bargaining representative of NFL players, and its lawyers (who were "Class Counsel" under the SSA) initiated a new antitrust lawsuit (*Brady*) against the League and the Clubs; upon expiration, the NFL exercised its right to lock out the players. *See generally id.* at 661–62.

By the spring of 2011, the labor dispute had spread to multiple fora: The NFLPA and Class Counsel were jointly pursuing in the *White* docket the collusion action (and another significant breach-of-SSA claim relating to television contracts and broadcast revenues). The NFLPA was sponsoring the *Brady* antitrust case challenging the lockout; that lawsuit also sought a declaration that in the *White* SSA, the NFL had waived its right to assert the non-statutory labor exemption. (Doc. No. 1, in *Brady*). The NFL was pursuing an unfair labor practice charge with the NLRB over the NFLPA's purported disclaimer. *See, e.g.*, *Brady*, 640 F.3d at 788–89.

Labor Peace. In August 2011, the parties reached a global agreement intended to provide a comprehensive resolution of any and all

disputes arising out of the expired SSA and the ensuing lockout. On August 4, 2011, after re-acknowledging its role as the players' exclusive bargaining representative, the NFLPA agreed with the NFL on a new, comprehensive CBA, which was ratified overwhelmingly by a vote of all NFLPA members after ample notice through the Union. The end of the lockout and the new CBA assured NFL players billions of dollars in compensation and benefits over a ten-year period.

Article 3, Section 3(a) of the new CBA provides that:

> the NFLPA "on behalf of itself [and] its members … releases and covenants not to sue, or to support financially or administratively … *any suit or proceeding* (including *any* Special Master *proceeding brought pursuant to* the *White* SSA … against the NFL or any NFL Club … including, *without limitation*, any claim relating to … *collusion with respect to any League Year prior to 2011*, or any claim that could have been asserted in *White* … related to any other term or condition of employment with respect to *conduct occurring prior to the execution of this Agreement*.

(JA 2200–01 (emphases added). A side letter agreement excepted from the release only the claim regarding the 2010 Philadelphia Eagles rookies referenced below.)

As part of the same comprehensive agreement and on the same day, the NFLPA and Class Counsel also filed this stipulation in the *White* docket:

STIPULATION OF DISMISSAL

The parties stipulate to the dismissal with prejudice of all claims, known and unknown, whether pending or not, regarding the Stipulation and Settlement Agreement ("SSA") including but not limited to the claims asserting breach of the SSA related to (i) television contracts and broadcast revenues; and (ii) asserted collusion with respect to the 2010 League Year, excepting only the pending claim filed March 11, 2011 relating to an alleged rookie shortfall on the part of the Philadelphia Eagles.

SO STIPULATED:

August 4, 2011

Class Counsel and Counsel for the NFLPA

Counsel for Defendants National Football League, et al.

(JA 2159.[2]) The NFL withdrew its pending NLRB charge and the parties also filed a stipulation of dismissal with prejudice in *Brady*.

In short, as part of the comprehensive resolution of their labor dispute, including unprecedented compensation and benefits in the 2011 CBA, the parties agreed in two separate agreements to dismiss and forgo (with only one minor exception) any claims regarding their prior relationship, specifically including any claims regarding the SSA.

[2] On August 11, 2011, the District Court entered a "Text Entry" Order in the *White* docket noting the dismissal of all claims pending regarding the SSA and all other outstanding motions. (JA 65.) *See generally* District of Minnesota ECF Filing Procedures Guide for Civil Cases § II.G.1(c) (text entries to be used only for "routine orders or notices").

The Petition for Leave To Re-Open and the Rule 60(b) Motion. On May 23, 2012, Appellants filed their Petition to Reopen in the *White* docket. They sought leave from the District Court again to bring an action, under the expired SSA, for collusion that had allegedly occurred two years earlier, during the 2010 League Year. The Petition alleged damages of "up to $1 billion, if not substantially more," on the theory that the NFL Clubs had a "secret Salary Cap" of $123 million for that year. (JA 74.)[3]

The Petition did not mention the Stipulation of Dismissal or the CBA release and covenant not to sue. It only briefly mentioned, in an effort to portray the asserted claim as "entirely new," the claim for collusion during the 2010 League Year that Appellants had brought in January 2011, pursued with broad discovery, and then dismissed. (*See id.*)

Three months later, while the Petition was still pending, Appellants filed a motion arguing that, if the District Court were to deny the Petition to Reopen because of the Stipulation of Dismissal, then it should set the Stipulation aside under Rule 60(b) on the ground that, by failing

[3] In fact, the record confirms that for the 2010 League Year, 21 of the 32 Clubs *exceeded* the alleged "$123 million cap"; most did so by more than $10 million. (JA 2386–87, JA 2391.)

to disclose the conduct that they subsequently sought to challenge, the NFL had fraudulently induced Appellants to dismiss with prejudice any unknown claims regarding the SSA. (JA 2166.)

The District Court Orders. On December 31, 2012, recognizing that, in the Stipulation of Dismissal, the NFLPA and Class Counsel had "released the claims [they] attempt[] to assert in the underlying action," the District Court denied the Petition. (Add. 10.)

The NFLPA and Class Counsel then requested leave to conduct discovery focused on whether there had been a secret $123 million Salary Cap in the 2010 League Year; notwithstanding the fact that the NFLPA had publicly alleged such a cap two years before (JA 2216), they argued that such discovery (which went to the merits of the action that the District Court had denied them leave to pursue) would support their Rule 60(b) challenge to the Stipulation of Dismissal. (JA 2396.)

On February 13, 2013, holding that "declining to reopen the matter achieves the appropriate balance between bringing litigation to a close and satisfying the equitable principles of Rule 60(b)" and following two decisions of this Court, the District Court denied the Rule 60(b) Motion. (Add. 18.) This consolidated appeal followed.

SUMMARY OF THE ARGUMENT

Now that they have received substantial benefits from the comprehensive labor agreement, Appellants contend that the Stipulation of Dismissal *that they signed* (and the Collective Bargaining Agreement *that they negotiated* and which was overwhelmingly ratified by players whom *they represent*) are not enforceable absent judicial approval because, by entering into those agreements, *Appellants* jeopardized the interests of unidentified players whom at the time *they represented*.

Appellants make these arguments notwithstanding their own contractual commitments to dismiss, and to release and covenant not to bring, the very claims that they sought leave to assert. They ignore the fact that they knowingly and voluntarily dismissed and released those claims as part of a comprehensive *quid pro quo* for labor peace, the end of the lockout, and a new CBA providing extensive consideration that NFL players have accepted and indeed embraced.

This Court should affirm the District Court and reject Appellants' hollow plea to be rescued from themselves. Their attempt to escape their commitments on the ground that the Stipulation of Dismissal was procedurally deficient fails for several reasons.

First, the claims released by the Stipulation of Dismissal are not the claims of a certified class; no Rule 23(e) procedures were required.

Second, even if Rule 23(e) process would otherwise have applied, as a matter of federal labor law the NFLPA's agreement to the Stipulation of Dismissal both released the claims of any NFL player who could have asserted injury from collusion in the 2010 League Year and mooted the Rule's procedural requirements. In addition, Appellants' procedural complaints about the Stipulation of Dismissal are barred by their own failure to request Rule 23 process.

Third, Appellants' argument that the Stipulation of Dismissal was void because it exempted one SSA claim is both waived (not having been raised below) and frivolous. That argument ignores both the language of the SSA and the holdings of the cases upon which Appellants rely.

Appellants' attempt to invalidate the Stipulation of Dismissal under Rule 60(b) is also unavailing.

To begin, the District Court correctly followed the plain language of the Rule in concluding, consistent with two prior unanimous panels of

this Court, that Rule 60(b) relief is not available from a voluntary stipulation of dismissal, which is not a "final judgment, order or proceeding."

Moreover, even if the Rule could apply to a voluntary dismissal, Appellants did not—and could not—assert any valid basis for undoing their knowing decision to dismiss unknown claims. There is simply no basis for Rule 60(b) relief in these circumstances.

This Court may also affirm both Orders on the alternative ground that Appellants' attack on the Stipulation of Dismissal is futile in light of the independent release and covenant not to sue in the 2011 CBA, or in light of the expiration of the express limitations period in the SSA for claims of collusion.

In sum, this Court should affirm the District Court's Orders, upholding the parties' intention, reflected in the multiple agreements that bar Appellants' claim, to close the book on the SSA and their prior labor relationship in favor of the new CBA.

STANDARD OF REVIEW

This Court reviews the District Court's Orders denying Appellants' requests for post-judgment relief for a clear abuse of discretion. *See Roark v. City of Hazen*, 189 F.3d 758, 761 (8th Cir. 1999) ("A district court has broad discretion in determining … a motion for post judgment relief, and we will not reverse absent a clear abuse of discretion."); *Abernathy v. Mo. Pac. R.R.*, 972 F.2d 353 (8th Cir. 1992) ("Although [plaintiff] did not specify under which rule … her motion to reopen fell, we believe it is properly characterized as a Rule 60(b) motion.").

"[R]eversal of a district court's denial of a Rule 60(b) motion is rare." *Int'l Bhd. of Elec. Workers v. Hope Elec. Corp*, 293 F.3d 409, 415 (8th Cir. 2002). Relief "is to be granted only in exceptional circumstances requiring extraordinary relief," *Nelson v. Am. Home Assur. Co.*, 702 F.3d 1038, 1043 (8th Cir. 2012), and when a party seeks such relief regarding claims that it voluntarily dismissed, "its burden is perhaps even more formidable than if it had litigated the claim and lost." *Middleton v. McDonald*, 388 F.3d 614, 616 (8th Cir. 2004).

This Court may affirm "on any basis supported by the Record." *Jones v. United States*, 255 F.3d 507, 511 (8th Cir. 2001).

ARGUMENT

Part I demonstrates that the District Court's denial of the Petition to Reopen should be affirmed. Part II demonstrates that the District Court's denial of the Rule 60(b) motion should be affirmed. And Part III explains that, in the alternative, this Court may affirm both Orders on either of two independent grounds: (A) that the release and covenant not to sue in the 2011 CBA independently precludes the action that Appellants sought leave to bring; or (B) that Appellants' action was untimely under the SSA.

I. The Stipulation of Dismissal Bars Claims For Collusion With Respect to the 2010 League Year.

The District Court's decision to deny the "Petition To Reopen" was correct because the Petition sought leave to assert a claim that had been dismissed with prejudice and hence released by the Stipulation of Dismissal. Appellants' attacks on the validity of the Stipulation of Dismissal for asserted failure to follow the procedures of Rule 23(e) have no basis whatsoever.

A. By its plain terms, the Stipulation of Dismissal bars the SSA action that Appellants sought leave to bring.

It cannot reasonably be disputed that the Stipulation of Dismissal covers the breach-of-SSA action that Appellants sought leave to assert. On August 4, 2011, the NFLPA and Class Counsel stipulated

> to the dismissal with prejudice of *all claims, known and unknown, whether pending or not, regarding the Stipulation and Settlement Agreement ("SSA")* including but not limited to the claims asserting breach of the SSA related to (i) television contracts and broadcast revenues; and (ii) asserted collusion with respect to the 2010 League Year, excepting only the pending claim … relating to an alleged rookie shortfall on the part of the Philadelphia Eagles.

(Add. 6 (emphasis added); *see also* JA 2159.)

The action that Appellants sought leave to bring is for breach of the Stipulation and Settlement Agreement's anti-collusion provisions. That is indisputably a claim "regarding the Stipulation and Settlement Agreement." Accordingly, whether it was "known" or "unknown," and whether it was "pending or not," it was dismissed with prejudice. (*Id.*)

The fact that the claims in the Petition are also of a kind to which the Stipulation of Dismissal specifically refers—a claim for "breach of the SSA related to … asserted collusion with respect to the 2010 League Year"—only reinforces the conclusion. The same follows from the Stipu-

lation's express exclusion of "only" the action alleging that the Eagles had failed to distribute certain sums; *expressio unius est exclusio alterius*. *See, e.g.*, *Minn. Licensed Practical Nurse's Ass'n v. NLRB*, 406 F.3d 1020, 1024 (8th Cir. 2005).

In the face of the unambiguous text of the Stipulation of Dismissal, Appellants argue that the word "asserted" limits the collusion claims that were released to claims that had already been "asserted." (App. Br. 26 n.8). But the word "asserted" modifies "collusion," to which it is adjacent, not "claims"; its role is to make clear that the NFL disagreed with any suggestion that collusion had occurred. The claims that were dismissed, in contrast, were "*all* claims, known and unknown, *whether pending or not*," regarding the SSA. (JA 2159 (emphasis added).)

Recognizing the plain language of the Stipulation of Dismissal, the District Court held that "the NFLPA [and Class Counsel had] released the claims it attempts to assert in the underlying action." (Add. 10; *see id.* 2.) That holding was undeniably correct and should be affirmed.

B. The Stipulation of Dismissal is not invalid under Rule 23.

Appellants contend that the Stipulation of Dismissal is of no force and effect because the District Court did not hold a Rule 23(e) hearing

to address the reasonableness of its terms. (*See, e.g.*, Br. 1, 8 (the District Court "abdicated the judicial oversight and approval expressly required by" Rule 23(e) and assumed the role of an "impotent bystander").) That argument fails for at least three reasons.

First, Rule 23(e) did not apply to the Stipulation of Dismissal because the dismissed claims were not the claims of a certified class.

Second, Rule 23(e) did not apply because the NFLPA, the players' union, signed the Stipulation of Dismissal, thereby precluding any challenge based upon Rule 23. Under the National Labor Relations Act, the Union has sole and exclusive authority, not subject to judicial review, to bargain over claims relating to terms and conditions of employment that its members might have, and it exercised that authority here.

Third, Appellants' own failure to seek Rule 23 process precludes their procedural attack on their own Stipulation.

1. Rule 23 does not govern the claims that Appellants sought leave to bring because those claims are not the claims of a "certified class."

Parroting the language of the Rule, which refers to court review of the settlement, compromise or voluntary dismissal of "[t]he claims, issues or defenses *of a certified class*," Appellants' Rule 23(e) challenge

rests entirely on the repeated *ipse dixit* that the claims in the Petition are "Class claims." (*E.g.*, Br. 37; Br. 36 ("The Petition claims … are 'claims' of the certified *White* Class"; Br. 38 ("The SOD expressly preserved certain specified Class claims"); Br. 48 ("Rule 23(e) compliance [was necessary] for the compromise of Class claims in the SOD to become effective."). That *ipse dixit* is wrong for a host of reasons.

As a threshold matter, "Rule 23(e) only requires court approval of the dismissal or compromise of '[the] class action' itself; it in no way suggests that negotiated resolutions of disputes peripheral to the class action need be approved." *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 4 (1st Cir. 1999); *see also Rodgers v. U.S. Steel Corp.*, 70 F.R.D. 639, 642 (W.D. Pa. 1976) ("By its terms, Rule 23 applies and is limited to the dismissal or compromise of a class action itself ….").[4] The

[4] Appellants argued below that *Duhaime* and *Rodgers* are not relevant because they were decided prior to an amendment to Rule 23(e) that replaced "class action itself" with "[t]he claims, issues, or defenses of a certified class." But that amendment was intended to *narrow* the scope of settlements for which court approval was required. *See* 2003 Advisory Comm. Cmt. ("Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of 'a class action.' That language could be—and at times was—read to require approval of settlements with putative class representatives that resolved only individual claims. The new rule requires approval only if the 'claims, issues or defenses of a certified class' are settled.").

claims that Appellants sought leave to assert here do not constitute the "class action itself."

First, the claims that Appellants sought leave to assert are completely different from the causes of action asserted in the *White* lawsuit. The *White* class claims were antitrust claims; they sought injunctive relief as to certain terms and conditions of employment in the NFL. Those class claims were "dismissed on the merits, with prejudice," by the Final Consent Judgment two decades ago. (JA 1115.)

The damages claims asserted in the Petition, in contrast, are claims for breach of the SSA. They are not and could not be antitrust claims; because the terms and conditions of player employment had been established by a collective bargaining agreement, any antitrust claims would have been barred by the non-statutory labor exemption. *See Brown v. Pro-Football, Inc.*, 518 U.S. 231 (1996).

Second, only a handful, if any, of the members of the *White* class—and certainly none of the plaintiffs in *White*—could have been affected by the claims asserted in the Petition.

The *White* class does not include any players who became eligible to play in the NFL after June 12, 1995. (*See* pp. 7–8, *supra*.) The players

allegedly injured by collusion were those who entered into NFL player contracts during the *2010* League Year, fifteen years later. All but a handful of the *White* class members had retired by that time; conversely, the overwhelming majority of players who entered into player contracts during the 2010 League Year were too young to have been members of the *White* class. It would make little sense to consider claims arising in 2010 to be "class claims" when there is so little overlap between the class membership and the potential claimants.[5]

Third, the mere fact that the Petition alleged breaches of the SSA does not mean that the Petition asserted the claims of a certified class. The SSA itself plainly contemplates claims by individual players, or groups of players, separate from any class. Specifically, in the context of claims for breach of its anti-collusion provisions, the SSA provides that a collusion claim may be brought by "any player, Class Counsel, or any Players Union acting on that player's or any number of players' behalf." (JA 1964 (SSA, Art. XIII, § 5).)

[5] The SSA action brought on behalf of the Eagles' 2010 rookies further proves the point: None of those rookies was a member of the *White* class because none was eligible to play in the NFL as of June 12, 1995.

The SSA's use of the term "player" and not the term "Class" or "Class Members"—which is specifically defined as a subset of "players" (JA 1771 (SSA Art. I(d))—is telling. Class Counsel could bring a collusion claim on one or more players' behalf without bringing a claim on behalf of the *White* class or even a *White* class member. Even Class Counsel's participation is unnecessary; the SSA's use of the disjunctive "or" demonstrates that the NFLPA could independently bring such a claim. If one need not be a member of the *White* class to bring an action for breach of the SSA, *a fortiori* such claims are not "class claims."

Fourth, Appellants' contention that breach-of-SSA claims may be compromised or dismissed only with court approval under Rule 23(e) is at odds with the text of the SSA, as well as with the parties' prior practice under it. Nothing in the SSA limits, or conditions upon court approval, the right of "any player," "any number of players," or "any Players Union" (or, for that matter, Class Counsel) to settle, dismiss or release actions alleging breaches of the SSA.

To the contrary, the SSA obligated the parties to attempt to "negotiate a resolution" of disputes alleging collusion (JA 1972 (SSA Art. XIII, § 18)), but did not require the District Court's approval of any such ne-

gotiated outcome. And the parties often did resolve disputes without involving the District Court.[6]

No party has ever suggested that such resolutions required Rule 23(e) review, let alone that they could be set aside for failure to obtain court approval. Indeed, claims of individual class members under a class action settlement or consent decree are routinely compromised, settled, or released without Rule 23 hearings or findings; any other rule would be unreasonable and unworkable. *See, e.g.*, *Pigford v. Vilsack*, Monitor's Final Report, No. 97-1978 (D.D.C. March 31, 2012), at 53 tbl. 10 (reporting that the government settled 75 claims brought by members of a class who, under a class action settlement with the USDA, could seek individualized compensation under that settlement).

In short, the claims that Appellants sought leave to bring are not the claims of the *White* class.

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[6] *See, e.g.*, John Clayton, *Ravens' Suggs to be designated as a franchise defensive end-linebacker*, ESPN.com (May 13, 2008), *available at* http://sports.espn.go.com/nfl/news/story?id=3394771 (noting settlement of SSA dispute regarding the appropriate amount of the Franchise Tender to apply to Mr. Suggs); ESPN.com, *Ravens, Niners compensated in settlement* (Mar. 17, 2004), *available at* http://sports.espn.go.com/nfl/news/story?id=1760284 ("Stephen Burbank, the arbitrator for disputes between the NFL and its players' union, heard two hours of arguments from lawyers Monday concerning the case, but didn't issue a ruling because a compromise was reached.").

2. In any event, Rule 23 has no application here because, exercising its authority under the labor laws, the NFLPA agreed to the Stipulation of Dismissal.

The District Court recognized that the NFLPA was the "exclusive bargaining authority" for NFL players (Add. 4) and that in the Stipulation of Dismissal, the NFLPA had "released the claims it attempts to assert in the underlying action." (Add. 10.) The Union's agreement to the Stipulation of Dismissal, an exercise of its statutory authority under the labor laws, was not subject to review for reasonableness—and is not subject to challenge—under Rule 23.

There is no question that, under the National Labor Relations Act, the NFLPA had authority to bargain over, and ultimately to agree to, the release and dismissal of its members' claims or potential claims relating to terms and conditions of their employment. *See, e.g.*, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983) (A "union may bargain away its members' economic rights"). *Accord, e.g.*, *Ia. Beef Processors, Inc. v. Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO*, 597 F.2d 1138, 1144 (8th Cir. 1979) (affirming enforcement of broad "no strike" provision in a collective bargaining agreement); *Mont.-Dak. Utilities Co. v. NLRB*, 455 F.2d 1088, 1093–94

(8th Cir. 1972) ("We hold that under the bargaining contract as a whole … the Union and the members which it represents waived any right they might otherwise have had ….").

Indeed, it is black-letter law that "employees are bound by their union's decisions as *quid pro quo* for the benefit they receive from collective bargaining." *Monahan v. N.Y. City Dep't of Corrections*, 214 F.3d 275, 287 (2d Cir. 2000); *see also Espinoza v. Cargill Meat Solutions Corp.*, 622 F.3d 432, 442 (5th Cir. 2010) (recognizing the "right of the union to waive some employee rights … [including] an employee's right to sue"); *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 449 (D.C. Cir. 2004) (overruling NLRB refusal to enforce a settlement agreement between union and employer over objection of a union member).[7]

Appellants do not challenge the NFLPA's exclusive labor law authority to release or dismiss the claims or potential claims of its members. Instead, they simply assert, without authority or any other support,

[7] As part of the *quid pro quo* for the Stipulation of Dismissal, the NFLPA secured for its members the end of the lockout and a new CBA, under which, as Class Counsel informed NFLPA members, "players are now receiving more in cash than they ever received under the prior CBA, both on a percentage and dollar basis." *See* http://proplayerinsiders.com.s3.amazonaws.com/2012/05/First-Year-CBA-Analysis.pdf (last visited June 12, 2013); *see id.* (also noting "additional payments to veterans and/or former players").

that "the mandatory nature of court approval under Rule 23(e) … renders irrelevant any NFL argument that … the NFLPA … had authority to bind players whom [it] represented." (Br. 57 n.19.)

Appellants have it backwards. As the Rules Enabling Act, 28 U.S.C. § 2072(b), makes clear, the NFLPA's exercise of its exclusive labor law authority in negotiating and executing the Stipulation of Dismissal conclusively undermines any rules-based challenge to its validity. The Supreme Court has repeatedly held that "no reading of [Rule 23] can ignore the Act's mandate that rules of procedure 'shall not abridge … or modify any substantive right.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815,845 (1999) (citation and internal quotation marks omitted). *Accord Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2561 (2011).

The substantive rights that Appellants ask this Court to abridge—the statutory rights of unions and their members to negotiate and reach agreements with management, and the related right of management to rely on such agreements—are especially compelling here in light of Congress' unambiguous intention, in establishing the NLRA and encouraging collective bargaining, to bar federal courts from reviewing the reasonableness of agreements between unions and management: "Con-

gress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 488 (1960). Thus, as the Supreme Court has recognized: "Judicial nullification of contractual concessions … is contrary to what the Supreme Court has recognized as one of the fundamental policies of the National Labor Relations Act—freedom of contract." *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 257 (2009).

Moreover, Appellants' rules-based challenge to the validity of the Union's stipulation is totally divorced from the underlying purpose of Rule 23, which is to protect unrepresented, *absent* class members from secret or out-of-court settlements. (Br. 40–41).[8]

Here, the players' union, acting pursuant to its authority under the NLRA, was the "sole and exclusive" representative of any and all class

[8] If Rule 23 applied, *absent* class members, not the authors or proponents of the settlement, would be the only ones with standing to object to the absence of Rule 23(e) process. *See, e.g.*, *In re Gen. Motors Pick-Up Truck Fuel Tanks Prods. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995) (noting that if class claims are settled without notice or a fairness hearing, "*absentees* have an action to enjoin the settlement"). Given the labor law overlay and the role of the Union, if any player is unhappy with the Stipulation of Dismissal, his remedy is a claim against the NFLPA for breach of its duty of fair representation.

members who might have had a claim for collusion. Hence, there were no unrepresented *absent* class members with potential claims, and no need for the procedures of Rule 23(e). And the CBA ratification process, overseen by the NFLPA, ensured not only that its members were notified and fully informed of the settlement terms, but also that they had a voice in their approval, thereby fully satisfying any notice issues.

At bottom, then, Appellants' assertion that Rule 23 "renders irrelevant" the NFLPA's dismissal with prejudice of any actions for breach of the SSA "amounts to an unsustainable collateral attack on the NLRA." *14 Penn Plaza,* 556 U.S. at 249; *see id.* at 271 ("It was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands."). The NFLPA's agreement to the Stipulation of Dismissal mooted Appellants' Rule 23-based challenge—not the other way around.

3. Equitable principles also bar Appellants' attack on the validity of the Stipulation of Dismissal.

The relief that Appellants seek—"reopening" terminated litigation and setting aside a stipulated dismissal—is equitable in nature. And "one who seeks equity must come with clean hands." *Smith v. World Ins. Co.*, 38 F.3d 1456, 1463 n.2 (8th Cir. 1994).

Accordingly, courts routinely refuse to entertain claims not only when relief is sought in violation of a release or covenant not to sue, *see, e.g.*, *In re Gen. Am. Life Ins. Co. Sales Practices Litig.,* 357 F.3d 800, 803 (8th Cir. 2004), but also when the party seeking relief shares responsibility for the procedural deficiencies said to require remedy, *see Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 127 (2d Cir. 2009). Courts have similarly rejected litigants' attempts to "have their cake and eat it too" in seeking relief from a release while retaining the benefits of their settlement. *See, e.g.*, *Fleming v. U.S. Postal Service AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994).

Assuming *arguendo* that there is a procedural deficiency—if Rule 23(e) procedures were required, as Appellants contend—these equitable principles would apply with compelling force to bar Appellants' attempt to reopen the SSA. The gravamen of Appellants' argument is that they should be permitted to do so because of an asserted procedural failure for which *they* were substantially, if not principally, responsible. *See Greenfield v. Villager Industries, Inc.,* 483 F.2d 824, 832 (3d Cir. 1973) ("Responsibility for compliance with [class action procedures] is placed

primarily upon the active participants in the lawsuit, *especially upon counsel for the class*.") (emphasis added).

Appellants were fully aware of Rule 23 and the circumstances in which it applies. The original SSA, signed twenty years ago by the same lawyer who signed the Stipulation of Dismissal "as Class Counsel and Counsel for the NFLPA," included provisions addressing all of Rule 23's requirements, including notice to the *White* class, a fairness hearing, and preliminary and final Court approval. (JA 1299–1300 (SSA Art. XXIII).) In contrast, in agreeing to the Stipulation of Dismissal, Appellants did not include any provisions requiring notice to any class, hearings before any court, or judicial review of the fairness of its terms. *Appellants*' failure to provide for or to seek Rule 23(e) review speaks volumes, especially in light of their assertion that *the Court* abdicated its judicial oversight role by not convening Rule 23 hearings. (Br. 1, 8.)

The equitable considerations against Appellants here are even more compelling because they seek relief in breach of their contractual commitments (*see* pp. 23–24, 53–56), while retaining all of the benefits that they secured in the global negotiations, including an end to the lockout and the benefits of the new CBA (*see* p. 32 n.7 above, and p. 45, below).

C. The Stipulation of Dismissal is not invalid under Rule 41.

A stipulation of dismissal operates automatically, without any further action by the court. *See* Fed. R. Civ. P. 41(a); *United States v. Altman,* 750 F.2d 684, 696 (8th Cir. 1984); *Gardiner v. A.H. Robins Co., Inc.* 747 F.2d 1180, 1189 (8th Cir. 1984).

Appellants contend (Br. 58) that the Stipulation of Dismissal is invalid under Rule 41 because, given the express exception for the dispute over the Eagles' rookies' compensation, it "d[id] not dismiss an entire 'action' as the Rule requires."

Appellants did not make this argument below; they may not make it now. *E.g., Copeland v. ABB, Inc.*, 521 F.3d 1010, 1015 n.5 (8th Cir. 2008) ("[T]his argument is waived because [Appellant] did not raise it before the district court.").

The argument is also misconceived. The SSA specifically describes each claim for breach of the SSA as "an action." (JA 1964 (SSA Art. XIII, § 5 ("[A]ny player, Class Counsel, or any Players Union … may bring *an action* before the Special Master alleging [collusion]" (emphasis added))).) Even under Appellants' hyper-technical view of the Rule, each claim is an "action" that can be dismissed by stipulation.

Moreover, the cases that Appellants cite do not bar dismissal of some, but not all, of a plaintiff's claims; they merely address the two alternative vehicles by which that can be accomplished—stipulation of dismissal under Rule 41(a) or amendment of the complaint under Rule 15(a). *See Wilson v. Crouse-Hinds Co.*, 556 F.2d 870, 873 (8th Cir. 1977) (noting that whether a party should follow Rule 15(a) or Rule 41(a) "when dismissing less than all of the claims in an action" is a "difference[] more technical than substantial").

Here, of course, there was no viable complaint to amend under Rule 15 because the *White* complaint, the *White* "action," and all of the "claims and counterclaims set forth in [the *White*] action" were dismissed more than twenty years ago by the Final Consent Judgment. (JA 1115.)

The implication of Appellants' argument is that in these circumstances there was *no* vehicle by which the parties could have resolved or dismissed actions for breach of the SSA without Court approval. But this Court has never applied Rule 41 in such a rigid manner. *See, e.g., Johnston v. Cartwright*, 355 F.2d 32, 39 (8th Cir. 1966) (Blackmun, J.) (noting that while some cases in other Circuits held that Rule 41 can

apply only to an entire action, as opposed to particular claims, "[w]e would be inclined to favor, however, the liberality of the contrary view"). Appellants' position also contradicts Federal Rule of Civil Procedure 1's mandate to "construe[] and administer[the Rules of Procedure] to secure the just, speedy, and inexpensive determination of every action and proceeding."

* * * *

For all of the foregoing reasons, the District Court did not err or commit a clear abuse of discretion in denying the Petition to Reopen. It cannot be error or an abuse of discretion to decline a request for leave to bring claims that have been released. S*ee, e.g., In re Gen. Am.,* 357 F.3d at 803.

The District Court also stated that "the court is without jurisdiction" (Add. 10), and Appellants fixate on that phrase. But in context it is clear that the District Court was recognizing that the Petition was futile in light of the Stipulation of Dismissal. (*See* Add. 7 ("The NFL argues that the court should deny the petition to reopen because (1) the NFLPA dismissed with prejudice all claims relating to the SSA …. Because the NFLPA dismissed all claims pertaining to the underlying

action, the court need only address the NFL's first argument."); Add. 10 ("*In other words*, the NFLPA released the claims it attempts to assert in the underlying action.") (emphasis added).

Appellants also strain to find error in the District Court's treatment of the Final Consent Judgment, but their extensive discussion (Br. 50–57) is beside the point. The District Court did not vacate the Final Consent Judgment. (*See* Add. 10 n. 9.) Rather, it reached the logical and inevitable conclusion that after Appellants had dismissed with prejudice all possible claims under the SSA, which had long since expired, there was nothing left for the District Court to enforce.

II. The District Court Correctly Denied Appellants' Rule 60(b) Motion.

In August 2012, nearly a year after (1) stipulating to the dismissal with prejudice of any breach-of-SSA claims, (2) releasing in the CBA and covenanting not to bring such claims, and (3) realizing enormous benefits from the end of the lockout and the comprehensive labor agreement, Appellants brought what they characterized as a "precautionary, prophylactic" motion to set aside the Stipulation of Dismissal in case their attack on its effectiveness failed.

After the District Court denied the Petition To Reopen, they sought leave to pursue additional discovery in support of their theory that the NFL had breached the SSA's anti-collusion provisions during the 2010 League Year. They argued that, if there were evidence of such collusion of which they had been unaware, they would not have agreed to the Stipulation of Dismissal; accordingly, they contended that the Stipulation of Dismissal (but not the rest of the comprehensive labor agreement of which it was a part) should be undone on the ground that it was "fraudulently" obtained.

Recognizing that "declining to reopen the matter achieves the appropriate balance between bringing litigation to a close and satisfying the equitable principles of Rule 60(b)," the District Court denied their request. (Add. 18.) That holding was correct, and certainly not a clear abuse of discretion.

A. Under its plain language, Rule 60(b) affords District Courts authority to grant relief from judicial determinations, but not from voluntary dismissals.

Rule 60(b) provides that a party may seek relief from "a final judgment, order, or proceeding." The voluntary Stipulation of Dismissal from which Appellants sought relief is none of those things. As the Dis-

trict Court concluded, "there is no final judgment or order … for the court to overturn." (Add. 21.)

That determination was correct. Appellants did not seek relief from a "final judgment." The final judgment in this case was entered in August 1993, two decades ago, and Appellants did not seek to upset or overturn it. Nor did they seek relief from an "order," final or otherwise. The Stipulation of Dismissal was a voluntary, self-effecting filing by the parties rather than a directive or mandate from the Court. And Appellants plainly did not seek relief *from* a "proceeding"; to the contrary, they had stipulated to end their proceeding and sought leave to *initiate* or *reopen* one.

Nonetheless, Appellants contend (Br. 62) that because a stipulated dismissal has the "same res judicata effect" as a final judgment or order, it should be treated *as if* it were a final judgment for purposes of Rule 60(b). There is no justification for such an atextual expansion of the Rule, particularly based on an analogy to common law principles of *res judicata* that *favor* finality.

The Rule's plain language demonstrates an intent to create a vehicle to overturn *judicial* determinations when circumstances warrant; nei-

ther the language of the Rule nor the accompanying commentary suggests that the rulemakers intended similar exceptions to principles of finality for claims that had been dismissed voluntarily or by agreement. Indeed, such dismissals are specifically described as "*[w]ithout a Court Order*." Fed. R. Civ. P. 41(a)(1)(A); *see also State Treasurer of Michigan v. Barry,* 168 F.3d 8, 19 n.20 (11th Cir. 1999) (noting the distinction between the court's "own orders" and "the parties' stipulation" and that the absence of a court order is a "stumbling block" to Rule 60(b) relief from a stipulated dismissal).

Nor would it have made sense so to expand the Rule. Judicial determinations stand alone; they rest on their own records and are decided by the district court independently. Voluntary dismissals, in contrast, are often part of broader settlements with consideration flowing in both directions; such settlements would be difficult, if not impossible, to unwind if the dismissal could be set aside months or even years after the settlement was consummated. The District Court so recognized when it observed that neither the SSA nor the Final Consent Judgment contemplated judicial review, after SSA expiration, of "prospective" agreements between the parties. (Add. 9.)

The Stipulation of Dismissal here, for example, was an integral part of a much broader comprehensive agreement, including a new ten-year collective bargaining agreement, to bring labor peace to professional football. Appellants do not seek to rescind that global agreement; they have not offered to return the consideration that they have received. Allowing them selectively to challenge only those parts of the agreement about which they have second thoughts would be antithetical to principles of finality.

Indeed, disturbing the finality of such dismissals would inevitably thrust district courts into a thicket extending far beyond the claims that had been dismissed in the first instance. *See generally, e.g., Fleming*, 27 F.3d at 260 ("The principal that a release can be rescinded only upon a tender of any consideration received … is a general principle of contract law."); *Brown v. City of S. Burlington,* 393 F.3d 337, 345 (2d Cir. 2004) ("Avoiding a contract of release … requires a return of any consideration received by the releasor."). In these circumstances, the rulemakers' decision to afford finality to voluntary dismissals, but not to judicial determinations, makes perfect sense.

B. Two decisions of this Court confirm the plain meaning of Rule 60(b).

The District Court's conclusion—that under the plain meaning of its terms, Rule 60(b) did not afford the court power to set aside a voluntary stipulation of dismissal—is identical to the conclusion reached by two unanimous panels of this Court. *See Ajiwoju v. Cottrell*, 245 Fed. App'x 564 (8th Cir. 2007) (per curiam) (unpublished); *Scher v. Ashcroft*, 960 F.2d 1053, 1992 WL 83547 (8th Cir. 1992) (per curiam) (unpublished).

In *Ajiwoju*, after settling a dispute, the plaintiff filed a stipulation of dismissal. *See* 245 Fed. App'x at 564. As Appellants did here, the plaintiff later asserted "that the settlement was unfavorable and fraudulent" and asked the "court to set aside the stipulation pursuant to Federal Rule of Procedure 60(b)." *Id.*

This Court affirmed the district court's ruling that the court "lacked jurisdiction to set aside the stipulated dismissal." *Id.* It observed that "[b]ecause such a dismissal is effected without a court order, there is no final order or judgment from which a party may seek relief under Rule 60(b), and the district court thus lacks jurisdiction to grant a Rule 60(b) motion." *Id.* at 565. And it held that the district court did not abuse its discretion in denying the Rule 60(b) motion. *See id.*

Scher also involved a situation virtually identical to that presented here. The parties settled; plaintiff's counsel filed a stipulation of dismissal; several months later, the plaintiff moved to set aside that dismissal. *See* 960 F.2d at 1053. The district court denied the motion and this Court affirmed, holding that because a "voluntary dismissal by stipulation … is effected without order of the court, … there is no final order or judgment from which a party may seek relief under Rule 60(b)." *Id*. (citing *Altman*, 750 F.2d at 696–97).[9]

[9] Relying on Eighth Circuit Rule 32.1A, Appellants argue (at 61) that *Ajiwoju* and *Scher*, both unpublished opinions, are not binding on this Court. The constitutionality of that Rule "remains an open question in this Circuit." *Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000) (*en banc*), *vacating as moot Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) (Richard Arnold, J.). For the reasons persuasively explained by Judge Arnold, the rule "that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'" 223 F.3d at 899; *see also id.* at 905 (Heaney, J., concurring) ("I agree fully with Judge Arnold's opinion."). This Court can and should avoid that constitutional question, however, by simply relying on the persuasive force of its prior analyses of this issue, as the *Ajiwoju* panel did in following *Scher*, and as the District Court did below.

C. The cases from other jurisdictions upon which Appellants rely are inapt or unpersuasive.

Appellants urge this Court to disregard the plain meaning of Rule 60(b), which they contend leads to "impermissible form-over-substance decision making" (Br. 62), and instead to follow "authority" from other Circuits that, upon examination, provides insubstantial support for their position.

Almost all of the cases upon which Appellants rely follow, without any analysis of the relevant language, *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985). But the claims at issue in *McCall-Bey* were *not* dismissed by voluntary stipulation; they were dismissed *by court order*. *Id.* at 1182, 1184–85.[10] Moreover, as the District Court here recognized, the Seventh Circuit in *McCall-Bey* "did not specifically address the interplay between Rules 41 and 60" (Add. 20); it simply noted that dismissed cases may be reopened "*within the scope allowed* by Rule 60(b)." *McCall-Bey*, 777 F.2d at 1190. That statement is a truism; it was

[10] The parties in *McCall-Bey* had signed a stipulation of dismissal, "but it was not filed with the district court [until] five days after the court had dismissed the suit." *Id.* at 1182. Thus, the Seventh Circuit held that "[t]he only provision in the Federal Rules of Civil Procedure for voluntary dismissal by order of court that could apply here is Rule 41(a)(2)." *Id.* at 1185.

plainly accurate in the context of the dismissal *order* at issue in that case, but it does not even purport to delineate the "scope allowed" by Rule 60(b) in other contexts.

Similarly, in *Hinsdale*, like *McCall-Bey*, "*the district court* dismissed" the case with prejudice; moreover, a Rule 60(b) motion was not even before the Court. *Hinsdale v. Farmers Nat'l Bank & Trust Co.*, 823 F.2d 993, 995 (6th Cir. 1987); *see also* Add. 20 ("*McCall-Bey* and its progeny [are] of limited persuasive authority" on the question of Rule 60's application to Rule 41(a)(1)(ii) dismissals).

Smith v. Phillips, 881 F.2d 902, 904 (10th Cir. 1989) did involve a stipulation of dismissal, but it did not involve a Rule 60(b) motion. In any event, the court held that the "stipulation of dismissal divested the district court of any jurisdiction." In almost all of the other cases upon which Appellants rely, the Rule 60(b) motion was denied. *E.g., Nelson v. Napolitano*, 657 F.3d 586 (7th Cir. 2011).

In short, the "overwhelming weight of authority" trumpeted by Appellants is illusory. *See also, e.g., Anago Franchising, Inc. v. Shaz*, 677 F.3d 1272, 1278 (11th Cir. 2012) ("[D]istrict courts … may not take action after the stipulation [of dismissal] becomes effective because the

stipulation dismisses the case and divests the court of jurisdiction.") The plain language of the Rule, and its sensible policy of preserving the finality of complex negotiated settlements of which stipulated dismissals are often a part, conclusively undermine Appellants' position.

D. In any event, Appellants failed to assert any proper ground for Rule 60(b) relief.

Finally, even if the District Court should have considered the Stipulation of Dismissal to be a "final judgment" for purposes of Rule 60(b), denial would still have been required because Appellants did not—and could not—assert any proper ground for Rule 60(b) relief.

"[T]he vast bulk of reported fraud cases under Rule 60(b) … involve fraud or misstatements perpetrated in the course of litigation or other misconduct aimed directly at the trial process; those few litigants who seek to utilize Rule 60(b) fraud motions *to redress non-litigation conduct* are typically rebuffed *at the threshold*." *Roger Edwards, LLC v. Fiddes & Son Ltd.*, 427 F.3d 129, 134 (1st Cir. 2005) (emphasis added). The same result is required here.

Appellants sought Rule 60(b) relief on the ground that *they* had been defrauded, outside of this case, into entering into the Stipulation of Dismissal. The basis of this alleged "fraud" is that—despite having pub-

licly alleged such collusion a year prior to entering into the Stipulation of Dismissal—Appellants purportedly did not know about the allegedly "unknown" claim of collusion that they were dismissing, and the League did not tell them. That assertion cannot warrant Rule 60(b) relief.

First, Appellants do not and could not allege that the NFL engaged in any "misconduct aimed directly at the trial process" or even the settlement process. *Roger Edwards*, 427 F.3d at 134. All they point to is an entirely accurate, out-of-court public statement from an NFL press spokesman stating that the SSA "calls for no salary cap in 2010." (*See* Br. at 33–35.) That is far from sufficient to satisfy the requirements of Rule 60(b).

Second, even if out-of-court misconduct could suffice as a basis to vacate a stipulation of dismissal, persuading a party to release "unknown" claims without first making them "known" cannot be misconduct. If that were the case, it would be impossible to release unknown claims. Put differently, Appellants' voluntary release of "unknown claims" precludes any allegation of fraud in the inducement. As this Court has explained, "there is no doubt that a person, as a matter of contract, may release, in exchange for consideration she deems adequate, claims existing at the

time but not known to her. This is simply part of the bargain." *In re Gen. Am.*, 357 F.3d at 804.

The plaintiffs in *General American*, like Appellants here, sought to avoid the effect of their release by claiming that the "alleged fraud" with respect to their claim "had not, at that time, been discovered by the plaintiff." *Id.* Rejecting that challenge, this Court observed: "this is the kind of argument designed to be encompassed by the provision of the settlement agreement releasing claims unknown as well as those known." *Id. Accord, e.g.*, *Roger Edwards*, 427 F.3d at 135 ("[W]e do not regard newly discovered instances of commercial wrongdoing as encompassed by Rule 60(b)(3).").

Third, while Appellants now regret having stipulated to the dismissal with prejudice of unknown claims for breach of the SSA, "mere dissatisfaction in hindsight with choices deliberately made … is not grounds ... to justify [relief under] Rule 60(b)(1).... [F]ailure to evaluate carefully the legal consequences of a chosen course of action provides no basis for relief ... ." *Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir. 1986).

Appellants' request for Rule 60(b) relief from their own stipulation should be "rebuffed at the threshold." *Roger Edwards*, 427 F.3d at 134.

III. Reopening the SSA and/or Vacating the Stipulation of Dismissal Would Have Been Futile.

This Court may also affirm both orders of the District Court on either of two independent grounds, each of which establishes that reopening the SSA and/or vacating the 2011 Stipulation of Dismissal would have been futile. *See, e.g.*, *Boyd v. Bulala*, 905 F.2d 764, 769 (4th Cir. 1990) (final judgment may not be reopened if doing so will "in the end have been a futile gesture").

First, the release and covenant not to sue in the CBA independently bar Appellants' claims.

Second, Appellants' post-dismissal effort to assert such claims was untimely under the express terms of the SSA.

A. The CBA release and covenant not to sue independently bar the SSA action that Appellants sought leave to bring.

The claims that Appellants sought leave to assert are also barred by the release and covenant not to sue in Article 3, Section 3(a) of the 2011 CBA. (*See* Add. 5–6; JA 2200–01.) That release and covenant not to sue extends to "*any* suit or proceeding against the NFL or any NFL Club," *including* any proceeding "brought pursuant to the *White* SSA," and *specifically including* any claims of "collusion with respect to any League Year prior to 2011"; it also encompasses any other claim "that

could have been asserted in *White* with respect to conduct occurring prior to" August 4, 2011. (Add. 5–6; JA 2200–01.)[11]

It has long been settled that such general releases "are not to be shorn of their efficiency by any narrow, technical, and close construction"; the express language used in the CBA "indicates an intent to make an ending of every matter arising under or by virtue of the contract. If the parties intend to leave some things open and unsettled, their intent to do so should be made manifest." *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907).[12]

It also bears emphasis that the CBA release and covenant not to sue is not a static, one-moment-in-time commitment. "This Agreement [the new CBA] shall be effective from August 4, 2011 until the last day of the 2020 League Year … ." (JA 2202 (2011 CBA Art. 69, § 1).) The oper-

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[11] Appellants argued below that theirs are not claims that "could have been asserted" because they were unknown. That argument is factually wrong (*see* pp. 11–12, *supra*) and legally insupportable. *See Kakani v. Oracle Corp.*, 2007 WL 1793774, at *3 (N.D. Cal. June 19, 2007) ("In settlement practice, … the "could have been [asserted]" language is used to obtain the broadest release possible."). In any event, the release makes clear that "claims that could have been asserted" are merely examples, "without limitation," of "*any*" proceeding in *White*.

[12] Again, the express reservation (by side letter) of *only* the pending claim regarding the Eagles rookies confirms that the parties intended to leave open and unsettled *only* that action.

ative verbs in Article 3, Section 3(a)—"releases" and "covenants"—are active verbs expressed in the present tense and apply each and every day of the new CBA's term.[13] The Petition and Rule 60(b) Motion sought leave to assert such claims; the CBA release and covenant barred those claims at the time the CBA was signed and continue to bar them today.

Finally, the 2011 CBA expressly supersedes "any other document affecting terms and conditions of employment of NFL players." (JA 2198 (2011 CBA Art. 2, § 1).) Hence, if there were any conflict between the new CBA and the Final Consent Judgment or the SSA—and we respectfully submit that there is no such conflict—the new CBA would control, and the obligation that it imposes on the NFLPA and its members to release and not bring claims for collusion with respect to any League Year prior to 2011 would be a complete defense rendering the Petition and Rule 60(b) Motion futile. And Appellants do not and cannot contend that the CBA was subject to Rule 23 review. *See, e.g.*, *infra* pp. 31–34 (discussing sole and exclusive right of the Union under the NLRA to bargain away its members' claims).

[13] "Words in the present tense include the future." N.Y. Stat. Ann. § 48; N.Y. Stat. Ann. § 91 cmt. (2012) (under New York law, the "rules of statutory interpretation are, in general, the same as are used in the construction of … contracts").

B. The action that Appellants sought leave to bring was untimely.

In addition to being barred by the Stipulation of Dismissal and the CBA release and covenant not to sue, the action that Appellants sought leave to bring was time-barred by the limitations provisions of the SSA. Article XIII, Section 17 of the SSA provided that any claim for collusion had to be "brought within ninety (90) days of the time when the player knows or reasonably should have known with the exercise of due diligence that he had a claim, or within ninety (90) days of the first regular season game in the season in which a violation … is claimed, whichever is later." (JA 1971.)

Even if the collusion claim in the Petition was "entirely new," as Appellants contend, it would also have been entirely too late. There is no question that Appellants knew or reasonably should have known by the end of the 2010 season of any basis for the "new" collusion claim that they belatedly sought leave to pursue. They received within a few days of execution copies of every player contract (JA 2021 (SSA Art. XXIX, § 5)), so they knew exactly what the payrolls were. And as early as March 2010, they were *publicly* asserting that collusion was taking place during the 2010 League Year. (*See* pp. 11–12, above.)

In short, if there were a "uniform decrease" in payrolls, as the NFLPA's Executive Director asserted in March 2010, or if the NFLPA believed or even suspected, as one of its prominent agents publicly complained in early 2010, that "contracts [were] being done as if there [was] a cap" (JA 2216), then Appellants were plainly on notice sufficient to require them to pursue a claim. *See, e.g.*, *Garza v. U.S. Bureau of Prisons*, 284 F.3d 930, 935 (8th Cir. 2002) ("[S]uspicions do give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence.").

There was no collusion with respect to the 2010 League Year. (*See* p. 16 n.3, above.) But for purposes of evaluating timeliness, it suffices to say that, even without regard to their contemporaneous public assertions that a secret salary cap was depressing the market, it is simply incredible for Appellants simultaneously to assert—as the Petition alleges (JA 74, 86 (Pet. ¶¶ 3, 35))—that over $1 billion in player compensation went "missing" in 2010, and that they did not then know, and would not have known with the exercise of due diligence, of the potential for a claim that player compensation had been depressed through collusion.

CONCLUSION

For the foregoing reasons, this Court should affirm both Orders of the District Court.

Respectfully submitted,

/s/Gregg H. Levy
Gregg H. Levy
Benjamin C. Block
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, NW
Washington, DC 20004-2401
(202) 662-6000
(202) 662-6291 (fax)
glevy@cov.com
bblock@cov.com

Daniel J. Connolly
Aaron D. Van Oort
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh St.
Minneapolis, MN 55402-3901
(612) 766-7806
(612) 766-1600 (fax)
dconnolly@faegre.com
avanoort@faegre.com

Counsel for Appellees

June 17, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 11,781 words as determined by the word counting feature of Microsoft® Word 2010.

I further certify that this brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirement of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Century Schoolbook 14-point font.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Brief have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

Respectfully submitted,

/s/Benjamin C. Block
Benjamin C. Block

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eight Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I hereby further certify that on June 17, 2013, I served copies of the foregoing on all participants in the case who are not registered CM/ECF users by mailing a copy of the same, first-class, postage paid, to the address listed on the Court's docketing sheet.

s/Benjamin C. Block
Counsel for Appellees