Nos. 13-1251 & 13-1480

In the

United States Court of Appeals
for the
Eighth Circuit

Reggie **WHITE**, *et al.*,

Plaintiffs-Appellants,

v.

NATIONAL FOOTBALL LEAGUE, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
NO. 4:92-CV-00906-DSD-SPMS

OPENING BRIEF OF APPELLANTS

April 30, 2013

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SUMMARY OF THE CASE

The Reggie White NFL player class ("Class") settled this action with the NFL defendants in a Stipulation and Settlement Agreement ("SSA") that governed the parties' conduct through the 2010 NFL season. The Class was certified under Federal Rule of Civil Procedure 23(b)(1), the SSA was approved under Rule 23(e), and the District Court retained jurisdiction to enforce the SSA in a consent decree.

This appeal concerns the District Court's improper determination that Rule 23(e)'s judicial approval requirements for dismissing or compromising class claims did not apply to a stipulation of dismissal ("SOD") covering known and unknown Class claims for past SSA breaches. This appeal also concerns the District Court's erroneous determination that it lacked jurisdiction to grant the Class relief under Rule 60(b) even though the NFL defendants obtained the SOD through misconduct. If affirmed, the District Court's rulings will deprive the Class of a newly revealed claim for collusion in violation of the SSA, and will set a precedent that private stipulations can be used to evade Rule 23's protections for absent class members. Given these important issues, oral argument of 20 minutes per side is warranted.

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INTRODUCTION

This appeal arises from the District Court's improper adherence to a private stipulation to dismiss certified Class claims—procured through defendants' misconduct—without providing notice, holding a hearing, or conducting any inquiry into whether the proposed settlement should be approved as being in the best interests of the Class. The District Court thus abdicated the judicial oversight and approval expressly required by Federal Rule of Civil Procedure 23(e) before class claims may be compromised.

The parties to this action, defendants National Football League and its 32 member Clubs (collectively, "NFL" or "NFL defendants") and the Reggie White Class, originally settled this antitrust litigation in 1993 in a Stipulation and Settlement Agreement ("SSA"). The SSA was approved by the District Court as a class action settlement under Rule 23(e) and then affirmed by this Court.

The SSA afforded the Class continuing injunctive relief protection through the 2010 NFL season by, among other things, prohibiting the NFL defendants from colluding in the market for NFL players. Over the years, the SSA was the subject of numerous District Court

proceedings to enforce its terms, and—pursuant to a Final Consent Judgment—the District Court retained jurisdiction to enforce the SSA and protect the rights of Class members thereunder.

The SSA provided that, in exchange for free agency and players' increased share of NFL revenues, player salaries would be subject to a team salary "cap." However, the NFL agreed that there would be no such "cap" during the Final League Year of the SSA—the 2010 season. This "uncapped year" significantly benefitted the Class by, among other things, incentivizing NFL owners to extend the SSA or face a season with free agency and no ceiling on player salaries.

Between 1993 and 2010, the SSA was amended and extended by the parties four times; on each occasion, the District Court ordered notice to the Class, held a hearing, and approved the amendments pursuant to Rule 23(e). Prior to the 2010 Final League Year, however, no such SSA extension was negotiated. As a result, the 2010 season became uncapped. The SSA expired at the end of the season, March 11, 2011, and on that same date, the NFL imposed a "lockout" of all NFL players that became the subject of new antitrust litigation in *Brady v.*

NFL, 779 F. Supp. 2d 992 (D. Minn.), *appeal docketed*, No. 11-1898 (8th Cir. Apr. 26, 2011).

When *Brady* was settled on a non-class basis and the NFL lockout ended in August 2011, the NFL also insisted that the *White* Class agree to file with the District Court a proposed stipulation of dismissal ("SOD") for any Class claims for past SSA violations—including unknown claims—with the exception of a specific, pending proceeding related to the Philadelphia Eagles. Pursuant to Rule 23(e), the SOD had to be approved by the District Court before it could compromise Class claims under the SSA. The District Court, however, never approved the SOD. Nor did the NFL take any steps to seek the judicial approval necessary to make the SOD effective. Instead, the District Court merely issued a text-entry order dismissing a then-pending SSA enforcement proceeding not at issue on this appeal.

In March 2012, several NFL owners, apparently believing that the SOD protected them from past breaches of the *White* SSA, publicly admitted that the NFL had imposed a secret salary cap during the 2010 uncapped year. (For example, the New York Giants owner publicly supported harsh punishments for teams that had breached the NFL

defendants' secret and illegal salary cap and referred to the uncapped year—a critical SSA benefit to the Class—as a mere "loophole": "What they did was in violation of the spirit of the salary cap. They attempted to take advantage of a one-year loophole, and quite frankly, I think they're lucky they didn't lose draft picks." *Giants owner Mara: Cap penalties could have been worse*, NFL.com (Mar. 25, 2012), http://www.nfl.com/news/story/09000d5d827db3e0/article/giants-owner-mara-cap-penalties-could-have-been-worse; *see also* JA 84, R.703.) Thus, unbeknownst to the Class, the NFL had willfully violated the SSA's anti-collusion provisions. The NFL affirmatively concealed this fact from Class Counsel, the National Football League Players Association ("NFLPA"), and the District Court, at the very time the NFL was insisting that Class Counsel agree to submit the SOD to the District Court as a condition for ending the lockout. In hindsight, the SOD has been exposed as a calculated effort by the NFL to wrongfully obtain protection for its secret SSA violation during the 2010 League Year.

The Class, however, was not without recourse. As Rule 23(e) provides: "The claims, issues, or defenses of a certified class may be

settled, voluntarily dismissed, or compromised *only* with the court's approval." Fed. R. Civ. P. 23(e) (emphasis added). A district court may grant such approval only after notice to the class, a hearing, and a determination that the settlement is "fair, reasonable, and adequate" to the class. *Id.* Despite having followed Rule 23 with respect to *all* prior amendments of Class rights under the SSA, none of these Rule 23 requirements were followed by the District Court with respect to the proposed compromise of Class claims under the SOD, which should have rendered the SOD legally ineffective.

Further, even if Rule 41(a)(1)(A)—which permits parties to voluntarily dismiss entire "action[s]"—applied in the case of a certified class action (it does not), the SOD would nonetheless fail the requirements of Rule 41. Fed. R. Civ. P. 41(a)(1)(A). Rather than purport to dismiss the *White* "action," the SOD expressly preserves certain specified Class claims. Thus, the SOD was legally invalid under Rule 41 as well as Rule 23.

After learning of the NFL's collusion, the Class filed a Petition to Reopen the SSA ("Petition") to seek relief for the NFL's secret salary cap breach of the SSA during the 2010 season. The NFL opposed the

Petition on the ground that the SOD had, upon its execution, extinguished the Class's collusion claims under the SSA even though the SOD had never been judicially approved as required by Rule 23(e). Erring as a matter of law, the District Court agreed.

Specifically, on December 31, 2012, the District Court denied the Petition, ruling that: (i) after the SSA expired, Rule 23 no longer applied even to a compromise of Class claims that arose *during* the unexpired term of the SSA; (ii) the SOD was therefore self-effectuating upon execution and compromised Class claims without Rule 23 judicial approval; and (iii) as a result, the District Court lacked jurisdiction to hear the Petition, notwithstanding the continued vitality of the Final Consent Judgment (an erroneous legal conclusion not even advanced by the NFL). (JA 93-103, R.740.)

Given the NFL's position that the SOD should be given effect to compromise previously unknown Class claims without judicial approval, the Class timely filed a motion under Rule 60(b) for relief from the SOD on the ground that the NFL obtained the SOD through "misconduct." Fed. R. Civ. P. 60(b). The Rule 60(b) Motion was an alternative basis for relief that would need to be adjudicated only if the District Court

concluded the SOD was effective notwithstanding its non-compliance with Rule 23.

On February 22, 2013, the District Court denied the Rule 60(b) Motion on the ground that the SOD deprived it of jurisdiction to consider the merits of the Motion. Thus, under the District Court's ruling, even when a stipulation of dismissal is improperly procured in violation of Rule 60, the court enforcing that stipulation is powerless to grant relief under Rule 60(b). The District Court's decision on this point conflicts with contrary authority in the Sixth, Seventh, Ninth, Tenth and D.C. Circuit Courts of Appeals. (JA 104-14, R.759.)

Neither of the District Court's rulings can stand. As guardian of the Class, the District Court was bound by Rule 23(e) to provide notice, to conduct a fairness hearing, and to determine affirmatively whether the SOD was in the best interests of the Class. In the absence of these procedures and determinations, the District Court could not give effect to the SOD as a compromise of Class claims for SSA violations. Compounding the District Court's error was its conclusion that it also lacked jurisdiction to consider the Rule 60(b) Motion to set aside the wrongfully procured SOD. The combined effect of the District Court's

rulings was to render it an impotent bystander to protect the interests of the certified *White* Class, while the NFL sought to compromise the Class's claims without any Rule 23 or Rule 60 judicial oversight. This was legal error.

Indeed, this Court rejected prior NFL efforts to terminate the District Court's continuing jurisdiction, finding that the Final Consent Judgment ("FCJ") empowered the District Court to enforce the rights of the Class under the SSA. *See, e.g., White v. NFL (Vick)*, 585 F.3d 1129, 1136-38 (8th Cir. 2009). This same reasoning compels reversal of the decisions below; the FCJ has not been modified or terminated and the SSA breaches alleged in the Petition occurred *during* the term of the unexpired class action settlement agreement. There is no basis in law or policy to affirm the District Court's conclusion that the SOD deprived it of its jurisdiction and obligation to protect the rights of the Class under Rules 23 and 60(b).

JURISDICTIONAL STATEMENT

In 1993, the *White* Class filed this lawsuit against the NFL defendants alleging violations of the Sherman Act, 15 U.S.C. § 1. The District Court exercised subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

The parties settled *White* in the SSA. In connection with granting Rule 23(e) approval of this certified class action settlement, the District Court entered the FCJ, through which it asserted exclusive and continuing jurisdiction to enforce the SSA:

> ORDERED AND ADJUDGED, that . . . this court retains exclusive jurisdiction over this action to effectuate and enforce the terms of the Stipulation and Settlement Agreement, as amended, and this Judgment.

(JA 1115, R.318.)[1] The FCJ was never modified or terminated by the District Court; to this day, it remains effective. Even the NFL did not

[1] The SSA correspondingly provides:

> Pursuant to the Final Consent Judgment in this Action, the Court shall retain jurisdiction over this Action to effectuate and enforce the terms of this Agreement and the Final Consent Judgment.

(JA 1999, R.524.)

challenge the District Court's jurisdiction to adjudicate the claims asserted in the Petition.

There are two separate but related Orders on appeal; each Order is final, no claims remain pending below, and thus this Court has jurisdiction. *See* 28 U.S.C. § 1291.

First, the District Court denied the Petition on December 31, 2012 ("Order Denying Petition"), and the Class timely appealed on January 30, 2013. *Second*, on February 22, 2013, the District Court denied the Rule 60(b) Motion to set aside the SOD, as well as the Class's request to modify the Rule 60 briefing schedule to seek discovery concerning the NFL's misconduct in procuring the SOD ("Order Denying Rule 60 Motion"). The Class timely appealed from the Order Denying Rule 60 Motion on March 1, 2013.

The two appeals were consolidated as of March 4, 2013. (*See* Mar. 4, 2013 Ltr. from Clerk of Court to Barbara Podlucky Berens at 1.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court committed legal error by holding the Stipulation of Dismissal to be self-effectuating and dismissing the claims of a certified class without the judicial oversight or approval required to settle, voluntarily dismiss or compromise class claims under the express terms of Rule 23(e), including the following subsidiary issues:

a. Whether the District Court committed legal error in holding that Rule 23(e) ceases to apply following expiration of a class action settlement agreement, even with respect to class claims for breaches of the settlement agreement that occurred during its unexpired term.

- Fed. R. Civ. P. 23(e).

b. Whether the District Court committed legal error in holding that it lacked jurisdiction to enforce the Stipulation and Settlement Agreement notwithstanding the Final Consent Judgment, which was never modified or terminated and expressly provides the District Court with continuing jurisdiction to enforce the Stipulation and Settlement Agreement.

- *White v. NFL (Vick)*, 585 F.3d 1129 (8th Cir. 2009).
- *McDonald v. Carnahan*, 109 F.3d 1319 (8th Cir. 1997).
- *Greene v. Am. Cast Iron Pipe Co.*, 871 F. Supp. 1427 (N.D. Ala. 1994).

2. Whether the District Court committed legal error in holding the Stipulation of Dismissal to be self-effectuating for the additional reason that the Stipulation of Dismissal is invalid under Rule 41 because, by its express terms, it does not purport to dismiss the *White* action in its entirety.

- Fed. R. Civ. P. 41(a).

3. Whether the District Court committed legal error in denying the *White* Class's alternative Rule 60(b) Motion for relief from the Stipulation of Dismissal on the ground that the Stipulation of Dismissal deprived the District Court of jurisdiction to consider the Motion—a ruling that is in conflict with precedent from the Sixth, Seventh, Ninth, Tenth and D.C. Circuit Courts of Appeals.

- *Nelson v. Napolitano*, 657 F.3d 586 (7th Cir. 2011).
- *In re Hunter*, 66 F.3d 1002 (9th Cir. 1995).
- *Hinsdale v. Farmers Nat'l Bank &Trust Co.*, 823 F.2d 993 (6th Cir. 1987).

- *Randall v. Merrill Lynch*, 820 F.2d 1317 (D.C. Cir. 1987).

STATEMENT OF THE CASE

On May 23, 2012, the Class filed the Petition to seek monetary relief for the NFL's "secret salary cap" breaches of the anti-collusion, anti-circumvention and other provisions of the SSA during the 2010 season—a period before the SSA expired. (JA 73-92, R.703.)

On December 31, 2012, the District Court denied the Petition. It held that the stipulation to dismiss Class claims under the SSA (*i.e.*, the SOD) was effective without any Rule 23(e) judicial evaluation or approval and divested the District Court of jurisdiction over the Petition because the SSA had expired. (JA 93-103, R.740.)

While the Petition was pending before the District Court, the Class alternatively moved for Rule 60(b) relief from the SOD. In the Rule 60(b) Motion, the Class asserted that the NFL had improperly obtained the SOD through misconduct, including by affirmatively concealing its secret salary cap collusion in 2010 from both the Class and the District Court. (JA 2166-72, R.716.) After the District Court denied the Petition, the Class sought to move forward with its Rule 60(b) Motion and to modify the pending briefing schedule and take

discovery concerning the NFL's misconduct in procuring the SOD. (JA 2396-97, R.741; R.743.)

On February 22, 2013, the District Court rejected the requested briefing schedule and discovery and denied the Rule 60(b) Motion on the ground that the SOD deprived the District Court of jurisdiction to consider the Motion. (JA 104-14, R.759.) Accordingly, the Class has had no discovery into the NFL's misconduct in procuring the SOD; nor has the District Court considered the merits of the Rule 60(b) Motion.

STATEMENT OF RELEVANT FACTS

I. THE *WHITE* CLASS ACTION AND THE STIPULATION AND SETTLEMENT AGREEMENT

The SSA "represented the resolution to a decades-old dispute" in which the NFL and owners of NFL Clubs colluded "to minimize labor costs." *White v. NFL (Vick)*, 585 F.3d 1129, 1133-34 (8th Cir. 2009).

Specifically, "[o]n September 10, 1992, following a ten-week trial, a jury found the NFL in violation [of] § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1." *White v. NFL (TV Revenues)*, 766 F. Supp. 2d 941, 944 (D. Minn. 2011) (citing *McNeil v. NFL* (*Plan B Free Agency*), No. 90-476, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992)) (JA 2132-33, R.676).

"Less than two weeks after the *McNeil* verdict, players . . . brought [the *White*] antitrust class action seeking injunctive relief in the form of total or modified free agency." *Id.* (citing *White v. NFL*, 822 F. Supp. 1389 (D. Minn. 1993)). Ultimately, "[t]he parties decided to settle their financial and labor disputes, and a mandatory settlement class was certified for damages and injunctive relief [under Federal Rule 23(b)(1)]." *Id.* "The NFL and the Players formed the SSA to bring

an end to a wide range of litigation. On April 30, 1993, the court approved the SSA." *Id.*[2]

II. THE FINAL CONSENT JUDGMENT

Several months later, on August 20, 1993, the District Court entered the FCJ, which provides that the "court retains exclusive jurisdiction over this action to effectuate and enforce the terms of the [SSA] and this Judgment." (JA 1115, R.318; *see also* SSA Art. XX (acknowledging by reference to the FCJ that "the Court shall retain jurisdiction over this Action to effectuate and enforce the terms of this Agreement and the Final Consent Judgment"), JA 1999, R.524.) The FCJ has no expiration date.

Over the years, the District Court adjudicated numerous proceedings brought by the Class or the NFL to enforce the SSA.[3] Several times, the NFL sought to terminate the District Court's jurisdiction to oversee and enforce the SSA under Rule 23, but both the

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[2] The NFL and the NFLPA also entered into a number of Collective Bargaining Agreements ("CBAs") that mirrored and expanded upon the terms of the SSA. (JA 96, R.740.)

[3] *See, e.g.*, *White v. NFL (TV Revenues)*, 766 F. Supp. 2d 941 (D. Minn. 2011) (JA 2130-58, R.676); *White v. NFL* (*Circumvention*), 92 F. Supp. 2d 918 (D. Minn. 2000); *White v. NFL* (*30% Rule*), 899 F. Supp. 410 (D. Minn. 1995).

District Court and this Court rejected such efforts, recognizing the requirement of continued Rule 23 judicial supervision to protect the Class, as well as the fact that the FCJ provided for the District Court's continuing and exclusive jurisdiction to enforce the SSA. *See, e.g., White v. NFL (Vick)*, No. 4-92-906(DSD), 2008 WL 1827423, at *6 (D. Minn. Apr. 22, 2008) (rejecting NFL motion to modify the FCJ and terminate the District Court's jurisdiction) (JA 2128-29, R.586), *aff'd*, 585 F.3d 1129 (8th Cir. 2009); *White v. NFL (Hobert-Grbac)*, 972 F. Supp. 1230, 1234 (D. Minn. 1997) ("*Unless and until the [FCJ] is modified*, the court has the power to enforce the terms of the SSA.") (emphasis added) (JA 1545, R.432), *vacated in (relevant) part, White v. NFL*, No. 4-92-cv-906, slip op. (D. Minn. June 2, 1999) (JA 1625, R.457). This Court and the District Court have also held that the NFL would be bound by the injunctive relief imposed through the FCJ.[4]

III. UNTIL THE AUGUST 2011 SOD, EACH TIME THE SSA WAS AMENDED, THE DISTRICT COURT FOLLOWED RULE 23 BEFORE COMPROMISING CLASS MEMBERS' RIGHTS

After the SSA was first agreed to by the parties in 1993, the District Court followed all of the requirements of Rule 23(e) and issued

[4] (*See* JA 285-399, R.224; JA 1531-34, R.415; JA 1622-24, R.455; JA 1687-89, R.504; JA 1690-97, R.508; JA 2086-88, R.526.)

an Order certifying a non-opt out, Rule 23(b)(1) class. The Court also issued a second, 115-page Order evaluating and determining the fairness, reasonableness and adequacy of the SSA with respect to the Class. (JA 115-20, R.67; JA 285-399, R.224.)

In approving the SSA, the District Court observed:

> Notwithstanding the strong policy favoring settlement, *Federal Rule of Civil Procedure 23(e) provides that a class action may not be dismissed or compromised without court approval.* Under this rule, the court has a duty to protect the rights of absent class members as well as the interests of the named plaintiffs.

(JA 345, R.224 (emphasis added) (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975); *Welsch v. Gardebring*, 667 F. Supp. 1284, 1289 (D. Minn. 1987)).)

Thereafter, Class Counsel and the NFL negotiated amendments and extensions to the SSA four times: 1996, 1999, 2002, and 2006. To give legal effect to these amendments—which would compromise Class members' rights under the SSA—on each occasion the District Court (i) required that notice of the amendments be given to the Class, (ii) held a hearing concerning the proposed amendments at which Class members

had the opportunity to be heard, and (iii) approved the proposed amendments as fair, reasonable and adequate for the Class.[5]

IV. THE SSA PROVIDED THAT THE FINAL LEAGUE YEAR WOULD BE "UNCAPPED"

A critical part of the *quid pro quo* in the SSA was the NFL's right to impose a "salary cap"—a limit on the aggregate salaries that a Club may pay its players in a given NFL League Year—and the Class's securing free agency and other player rights in return. (*See, e.g.,* JA 1878-88, 1803-21, R.524.)

Critically, however, each version of the SSA provided that the "Final League Year" under the SSA would be *un*capped—*i.e.*, the final NFL season under the SSA would be free from any "cap" on player salaries. In exchange, during the Final League Year, Class members would be subject to increased restrictions on free agency (*e.g.*, two additional years of accrued service would be required before a Class member could be eligible for unrestricted free agency). (JA 1778-79, 1959, R.524.)

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[5] (*See* JA 96, R.740; JA 1531-34, R.415; JA 1622-24, R.455; JA 1687-89, R.504; JA 1690-97, R.508; JA 2086-88, R.526.)

By agreeing that the Final League Year would be uncapped and impose greater restrictions on free agency, the parties created mutual incentives to negotiate extensions of the SSA before it expired. (JA 80, R.703.) As Class Counsel explained during the Preliminary Settlement Approval Hearing in 1993:

> The last year of the agreement, the salary cap will come off, and the free agency years will go up. I mention that because I think it's important to recognize why that particular provision was put in. It was put in so that we could avoid in the future another five or ten or fifteen-year round of litigation by putting into place a mechanism that will incur some pain on each side, that is, having a last year with no salary cap makes the NFL unhappy. Having a year where free agency is back up to six years makes the players unhappy. The hope is that in that last year prior to it going into effect, the parties would be able to negotiate a new agreement without having to end up back in court fighting with each other.

(JA 199, R.106; *see also* JA 333, 336-37, R.224 (summarizing the Final League Year being uncapped as a "principal provision" of the SSA).) The proof, ultimately, was in the pudding: each of the SSA's four extensions was negotiated before reaching the Final League Year.

At the Rule 23(e) approval hearing when the SSA was extended in 2006, Class Counsel reiterated the importance to the Class of the Final League Year being uncapped:

> The last year of the agreement is always uncapped. I can tell Your Honor that was critical and crucial to our ability to get this extension. It was probably one of the most important provisions in this deal from the beginning. . . . [I]t created dual pressures for there to be an extension rather than to let it expire and end up in a different situation without labor peace.

(JA 2101-02, R.527.)

However, a few years after the 2006 extension, the NFL made clear that it would exercise its right to terminate the SSA early—making the 2010 season the Final League Year of the SSA—and would not negotiate another SSA extension. Instead, the NFL insisted it was, for the first time, willing to endure an uncapped year. What the Class did not know at the time was that the NFL's unprecedented willingness to go through an uncapped year was because the NFL had no intention of abiding by the SSA's prohibition of a salary cap (and collusion) during the 2010 season. This secret plan enabled the NFL to let the SSA (and its companion CBA) expire without the negotiated-for economic pain of uncapped free agency and to then lock out the players.

V. THE 2010 "UNCAPPED" SEASON

During the 2010 NFL League Year, the Class had no reason to know or even suspect that the NFL defendants were colluding to impose

a salary cap during the uncapped year. Indeed, the NFL provided false assurances that it was complying with the SSA's prohibition of a salary cap during the 2010 season. (*See, e.g.*, *Ruling Bars Owners From Ending Pool*, ESPN.com (Feb. 1, 2010) (NFL Spokesman Greg Aiello explaining that "[t]he agreement calls for no salary cap in 2010"), http://sports.espn.go.com/nfl/news/story?id=4878750.) Two years later, in March 2012—well after the SOD was signed—it was revealed that the NFL had concealed its imposition of a secret salary cap during the 2010 NFL League Year and had used that deception to obtain the SOD.

VI. THE SSA EXPIRES BUT THE DISTRICT COURT CONTINUES TO EXERCISE JURISDICTION TO ADJUDICATE PRE-EXPIRATION BREACHES

After the Final League Year, the SSA expired on March 11, 2011. Nonetheless, the District Court (properly) continued to exercise jurisdiction over enforcement proceedings concerning SSA breaches the NFL had committed prior to the SSA's expiration.

Specifically, the Class continued to prosecute three SSA enforcement proceedings before the District Court: (i) an action in which the District Court held that the NFL had violated its SSA obligations by negotiating TV contracts that deferred revenues outside

of the SSA's term to finance its future lockout of NFL players (*White v. NFL (TV Revenues)*, JA 2155-56, R.676); (ii) an action regarding NFL collusion with respect to a discrete category of free agents known as Restricted Free Agents and certain bonus language for options contained in player contracts;[6] and (iii) an action challenging a shortfall in compensation which the SSA required to be paid to Philadelphia Eagles rookie players in 2010.

In August 2011, the latter two proceedings were pending before a Special Master acting pursuant to a Rule 53 appointment of the District Court, while the *TV Revenues* case was pending before the District Court itself. (*See White v. NFL* (*TV Revenues*), JA 2130-58, R.676.) In fact, the District Court held a hearing on May 12, 2011—three months after the SSA expired—to consider awarding damages and injunctive relief to the Class for the NFL's SSA violations in the *TV Revenues* proceeding. (*See* Minute Entry re: Hr'g on Money Damages and Equitable Relief, *White v. NFL* (*TV Revenues*), No. 4:92-cv-00906 (D. Minn. May 12, 2011), R.697.)

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[6] These were very different and far narrower claims of collusion than the Class's claim regarding the 2010 secret salary cap, which the Class would not discover until March 2012.

VII. *BRADY V. NFL*

Immediately after the SSA and its companion CBA expired, the NFL fulfilled its threat to lock out NFL players, the NFLPA disclaimed its status as the players' collective bargaining representative, and nine individual players filed an antitrust lawsuit against the NFL's lockout as a *per se* unlawful group boycott. (Order Denying Petition at 5 (citing *Brady v. NFL*, 644 F.3d 661, 662 (8th Cir. 2011)), JA 97, R.740.)

The NFL and the *Brady* plaintiffs eventually settled their lawsuit on a non-class basis, stipulating to dismiss with prejudice the claims of the individual plaintiffs in exchange for, among other things, an end to the lockout. (Settlement Agreement at 1-3, *Brady v. NFL*, No. 11-cv-00639, (D. Minn. July 25, 2011) ("*Brady* Settlement") (JA 2309-15, R.724-1).)[7] The *Brady* Settlement also was made contingent upon the players reconstituting the NFLPA as a union, and, if the players elected to do so, upon the NFL and NFLPA agreeing to a new CBA consistent with the terms of the *Brady* Settlement. (*Id.* ¶ 1, JA 2309.) Further, and most relevant here, the *Brady* Settlement was contingent upon (i)

[7] Because *Brady* was settled on a non-class basis, it could be dismissed by stipulation without judicial approval or order pursuant to Rule 41. (*Id.* ¶ 7, JA 2310.)

the "*filing*" (not *approval*) of the SOD with the District Court in *White*, and (ii) the release and dismissal of certain claims that had been "*asserted*" under the SSA (not *unasserted* claims). (*Id.* ¶¶ 1, 4 (emphasis added), JA 2309-10.)

Specifically, the parties agreed to file the SOD, which broadly provided as follows:

> The parties stipulate to the dismissal with prejudice of all claims, *known and unknown*, *whether pending or not*, regarding the [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,[8] excepting only the pending claim filed March 11, 2011 relating to an alleged rookie shortfall on the part of the Philadelphia Eagles.

(JA 2159, R.701 (emphasis added); JA 2313, R.724-1 (same).) In contrast, the only *White* Class claims that had to be *dismissed* in order for the *Brady* Settlement to become effective were "any and all claims *asserted* under the [SSA]." (*Brady* Settlement ¶ 1 (emphasis added), JA 2309, R.724-1.)

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[8] This is a reference to the "asserted" 2010 collusion claim discussed above regarding only Restricted Free Agents and certain option bonus language contained in player contracts. That limited collusion claim was unrelated to the Petition's secret salary cap claims now before this Court. (JA 86-87, R.703; JA 2210-11, 2225-27, 2237-52, 2254-59, R.721-1.)

As this carefully drafted language demonstrates, the parties recognized that they could not compromise the Class's unasserted claims under the SSA without Rule 23(e) judicial approval. Accordingly, the parties agreed to "file[]" the broader SOD with the District Court in *White*, but conditioned the *Brady* Settlement upon the dismissal of "asserted" claims for SSA violations. (*See id.* ¶ 6 (providing only that if the SOD was "not timely *filed*" in *White*, then the *Brady* Settlement "shall be null and void and of no legal effect") (emphasis added), JA 2310.)

The *Brady* Settlement thus reflected recognition that the SOD might or might not receive the required judicial approval under Rule 23. And, in the event that such approval was not obtained, the parties in *Brady* agreed to proceed with their non-class settlement so long as the specified preconditions—dismissal of those specific claims for breach of the SSA that had previously been "asserted" in *White*, "timely fil[ing]" of the SOD with the District Court in *White*, and negotiation of a new CBA consistent with the terms of the *Brady* Settlement—were satisfied.

Notably, many NFL players retire at the end of each NFL season, and the 2010 season was no exception. Those players, therefore,

suffered from the NFL defendants' secret salary cap during 2010, but received no benefit as active players from the *Brady* Settlement (and the end of the lockout) because their careers ended prior to the start of the 2011 NFL season.

VIII. THE SOD IS FILED BUT NOT JUDICIALLY APPROVED

On August 4, 2011, the SOD was filed with the District Court in *White*. But the Court never approved it. Instead, on August 11, 2011, the District Court entered a text-entry Order dismissing only certain, *"pending"* claims for specific SSA violations:

> IT IS HEREBY ORDERED that all claims *pending* regarding the [SSA] 637 are dismissed. All other *outstanding* motions – 642; 652 and 677 are dismissed.

(Aug. 11 Text Order (emphasis added).) Thus, the August 11 Text Order did *not* approve the broad SOD language seeking to compromise "all claims, known and unknown, whether pending or not." (*Compare id. with* SOD.) Nor did the District Court—despite having done so for every previous proposed modification of Class rights since 1993—order notice to the Class about the SOD, hold a hearing on the SOD, or consider the fairness, reasonableness, or adequacy of the SOD to the Class.

In response to the District Court's failure to take any steps to

approve the SOD, the NFL—and its team of experienced and able counsel from at least five law firms—did nothing. The NFL did not initiate *any* Rule 23 procedures or seek judicial approval for the SOD's proposed compromise of unknown and unasserted Class claims. Nor did the NFL take any action in response to the August 11 Text Order, which did not purport to dismiss unknown or unasserted claims for SSA violations like those that the Class would subsequently assert in the Petition.

IX. THE NFL'S SECRET IMPOSITION OF A 2010 SALARY CAP IN VIOLATION OF THE SSA IS REVEALED

In early March 2012, the NFL was negotiating with the NFLPA to obtain its consent to certain team salary cap reallocations as a *quid pro quo* for an NFLPA request to defer the salary cap charge of certain player benefit costs to future league years. (*See* JA 83, R.703.) Specifically, the NFL was seeking to reduce the Washington Redskins' and Dallas Cowboys' salary caps and redistribute their cap "room" among all other Clubs except the New Orleans Saints and Oakland Raiders. At the time, the NFLPA had no reason to believe that the NFL was seeking this redistribution to penalize the Redskins and Cowboys (and to a lesser extent, the Raiders and the Saints) for not abiding by a

secret salary cap in 2010. (*Id.*; JA 2262-65, R.723.) To the contrary, NFL officials concealed any such motivation and specifically justified the NFL's request on grounds of competitive balance. (JA 2262-65, R.723.)

One day after the NFLPA acquiesced, the NFL's true agenda was revealed through a barrage of media reports. (JA 80-83, R.703.) Apparently under the mistaken belief that, because of the SOD, they were immune from punishment for previously unknown breaches committed during the term of the then-expired SSA, certain NFL owners began publicly admitting to operating under a secret salary cap in 2010. (*See, e.g.*, M. Florio, *NFL warned teams "at least six times" about not dumping salary in uncapped year,* NBC ProFootballTalk (Mar. 12, 2012), http://profootballtalk.nbcsports.com/2012/03/12/nfl-warned-teams-at-least-six-times-about-not-dumping-salary-in-uncapped-year/; *see also* JA 81-82, R.703.)

Their admissions were stark. Giants team owner Mara, for example, referred to the uncapped year in the SSA as a "loophole" which all Clubs were instructed by the NFL not to "take advantage" of by spending freely on NFL player salaries. (D. Graziano, *Mara: Redskins,*

Cowboys got off "lucky," ESPN NFC East Blog (Mar. 25, 2012) ("[W]hen you look at the overall scope of what they did, they were trying to take advantage and they were told not to."), http://espn.go.com/blog/nfceast/post/_/id/37413/john-mara-redskins-cowboys-got-off-lucky; *see also* JA 84-85, R.703.) Further, Mr. Mara referred to the Redskins' and Cowboys' unrestricted spending on players during the 2010 season—as the SSA permitted—as a violation of the "spirit" of the salary cap (which, of course, was not supposed to be in place during the 2010 season). (*Giants owner Mara: Cap penalties could have been worse*, NFL.com (Mar. 25, 2012) ("I thought the penalties imposed were proper . . . . What [the Clubs] did was in violation of the spirit of the salary cap. They attempted to take advantage of a one-year loophole, and quite frankly, I think they're lucky they didn't lose draft picks."), http://www.nfl.com/news/story/09000d5d827db3e0/article/giants-owner-mara-cap-penalties-could-have-been-worse; *see also* JA 84, R.703.)

One prominent NFL owner even sent an email to the NFLPA Executive Director acknowledging the existence of the secret salary cap. (*See* JA 82-83, 85, R.703; *White* Class's Supplemental Reply in Supp. of

Petition at 2, R.736.) Specifically, the owner wrote that the Redskins and Cowboys were being punished because they spent significantly "over a 123m salary cap" during 2010 in comparison to teams that "abided by a 123m salary cap" during the 2010 season. (*Id.*)

In late March, the NFL for the first time acknowledged the existence of the 2010 secret salary cap to the media, explaining that it had established rules that were conveyed to and understood by the Clubs. (*See, e.g.,* D. Graziano, *No date set for cap penalty hearings,* ESPN NFC East Blog (Mar. 28, 2012) (quoting NFL Commissioner Roger Goodell on secret 2010 salary cap) ("[T]he rules were articulated. . . . [T]he rules were quite clear."), http://espn.go.com/blog/nfceast/post/_/id/37565/goodell-no-date-set-for-cap-penalty-hearings; D. Pompei, *Bears' McCaskey leery of expanding rosters*, Chicago Tribune (Mar. 26, 2012) (quoting Chicago Bears Chairman George McCaskey on secret 2010 salary cap) ("It's very important that everybody plays by the same set of rules. . . . If they tell people what the rules are, they all have to play by them."), http://articles.chicagotribune.com/2012-03-26/sports/chi-bears-

mccaskey-leery-of-expanding-rosters-20120326_1_instant-replay-replay-official-press-box; *see also* JA 81-82, R.703.)

As set forth in the Petition, the resulting harm to the Class was massive. It is believed that NFL players suffered damages approaching $1 billion, if not more, as a result of the secret salary cap during the 2010 season. (*See* JA 86, R.703.) Further, by colluding to circumvent the uncapped year in violation of the SSA, the NFL made it easier for the Clubs to endure the Final League Year and carry out their plan to let the SSA expire and lock out the players. (JA 86-91, R.703.)

X. AS THE NFL'S COLLUSION WAS REVEALED, SO WAS ITS MISCONDUCT IN OBTAINING THE SOD

At the time the SOD was negotiated, signed and filed with the District Court in *White*, the NFL was affirmatively concealing from the Class and the District Court the fact that it had imposed a secret salary cap in 2010. This was not an accident. The NFL took wrongful actions so it could obtain the SOD, as it knew full well that the SOD would never have been agreed to—let alone judicially approved—if the Class's claims concerning the secret 2010 salary cap were not hidden.

For example, in 2010, NFL Commissioner Roger Goodell approved each and every one of the player contracts that the NFL would later

punish the Redskins and the Cowboys for entering into (the SSA provided that all player contracts had to be approved by the NFL Commissioner, *see* JA 1975, 1988-90, R.524). Thus, even though the NFL knew that the Redskins and Cowboys were defying the secret salary cap, the NFL took no action to reject their contracts at the time, knowing that to do so would alert the Class to the secret collusion. Instead, the NFL waited until long after it had procured the SOD under false pretenses to seek to punish the non-compliant Clubs. (JA 83-84, R.703; *see also* JA-S 26, R.739 (describing internal NFL email on timing of penalties).)

The NFL committed further misconduct to secure the SOD by giving false statements in 2010 to make it appear as though the NFL were complying with the uncapped year: "The agreement calls for no salary cap in 2010." (*E.g., Ruling Bars Owners From Ending Pool*, ESPN.com (Feb. 1, 2010), http://sports.espn.go.com/nfl/news/story?id=4878750.) As would later be discovered, the NFL's statements were a smoke screen to mask its prohibited collusion and to enable the NFL to obtain the SOD.

The Class believes that discovery would reveal further evidence of the NFL affirmatively and wrongfully concealing its collusion from the Class and the District Court in order to obtain the SOD—and thus would provide further support for the Class's Rule 60(b) motion to set the SOD aside. However, the District Court's erroneous conclusion that the SOD left it without jurisdiction also led it to deny the Class's requested discovery and to decline merits briefing on the Rule 60 motion.

This appeal has been filed from the Orders of the Court below so that the protections of Rule 23(e) and Rule 60(b) will not be rendered a nullity. Specifically, this Court should hold that the claims of the Class for the previously unknown SSA violations alleged in the Petition cannot be compromised or dismissed by the SOD, which was never approved by the District Court or subject to any of the other class action procedures required by Rule 23(e). Moreover, the SOD was wrongfully obtained, warranting, in the alternative, relief from the SOD under Rule 60(b).

SUMMARY OF ARGUMENT

1. The District Court's determination that the SOD—which sought to compromise unknown *White* Class claims for violations of the SSA—did not require judicial approval under Rule 23(e) was wrong as a matter of law. If affirmed, the Order Denying Petition will serve as harmful precedent that the judicial scrutiny required by Rule 23 can be stipulated away in a private settlement of certified class claims for breach of a class action settlement agreement, thus jeopardizing Rule 23's protection of the rights of absent class members.

a. Rule 23(e) did not cease to apply to any dismissal or compromise of Class claims simply because the SSA expired. To the contrary, the plain text of Rule 23(e), which requires judicial approval before any such compromise of class claims, is mandatory and absolute: "The claims . . . of a certified class *may be . . . dismissed, or compromised only with the court's approval*." Fed. R. Civ. P. 23(e) (emphasis added). The Petition claims—which arose from NFL breaches of the SSA *before* it expired—are "claims" of the certified *White* Class. As such, those claims could not be compromised or dismissed

through the SOD without full Rule 23(e) compliance, regardless of whether such claims were asserted before or after the SSA expired.

b. The SOD did not terminate the District Court's jurisdiction to adjudicate Class claims pursuant to Rule 41(a). The plain text of Rule 41, which allows parties in *non*-class actions to voluntarily dismiss their claims without judicial approval, is expressly made "[s]ubject to Rule[] 23(e)," and thus prohibits such dismissals without obtaining the court approval mandated by Rule 23(e). Fed. R. Civ. P. 41(a)(1)(A). There is no dispute that Rule 23(e) procedures were not applied here, and, accordingly, the SOD has no legal effect.

c. The District Court's jurisdiction to enforce Class claims under the SSA also continues to this day because of the FCJ—a judicial consent decree, approved by this Court, that expressly provides the District Court with continuing and exclusive jurisdiction to oversee and enforce the SSA. The SOD did not purport to terminate the FCJ; nor could the SOD terminate the District Court's jurisdiction as a matter of law.

2. Even if the SOD were not defective as a matter of law for lack of judicial approval under Rule 23(e) (it is), the SOD would still be

invalid pursuant to Rule 41 because it did not dismiss the entire "action" as is necessary to be enforceable. *See* Fed. R. Civ. P. 41(a)(1)(A)(ii). The SOD expressly preserved certain specified Class claims and, therefore, did not dismiss the *White* action in its entirety. As a consequence, the SOD was not a valid Rule 41 dismissal.

3. Finally, the District Court erred in denying the *White* Class's alternative motion for Rule 60(b) relief from the SOD—due to the NFL's misconduct in procuring the SOD—by holding that the SOD extinguished the District Court's jurisdiction for purposes of Rule 60. The Court's erroneous Rule 60 ruling contradicts the language and purpose of the Rule, as well as persuasive authority from five Circuit Courts of Appeal holding that district courts retain jurisdiction to provide Rule 60 relief from stipulations of dismissal.

ARGUMENT

I. STANDARD OF REVIEW

Review on this appeal is *de novo*. The District Court made two erroneous legal determinations. First, the District Court concluded that Rule 23(e) was inapplicable and the SOD divested its jurisdiction to hear the *White* Class's Petition claims despite the absence of judicial approval, pursuant to Rule 23, of the SOD's dismissal of Class claims. (JA 93-103, R.740.) Second, the District Court concluded that, under Rule 41(a), it lacked jurisdiction to hear the *White* Class's Rule 60(b) Motion. (JA 104-14, R.759.) This Court "review[s] the district court's legal determinations de novo." *Scottsdale Ins. Co. v. Universal Crop Prot. Alliance*, 620 F.3d 926, 930 (8th Cir. 2010); *see also In re Baycol Prods. Litig.*, 616 F.3d 778, 782 (8th Cir. 2010) ("We review de novo the district court's interpretation of the law and Federal Rules of Civil Procedure.").

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING THAT THE SOD BARS THE *WHITE* CLASS'S PETITION CLAIMS

A. The District Court Erroneously Held That, After the SSA Expired, Rule 23(e) No Longer Applied to Any Compromise or Dismissal of Class Claims

In issuing the Order Denying Petition, the District Court erred as

a matter of law by holding that the SOD was not subject to Rule 23(e) because the SSA had expired.[9] The District Court's ruling defies Rule 23(e)'s unambiguous text and purpose.

Rule 23(e) renders parties to a class action powerless to settle, voluntarily dismiss or compromise any "claims" or "issues" of a certified class without district court approval pursuant to the Rule's procedures and requirements. Subsection (e) was added to Rule 23 in 1966; it was amended in important respects in 2003. The Rule, as amended, states in unqualified terms that:

> The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised *only* with the court's approval.

Fed. R. Civ. P. 23(e) (emphasis added) (also listing mandatory procedures for notice, objections, and related protections, consistent with absent class members' due process rights, added to Rule 23(e) by amendment in 2003).

Rule 23(e) functions to protect all members of a certified class, including—and in particular—absent class members. Once "a class has

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[9] The District Court held that Rule 23(e) approval of the SOD "was unnecessary, as the . . . SSA lapsed by its own terms [in March 2011]." (JA 100, R.740; *see also id.*, JA 101-02 ("It was at this point that . . . a stipulation of dismissal . . . no longer required Rule 23(e) approval.").)

been certified, the named parties are no longer sole masters of the fate of the action," 5 J. Moore, Moore's Federal Practice § 23.160 (3d ed. 2013), and "a class member cannot be bound unless she has received due process." *In re Gen. Am. Life. Ins. Co. Sale Pracs. Litig.*, 357 F.3d 800, 804 (8th Cir. 2004). Under Rule 23(e), the district court acts "as a fiduciary, serving as a guardian of the rights of absent class members." *In re Wireless Tel. Fed. Cost Recv'y Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005); *see also Christina A. v. Bloomberg*, 315 F.3d 990, 992 (8th Cir. 2003).[10]

Indeed, since its enactment in 1966, "the purpose of Rule 23(e) . . . [has been] to protect the rights and interests of absent class members." *Jenson v. Cont'l Fin. Corp.*, 591 F.2d 477, 482 n.7 (8th Cir. 1979). Legislative history leading to the Rule's 2003 amendments underscores the drafters' continued focus on the due process rights of absent members of a certified class. The drafters protected such rights by incorporating mandatory and absolute safeguards into Rule 23 to

[10] Rule 23(e) protections take on even greater import where, as here—due to the predominant injunctive relief at issue—the class is certified as a non-opt-out class under Rule 23(b)(1). (JA 115-20, R.67; JA 1110-16, R.318.) *See also White v. NFL*, 41 F.3d 402, 406-08 (8th Cir. 1994); *cf. Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 812-23 (1985) (addressing minimum due process requirements with respect to an *opt-out* class).

ensure that every compromise or dismissal of claims binding on absent class members would be fair, reasonable, and adequate.[11] The 2003 amendments[12] were intended, in part, to "strengthen the process of reviewing proposed class-action settlements" because "*court review and approval are essential to assure adequate representation* of class members who have not participated in shaping the settlement." Comm. on Rules of Practice and Procedure, Judicial Conference of the U.S., *Report of the Civil Rules Advisory Committee*, at 102 (May 20, 2002)

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[11] *See, e.g.,* Civil Rules Advisory Comm., *Meeting of Apr. 23-24, 2001—Minutes*, at 23-24 ("The second purpose of the proposal is to make it clear that notice to the class *is required*, as under present Rule 23(e), when a settlement, voluntary dismissal, or compromise would dispose of class claims, issues, or defenses . . . . There *must* be a hearing. And there *must* be findings to support the conclusion on fairness, reasonableness, and adequacy.") (emphases added); Comm. on Rules of Practice and Procedure, Judicial Conference of the U.S., *Meeting of June 7-8, 2001—Minutes*, at 21 ("Professor Cooper stated that the current rule provides that an action may not be dismissed or settled without notice. He explained that the rule, as revised, would distinguish between: (1) voluntary dismissals and settlements occurring before the court certifies a class; and (2) dismissals and settlements that bind a class . . . . In the second case—covered by proposed Rule 23(e)[1] and [2]—reasonable notice must be provided to all class members, and the court must determine that the dismissal or settlement is 'fair, reasonable, and adequate.'").

[12] Rule 23 was also amended in 2007 to make the Rule easier to understand and to conform the style and terminology to other rules. The 2007 Advisory Committee Notes state that "[t]hese changes are intended to be stylistic only."

(emphasis added); *see also id.* at 103 ("Subdivision (e)[2] confirms *and mandates* the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.") (emphasis added).[13]

The District Court's erroneous belief that Rule 23(e) contains an "on/off" switch for judicial approval of the dismissal or compromise of certified class claims cannot be reconciled with the unqualified text of Rule 23(e) and the due process rights of absent class members. The Rule does not so much as hint at a distinction between class claims asserted before, and class claims asserted after, expiration of a class settlement agreement. On its face, the Rule does not allow voluntary

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[13] *See also, e.g.*, Comm. on Rules of Practice and Procedure, Judicial Conference of the U.S., *Report of the Judicial Conference*, at 13 (Sept. 2002) ("The need for improved judicial review of proposed class settlements, along with the abuses that can result without effective judicial review, was a recurring theme in the testimony and written statements submitted to the advisory committee during public comment on the 1996 rule proposals. The RAND study also called for closer judicial review of class-action settlements. The proposed amendments focus on strengthening the rule provisions governing the process of reviewing and approving proposed class settlements in a setting that often lacks the illumination brought by an adversary process."); Comm. on Rules of Practice and Procedure, Judicial Conference of the U.S., *Meeting of June 10-11, 2002—Minutes*, at 12 (the proposed Rule 23(e)(2) specified "that a court may approve a settlement, voluntary dismissal, or compromise binding class members only after a hearing and on finding that it is 'fair, reasonable, and adequate'").

dismissal and/or compromise of any claims of a certified class without judicial approval. *See* Fed. R. Civ. P. 23(e) ("[C]laims . . . of a certified class *may be . . . dismissed, or compromised only with the court's approval*") (emphasis added).

The Petition claims at issue—for pre-expiration breaches of the SSA during the 2010 season—did not stop being "claims [or] issues . . . of a certified class" subject to Rule 23(e) simply because the SSA expired before they were discovered and asserted. As such, compliance with Rule 23(e) was mandatory for any settlement, voluntary dismissal, and/or compromise of such claims. *See, e.g.*, 7B C. Wright, et al., Federal Practice and Procedure § 1797.6 (3d ed. 2013) ("Wright & Miller") ("notice of dismissal or compromise . . . is *mandatory* in all cases under Rule 23") (emphasis added); *id.* § 1797.5 ("court approval is *necessary*") (fairness hearings "are *mandatory*") (emphases added); *Prof'l Firefighters Ass'n of Omaha v. Zalewski*, 678 F.3d 640, 648 (8th Cir. 2012) ("court *must* consider whether [the compromise] is fair, reasonable, and adequate") (emphasis added); *Crawford v. F. Hoffman La Roche*, 267 F.3d 760, 764 (8th Cir. 2001) (Rule 23(e) "directs the

court to protect the interests of absent plaintiffs before permitting dismissal").

Further, as shown below (Section II.C, *infra*), the SSA's expiration had no bearing on the District Court's continuing *jurisdiction* under the FCJ to provide the Class with remedies for pre-expiration breaches of the SSA. For example, after the SSA expired, the District Court (correctly) asserted its jurisdiction under the FCJ—without objection by the NFL—over three different SSA enforcement proceedings for prior breaches.

B. The District Court Erred by Concluding That Rule 23(e) Did Not Apply to the SOD

Because Rule 23(e) continued to apply to any dismissal or compromise of Class claims following the SSA's expiration, the SOD could not effectively dismiss or compromise Class claims for pre-expiration breaches of the SSA without full Rule 23(e) compliance. This is why the *Brady* Settlement required the SOD to be filed with the *White* Court. The District Court nonetheless concluded that, even though it never approved the SOD pursuant to Rule 23(e), the SOD deprived it of jurisdiction over the Petition—a position that even the NFL did not advance.

Rule 41(a)—from which the NFL claims the parties derived power to dismiss Class claims in *White* without judicial approval—expressly *mandates* compliance with Rule 23(e) in a certified class action. Specifically, Rule 41(a) is, by its own terms, "[s]ubject to Rule[] 23(e)," *i.e.*, when Rule 23(e) and Rule 41(a) intersect because class claims are at issue, the judicial approval requirements of Rule 23(e) trump Rule 41(a). Fed. R. Civ. P. 41(a)(1)(A); *see also Crawford*, 267 F.3d at 764 ("dismissal [of class claims] under . . . Rule 41 is subject to court approval pursuant to Rule 23(e)"). As emphasized in *Moore's*:

> Read together, the two rules mean that unlike an ordinary claim, which may be voluntarily dismissed by mere notice to the court, a class claim may not be dismissed or settled without approval of the court . . . . [Rule 23(e) procedures] render the relatively straightforward and simple procedures of Rule 41(a) *irrelevant*. Thus, in certified class actions, the Rule 41(a) procedures are more *overwhelmed* by the procedures set out in Rule 23(e) than merely "subject to" the Rule 23(e) procedures.

8 Moore's Federal Practice § 41.32[1] (emphases added); *see also Hamm v. Rhone-Poulenc Rorer Pharm.*, 176 F.R.D. 566, 570 (D. Minn. 1997) (Doty, J.) ("If a class action is involved, therefore, a voluntary dismissal is not allowed under Rule 41(a)(1) and a court order is required.").

Further, the Rules Enabling Act provides that the Rules, including Rule 41, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Thus, Rule 41 cannot "abridge" absent class members' substantive rights, including their due process rights to notice and a judicial hearing before their rights can be compromised. Accordingly, the SOD could not, as a matter of law, compromise or dismiss claims of the certified Class under the SSA, or divest the District Court of jurisdiction to consider such claims, without judicial approval.

The SOD was, in fact, no less a compromise of Class claims under the SSA than the amendments to the SSA in 1996, 1999, 2002, and 2006, which were each subject to, and effectuated only after compliance with, the requirements of Rule 23(e). (*See, e.g.*, JA 1531-34, R.415; JA 1622-24, R.455; JA 1687-89, R.504; JA 2086-88, R.526.) None of those SSA amendments became effective until after preliminary approval, class notice, an opportunity to object, a fairness hearing, and the District Court's determination that the proposed compromise of SSA rights was "fair, reasonable, and adequate" to the Class. (*Id.*) The same rationale that required Rule 23(e) compliance for the four sets of

SSA amendments to become effective also necessitated Rule 23(e) compliance for the compromise of Class claims in the SOD to become effective.

Under the District Court's erroneous reasoning, the safeguards imposed by Rule 23(e) on the dismissal of class claims would terminate when a class action settlement agreement expires and the class representatives and defendants agree to dismiss all class claims for prior breaches of the settlement agreement. However, the terms of Rule 23(e), and the self-subordinating terms of Rule 41(a), unambiguously protect absent class members from having their claims compromised without an opportunity to be heard or without the protection of judicial scrutiny.

In a similar vein, it makes no sense to hold that a private stipulation of dismissal could, without judicial approval, deprive a district court of its continuing jurisdiction to enforce a consent judgment used to settle a class action. If this were the law, defendants to a consent judgment in a class action could procure separate, side settlements with class representatives and/or class counsel that would terminate judicial oversight notwithstanding whether such termination

was in the best interests of the class.

Yet, the District Court erroneously concluded that the SOD deprived it of jurisdiction. In its Order Denying Petition, the District Court "acknowledge[d] that *had the parties not executed the SOD*, jurisdiction to enforce the SSA would have been present" because of the FCJ. (JA 102 n.9, R.740 (emphasis added).) But the SOD was a private stipulation seeking a voluntary dismissal and compromise of certified Class claims under the SSA. If, post-SSA expiration, the District Court had jurisdiction to adjudicate Class claims that arose *prior* to the SOD's expiration—as the District Court concedes—it necessarily follows that *any* effort to voluntarily dismiss or compromise those claims would require Rule 23(e) court approval.

There are numerous categories of class actions—such as discrimination, prisoner rights, antitrust, and school desegregation cases—in which long term injunctive relief for the class in a consent judgment is the remedy. If the ruling below is permitted to stand, Rule 23(e) protections would become a nullity for all such absent class members, who could be deprived of their rights under the consent judgments by stipulations of dismissal never approved by a court. This

is not the law.

C. The Final Consent Judgment Remains in Force and Provides Continuing Jurisdiction Over the Class Claims in the Petition

The District Court's conclusion that the SOD deprived it of jurisdiction to consider the Petition claims was erroneous for the additional reason that the SOD did not even purport to modify or terminate the *source* of the District Court's continuing jurisdiction over Class claims for breaches of the SSA: the FCJ, a judicial consent decree. (JA 1110-16, R.318.)

The FCJ is the court-ordered injunction that has protected the *White* Class since 1993[14] and it has not been modified or terminated. (*Id.*) It is the FCJ, not the expired SSA, that is the means by which the District Court "retain[ed] exclusive jurisdiction over this action" and applied the Rule 23(e) procedures that the District Court adhered to every time the SSA was amended from 1993 onward. (*Id.*; *see, e.g.*, JA 1531-34, R.415; JA 1622-24, R.455; JA 1687-89, R.504; JA 2086-88,

[14] There is no dispute that "district courts who enter judgment pursuant to a settlement agreement necessarily have the power to mandate compliance with it." *Alexander v. Chicago Park Dist.*, 927 F.2d 1014, 1023 (7th Cir. 1991) (internal quotations and citations omitted). And, "retention of jurisdiction is enhanced when the court is attempting to protect members of a class action." *Id.*

R.526; *see also* JA 830-32, R.256 (describing differences between the SSA and the FCJ).) Although the SSA contained an expiration date, the FCJ and its provisions for continuing court jurisdiction contain *no* expiration date. (*Compare* JA 1110-16, R.318 *with* JA 2010-14, R.524.) This is no accident, as the District Court needed continuing jurisdiction to consider Class claims for violations of the SSA even after it expired—exactly the situation presented by the Petition.

In light of the FCJ, the District Court's ruling that the expiration of the SSA permitted the SOD to deprive it of jurisdiction without Rule 23 approval makes no sense. The *in*clusion of a self-effectuating expiration in the SSA coupled with the *ex*clusion of any expiration date in the FCJ underscores the fact that the SSA's termination had no effect on the District Court's continuing jurisdiction to adjudicate breaches of the SSA that occurred before the SSA expired.[15]

The record from the long history of the FCJ and the SSA repeatedly illustrates the point that District Court jurisdiction to entertain Class claims for violations of the SSA continues so long as the

[15] "Because a consent decree reflects a compromise between hostile litigants its scope must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *White (Hobert-Grbac)*, 972 F. Supp. at 1238 (quotation omitted).

FCJ remains in effect. To this point, when it first entered the FCJ in 1993, "the court [found] that the present action is the type of case that requires *ongoing* court supervision." (JA 1483, R.320; *see also, e.g.*, JA 193:18-19, R.106; JA 829, R.256.) Thereafter, numerous proceedings have confirmed the District Court's jurisdiction to entertain Class claims for so long as the FCJ provides for such jurisdiction:

- In 1997, when reviewing a decision by the court-appointed special master, the District Court noted that: "The court's jurisdiction is based on the well-established principle that a trial court retains jurisdiction to enforce consent decrees *and* settlement agreements . . . . *Unless and until the [FCJ] is modified, the court has the power to enforce the terms of the SSA*." (JA 1545, R.432 (emphasis added).) While, pursuant to a stipulation, the court vacated that ruling without prejudice (JA 1625, R.457), the District Court's explanation of the source of its continuing jurisdiction has not changed.

- Similarly, the NFL moved in 1997 to "modify" the FCJ "to bring to an *end* the Court's *continuing jurisdiction* over the terms and conditions of player employment in professional football." (JA 1535, R.416 (emphases added).) The District Court rejected this motion (JA 1568, R.444), and its filing illustrates the NFL's recognition that the District Court would continue to have jurisdiction over Class claims unless and until the FCJ was judicially modified—which it never was.

- In 2008, the NFL again moved to modify the FCJ to "terminate further judicial oversight by this antitrust court over the terms and conditions of player employment in the NFL," further demonstrating that only a court modification of the FCJ could terminate the District Court's jurisdiction over class claims for a breach of the SSA. (JA 2113-14,

R.575.)

- In response to the above motion, the District Court again declined to "modify the [FCJ] and terminate its jurisdiction over the [SSA]" (JA 2115-29, R.586), and this Court affirmed, despite NFL arguments that, inter alia, the Class had too few remaining members for continuing court jurisdiction. *White v. NFL (Vick)*, 585 F.3d 1129, 1138 (8th Cir. 2009).

- Because the FCJ has no expiration date, it has never been necessary for the parties to seek an extension of the FCJ during the four times that judicial approval was sought for an extension of the SSA, which had a specific expiration date. (*See, e.g.*, JA 1698-99, R.516; R.518 at 10; JA 1704-15, R.521-2; JA 2086-88, R.526.)

- Finally, as discussed above (Statement of Facts, Section VI, *supra*), even *after* the SSA expired, the District Court continued to assert jurisdiction over *three* proceedings brought by the Class to enforce claims for prior SSA breaches, and did so under the continuing jurisdiction provided by the FCJ—without any objection by the NFL. *(See, e.g.*, R.683, 687-88, 690, 692, 695, 699.)

In light of the above record, and without modification of the FCJ, there is no conceivable basis for the District Court's ruling that the SOD deprived it of jurisdiction. Indeed, any termination of the FCJ—which would itself compromise the rights of class members—would require judicial approval under Rule 23(e).[16] Such a termination has never

[16] *See, e.g.*, *Greene v. Am. Cast Iron Pipe Co.*, 871 F. Supp. 1427, 1432 (N.D. Ala. 1994) ("[T]his court would be unwilling to consider the termination of the entire Consent Decree without first giving notice to, and obtaining the participation by, the class members.") ("[T]he plaintiff

occurred.

Thus, as the District Court correctly observed at the September 2012 hearing on this matter, long after the August 2011 filing of the SOD: "[The FCJ]'s still out there. It hasn't been dismissed. And it says the Court shall have plenary authority to enforce everything under the *White* matter." (JA 2324:9-11, R.728.) The District Court further added at the September 2012 hearing: regarding "the [FCJ] still being outstanding, I don't think there's any question about that." (*Id.* 2323:22-23.)

In its decision below, however, the District Court inexplicably brushed the FCJ aside in a footnote, asserting that the "FCJ also did not contemplate indefinite oversight." (JA 101 n.8, R.740.) As the record demonstrates, that is not correct. The FCJ has no expiration date and thus provides for continuing judicial oversight until all SSA

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class still has a substantial interest in the Consent Decree, an interest which under 'due process' principles could not be done away with without notice and hearing."); *Patterson v. Nwsppr. & Mail Delv'rs Union*, No. 73-3058, 1986 WL 520, at *4 (S.D.N.Y. Oct. 22, 1986) ("class [members] are entitled to notice and an opportunity to be heard on the issue of termination . . . of the consent decree"). While the SSA's expiration date was noticed to the class, there has never been such notice with respect to any proposed termination or modification of the FCJ. (*See, e.g.*, JA 1704-15, R.521-2 (2006 SSA class notice).)

claims are resolved or time-barred, or until the FCJ is terminated pursuant to Rule 23(e). Nor does "[t]he mere passage of time" render such "an injunctive [consent] order void." *Greene*, 871 F. Supp. at 1432; *see also McDonald v. Carnahan*, 109 F.3d 1319, 1321-23 (8th Cir. 1997) (judicial action is required to dissolve a consent decree).[17] Indeed, this Court, in concluding that a district court had properly exercised its jurisdiction in enforcing an order against a dismissed party, contemplated no temporal limitation on the court's jurisdiction to "enforce existing obligations created by prior remedial orders." *Jenkins v. Kan. City Mo. Sch. Dist.*, 516 F.3d 1074, 1081 (8th Cir. 2008) (affirming district court's exercise of jurisdiction in 2006 to enforce settlement agreement judicially approved in 1996 to resolve school desegregation lawsuit filed in 1977).

Finally, there was similarly no basis for the District Court to rest its "no jurisdiction" ruling on the assertion that, through the FCJ, the Court "*only* 'retain[ed] exclusive jurisdiction over this action to effectuate and enforce the terms of the [SSA], as amended.'" (JA 101

[17] The *McDonald* court dissolved a consent decree on defendants' motion, illustrating that a consent decree, like the FCJ (providing for continuing court jurisdiction with no specified end date), cannot simply lapse or be terminated by private agreement without court approval.

n.8, R.740 (emphasis added).) First, even if the District Court's statement were accurate as written, jurisdiction would still exist under the FCJ to enforce the terms of the SSA, as amended, for breaches of the SSA that occurred during its term. Second, the full text of the FCJ states that "this court retains exclusive jurisdiction over this action to effectuate and enforce the terms of the [SSA], as amended, *and this Judgment.*" (JA 1115, R.318 (emphasis added).) These last three italicized words underscore that the FCJ injunction compelling compliance with the SSA has a judicial force apart from the SSA itself. The SOD could not divest the District Court of jurisdiction to remedy violations of the FCJ injunction, including for SSA violations that took place before the SSA expired.[18]

* * *

In sum, the District Court erred as a matter of law by holding that it was divested of jurisdiction to hear the Class claims set forth in the Petition by a private stipulation never approved by the Court, and without judicial modification of the FCJ. The absence of judicial

[18] New York law, which governs the SSA, provides that breach of contract claims may be brought after the contract expires. *See, e.g.*, N.Y. C.P.L.R. § 213 (six-year statute of limitations).

approval pursuant to Rule 23 requires reversal of the District Court's ruling giving effect to the SOD. *See, e.g.*, *Gen. Am.*, 357 F.3d at 804; 7B Wright & Miller § 1797 ("[A] private settlement or compromise for which no approval is sought or notice given is not effective and may be ignored by the court.").[19]

III. THE SOD FAILS TO DISMISS ANY CLASS CLAIMS FOR THE ADDITIONAL REASON THAT IT DOES NOT COMPLY WITH RULE 41(A)

For the reasons set forth above, the SOD required judicial approval under Rule 23(e) to dismiss Class claims and terminate the District Court's FCJ jurisdiction. But, even if it did not, the SOD would nonetheless fail to bar the Petition claims because, as a matter of law, it does not meet the express requirements of Rule 41 to be a self-effectuating stipulation of dismissal.

The District Court ruled that the SOD was the reason that the Petition claims could not be heard, and that ruling was based on the provision for self-executing stipulations of dismissal under

[19] The mandatory nature of court approval under Rule 23(e) before class claims can be compromised renders irrelevant any NFL argument that player representatives, such as the NFLPA or Class Counsel, had authority to bind players whom they represented. There is no union or class counsel exception to Rule 23(e)'s court approval requirements.

Rule 41(a)(1)(A)(ii). (JA 101-02 & n.9, R.740.) Putting aside that Rule 41 is "[s]ubject to Rule[] 23(e)" and thus does not eliminate the judicial approval requirements for the dismissal of class claims, the SOD is also defective on its face under Rule 41, entitled "Dismissal of Actions," because it dismissed certain "claims," and expressly "except[ed,]" and thus continued, "the pending claim filed March 11, 2011 relating to an alleged rookie shortfall on the part of the Philadelphia Eagles." (JA 2159, R.701.) In other words, the SOD does not dismiss an entire "action" as the Rule requires. Fed. R. Civ. P. 41(a); *see also* 9 Wright & Miller § 2362 (3d ed. 2013) ("Rule 41(a) is applicable *only* to the voluntary dismissal of all the claims in an action.") (emphasis added); *Pratt v. S. Cty. Motor Sales*, No. 12-1492, 2012 WL 5906705, at *5 (E.D. Mo. Nov. 26, 2012) ("The Eighth Circuit . . . interprets Rule 41(a) to refer to the dismissal of *all* claims against a single defendant") (citing *Johnston v. Cartwright*, 355 F.2d 32, 39 (8th Cir. 1966));[20] *Bailey v. Shell W. E&P Inc.*, 609 F.3d 710, 720 (5th Cir. 2010) ("Rule 41(a)

[20] The reference to a single defendant in *Johnston* does not affect the analysis here—the dispositive point is that Rule 41(a) requires dismissal of *all* claims against a party to be effective. *See Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 687 (9th Cir. 2005); *Pratt*, 2012 WL 5906705, at *5.

dismissal only applies to the dismissal of an entire action—not particular claims."); *Hells Canyon*, 403 F.3d at 687 (same).

Notably, the NFL knew how to dismiss an entire "action" through a Rule 41 stipulation of dismissal. The *Brady* stipulation of dismissal, unlike the SOD, stated: "*Pursuant to [Rule] 41(a)(1)*, the parties hereby stipulate that this *action* shall be dismissed with prejudice." (R.758 at 5 n.6 (quoting *Brady v. NFL*, No. 11-639, Dkt. 187 (D. Minn. Aug. 4, 2011) (emphases added); *see also* JA 2314-15, R.724-1.) No such reference to Rule 41 or language dismissing the *entire White* action is contained in the SOD. The reason for this distinction, as explained above (Argument, Section II, *supra*), is that the SOD was *not* a self-effectuating Rule 41(a) stipulation of dismissal of non-class claims as in *Brady*, but a stipulation subject to judicial approval under Rule 23(e) in *White*.

Because the SOD did not dismiss the entire *White* "action," the SOD cannot be a valid self-effectuating stipulation of dismissal under the plain language of Rule 41(a)(1)(A)(ii).

IV. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING THAT THE SOD BARS THE *WHITE* CLASS'S ALTERNATIVE RULE 60(B) MOTION

The NFL defendants procured the SOD through misconduct and

concealment of their collusion; but for the NFL defendants' affirmative concealment of their wrongdoing from both the Class and the Court, there would be no SOD. (JA 2166-72, R.716.) Thus, to the extent the District Court wrongly applied the SOD despite the lack of judicial approval under Rule 23(e) or compliance with the terms of Rule 41(a) (*see* Argument, Sections II-III, *supra*), the Class alternatively moved for relief under Rule 60(b)(3), (5), or (6). (JA 2166-72, R.716.) Such Rule 60(b) relief would "relieve" the Class from the SOD and thereby enable the Petition claims to go forward. Fed. R. Civ. P. 60(b).

Rule 60(b) is "grounded in equity" and promotes the principle "that justice should be done." *Harley v. Zoesch*, 413 F.3d 866, 870 (8th Cir. 2005) (quotation omitted). However, the District Court did the opposite. It held that the SOD deprived it of jurisdiction even to consider whether Rule 60(b) relief should issue, denying the Class both the opportunity to take discovery relating to Defendants' wrongful procurement of the SOD and the opportunity to brief the merits of the matter. (JA 112-14, R.759.)

The District Court's ruling—"that Rule 60(b) is inapplicable in the context of a Rule 41(a)(1)(A)(ii) dismissal" (*id.*)—is in conflict with

persuasive authority from courts around the country holding that Rule 60(b) allows courts to vacate a wrongfully-obtained stipulation of dismissal under Rule 41(a)(1)(A)(ii). *See Fed'd Towing & Recv'y v. Praetorian Ins. Co.,* 283 F.R.D. 644, 659-60 (D.N.M. 2012) (surveying relevant law). The District Court disregarded this clear weight of authority, supported by five different Circuit Courts of Appeal (Sixth, Seventh, Ninth, Tenth and D.C. Circuits, discussed and cited below), in favor of two *unpublished* opinions of this Court.[21]

Yet, this Court has made it clear that "[u]npublished opinions . . . are *not* precedent." 8th Cir. R. 32.1A (emphasis added); *see also Young-Losee v. Graphic Pkg'g Int'l*, 631 F.3d 909, 913 n.1 (8th Cir. 2011). There was thus no basis for the District Court to have followed these unpublished rulings without any meaningful analysis. It should have instead followed the overwhelming weight of well-reasoned and precedential authority that supports the sound conclusion that Rule 60 can be used to vacate a Rule 41 stipulation of dismissal procured by misconduct.

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[21] (JA 112, R.759 (citing *Ajiwoju v. Cottrell*, 245 F. App'x 563 (8th Cir. 2007); *Scher v. Ashcroft*, No. 91-2661, 1992 WL 83547 (8th Cir. Apr. 29, 1992)).)

Rule 60(b) allows a court to "relieve a party . . . from a *final* judgment, order, or proceeding," and Rule 41(a)(1) allows parties to obtain a *final* dismissal of an action without court order. Fed. R. Civ. P. 60(b) and 41(a)(1) (emphasis added). The District Court saw the non-entry of a "judgment or order" under Rule 41(a)(1) as a fatal bar to granting the Class Rule 60(b) relief. (JA 113, R.759.) This conclusion epitomizes impermissible form-over-substance decision making,[22] and, as numerous courts have recognized, "the language of the Federal Rules of Civil Procedure clearly supports the opposite result." *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987).

Under the District Court's view, the SOD is a final, binding dismissal of the previously unknown Class claims in the Petition—*i.e.*, a final, binding termination with the same *res judicata* effect as a final judgment or order. Recognizing that the intent and function of Rule 60(b) is to cure injustice in the procurement of such judicial finality, the D.C. Circuit has held, in a similar context, that "[b]ecause the voluntary dismissal in this case operated as an adjudication on the

[22] *Cf., e.g.*, *First Union Nat'l Bank v. Pictet Overseas Trust Corp.*, 477 F.3d 616, 622 (8th Cir. 2007) (court "eschew[ing] a literal interpretation of [a rule] that places form over substance").

merits, it was a 'final judgment' under Rule 60(b)." *Id.*

Indeed, the District Court ignored Rule 60(b)'s language, which expands its coverage beyond judgments and orders to also include "proceeding[s,]" such as a Rule 41(a)(1) proceeding. Fed. R. Civ. P. 60(b). Thus, as the Ninth Circuit has explained, "a voluntary dismissal . . . is a judgment, order, *or proceeding* from which Rule 60(b) relief can be granted." *In re Hunter*, 66 F.3d 1002, 1004 (9th Cir. 1995) (emphasis added).

In addition to the foregoing decisions from the Ninth and D.C. Circuits, there is persuasive authority from the Sixth, Seventh, and Tenth Circuits that a Rule 41 stipulation of dismissal is susceptible to Rule 60 relief. *See, e.g.*, *Nelson v. Napolitano*, 657 F.3d 586, 589 (7th Cir. 2011) ("court may grant relief under Rule 60(b) to a plaintiff who has voluntarily dismissed the action"); *Smith v. Phillips*, 881 F.2d 902, 904 (10th Cir. 1989) ("an unconditional [Rule 41(a)(1)(A)(ii)] dismissal terminates federal jurisdiction *except* for the limited purpose of reopening and setting aside the judgment of dismissal within the scope allowed by [Rule] 60(b)") (quotation omitted; emphasis added); *Hinsdale v. Farmers Nat'l Bank &Trust Co.*, 823 F.2d 993, 995-96 (6th Cir. 1987)

(same); *cf. ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 116-17 (2d Cir. 2012) (affirming Rule 60(b) relief from Rule 41(a)(1)(A)(i) dismissal). The District Court and the NFL have cited no published circuit authority to the contrary (*see* JA 104-14, R.759; R.748 at 2-4), and Appellants are aware of none.[23]

Indeed, *Moore's* concurs with this multitude of persuasive circuit precedent: Rule 60(b) "[r]elief from a stipulated dismissal is appropriate." 12 Moore's Federal Practice § 60.48[3][b]; *see also* 8 Moore's Federal Practice § 41.34[6][g] ("An unconditional dismissal by stipulation terminates the district court's jurisdiction, except for the limited purpose of reopening and setting aside the judgment within the scope of Rule 60(b)."), § 41.34[6][i] ("The court retains jurisdiction to vacate a stipulation of dismissal under Rule 60(b), enabling it to reopen the case."). The reason for this is clear. If a Rule 41 stipulation of dismissal has the same effect as a judicial judgment terminating an action, then the policies underlying Rule 60 empower district courts to

[23] The District Court stated that the Eleventh Circuit questioned whether Rule 60(b) relief would be available in a Rule 41(a)(1) proceeding, while conceding the discussion was *dicta*. (JA 113, R.759 (citing *State Treasurer of Mich. v. Barry*, 168 F.3d 8, 19 n.9 (11th Cir. 1999).) In fact, the Eleventh Circuit has acknowledged that "[Rule] 60(b) may provide such relief." *Barry*, 168 F.3d at 19 n.9.

do justice and set aside such a proceeding when the result is procured through misconduct.

Given the well-reasoned and consistent authority from five Circuit Courts, this Court should eschew creating an unnecessary circuit split.[24] There is no reasoned justification under the Rule's plain language (or otherwise) to treat a final dismissal derived from a stipulation under Rule 41(a)(1) any differently under Rule 60(b) than a final dismissal derived from a court judgment or order. Where such finality is secured by misconduct or another basis for Rule 60(b) relief, a court may "vacate [such a] voluntary dismissal under Rule 60(b)." *Randall*, 820 F.2d at 1320.[25]

As this Court has recognized, "a party cannot fraudulently deprive the court of its otherwise lawful jurisdiction to act." *Conerly v. Flower*,

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[24] *Cf., e.g.*, *Cowden v. BNSF Ry. Co.*, 690 F.3d 884, 892 (8th Cir. 2012) ("declin[ing] to create a circuit split").

[25] The District Court misread *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985) to suggest that Rule 60(b) relief could issue on a Rule 41(a)(1) dismissal only if that dismissal expressly contemplated future judicial relief. (JA 112, R.759.) As subsequent decisions cited above show, *McCall-Bey* cannot be read that narrowly. *See, e.g.*, *Nelson*, 657 F.3d at 589. Limiting Rule 60(b) to stipulations of dismissal that specifically contemplate future judicial relief is incompatible with the Rule's equitable purpose of curing injustices after the fact and can be found nowhere in the Rule's text.

410 F.2d 941, 945 (8th Cir. 1969). Yet, that is precisely what the NFL defendants seek to do by arguing that the District Court is powerless to set aside a stipulated dismissal obtained through wrongful conduct.[26] (JA 2169-70, R.716.)

This Court should overturn the decision below and rule that the District Court has jurisdiction to determine whether the NFL defendants' misconduct "vitiated the consent" incorporated into the SOD. *Conerly*, 410 F.2d at 944. As a consequence, the District Court has the "power to vacate" under Rule 60(b) and view "the record as if the stipulation had not been made." *Id.* at 944-45 (affirming grant of Rule 60(b) relief from a stipulation of dismissal). As the Rule 60 Motion alleges, the SOD is the precise type of dismissal where Rule 60(b) relief is warranted since the purported dismissal was procured through misconduct. *See Ervin v. Wilkinson*, 701 F.2d 59, 61 (7th Cir. 1983) (vacating denial of Rule 60(b) relief from wrongfully obtained stipulation of dismissal: "Where the moving party has been prevented from presenting the merits of his case by the conduct of which he

[26] The allegations of misconduct in the Rule 60(b) Motion must be taken as true on this appeal as the District Court summarily dismissed the Rule 60(b) Motion for lack of jurisdiction without considering its merits or even accepting briefing on merits issues.

complains, Rule 60(b) relief is most appropriate."); *Dunlop v. PAN AM*, 672 F.2d 1044, 1051 (2d Cir. 1982) (Rule 60(b) relief warranted where "assurances" that led to a stipulation of dismissal turned out to be false).

If the Court concludes that the SOD is invalid under either Rule 23(e) or Rule 41(a) (*see* Argument, Sections II-III, *supra*), it will be unnecessary for the Court to determine whether relief from the SOD may be granted under Rule 60(b). However, in the event the Court finds it necessary to reach the Rule 60(b) issue, it should reverse the District Court's holding that it lacked jurisdiction to apply Rule 60 to the SOD and remand for full Rule 60(b) proceedings.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the District Court's Order Denying Petition and remand for full proceedings on the merits of the Class claims alleged in the Petition. Alternatively, this Court should reverse the District Court's Order Denying Rule 60 Motion and remand for full proceedings under Rule 60(b).

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Dated: April 30, 2013

Respectfully Submitted,

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Rule 28A(h) Certification

The undersigned hereby certifies, pursuant to Rule 28A(h) of the 8th Circuit Local Rules, that the electronic versions of the brief and addendum have been scanned for viruses and that they are virus-free.

Dated: April 30, 2013

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Certificate of Service

The undersigned hereby certifies that on April 30, 2013, I electronically filed the foregoing Opening Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit through the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that the service will be accomplished by the CM/ECF system.

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