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

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INTRODUCTION[1]

The NFL's Brief (hereinafter, "Opposition") does not even try to defend the two cornerstones of the ruling below: the District Court's erroneous legal conclusions that (i) Rule 23(e) stops applying to certified class claims upon expiration of a class action settlement agreement and, as a result, (ii) the out-of-court SOD stripped the District Court of jurisdiction. Instead, the NFL attempts to defend the outcome below by presenting arguments never addressed by the District Court. But the NFL's alternative arguments are no more sustainable than the District Court's legal errors.

The NFL does not deny the fundamental tenet that any dismissal or compromise of class claims or issues requires Rule 23(e) compliance. Rather, the NFL argues that the SOD was not subject to Rule 23(e) because it compromised claims arising under the *White* SSA as opposed to claims asserted in the *White* complaint. This is a distinction without a difference. Under the NFL's rationale, Rule 23 would cease to protect any certified class the moment it entered into a settlement agreement—permitting post-dismissal, out-of-court compromises of class member

[1] Defined terms in Appellants' Opening Brief ("Opening") have the same meaning herein.

rights under a judicially approved settlement. That is not the law and, indeed, even the NFL concedes that "any material change to the SSA" required judicial approval. (R.729 at 9.)

Similarly, the NFL's arguments about the diminishing size of the *White* Class are a red herring. The Petition claims compromised by the SOD would be no less "Class claims" even *if* none of the players directly injured by the 2010 secret salary cap are *White* Class members (they are). This is so because the Petition alleges violations of the injunctive relief awarded to the *White* Class, which protected future NFL players. That said, the NFL's attempts to define the Class narrowly are wrong. Multitudes of *White* Class members were, in fact, directly injured by the secret salary cap. Moreover, this Court already rejected the NFL's argument that a diminishing number of class members justifies termination of judicial oversight of the SSA. *See White v. NFL* (*Vick*), 585 F.3d 1129, 1137-38 (8th Cir. 2009).

Nor is there any merit to the NFL's argument that the NFLPA, as a union, could dismiss the claims of its members who were also class members in *White*—an antitrust litigation *outside* of the union's collective bargaining relationship with the NFL. Unions do not possess

unbridled power to release their members' legal claims in a non-labor setting, much less without judicial approval in a certified class action. Indeed, "except for the area of collective bargaining and its necessary incidents, the union has no unique authority to compromise the rights of its members." *Air Line Stewards & Stewardesses Ass'n, Local 550 v. Am. Airlines, Inc.*, 490 F.2d 636, 642 (7th Cir. 1973).

Apparently recognizing the SOD's vulnerability for non-compliance with Rule 23(e), the NFL presents two unfounded collateral attacks on the Petition. The first is that the NFLPA supposedly released the Petition claims in the CBA (the "CBA Release"). Unions, however, have no more legal authority than class counsel to compromise class claims without Rule 23(e) compliance. This legal principle alone disposes of the NFL's argument. But, even if the Court were to conclude that the CBA Release could theoretically release Class claims without judicial approval, its plain terms do *not* purport to release (i) the previously "unknown" claims asserted in the Petition, or (ii) *any* claims of the players who retired before the CBA Release was signed in August 2011. Moreover, the NFL's argument is unavailing for another reason: interpretation of the CBA Release falls within the exclusive

jurisdiction of the CBA arbitrator, and thus is not a task this Court may undertake at the NFL's behest.

As for the NFL's second collateral attack—untimeliness—this is a fact-intensive, hotly-disputed defense that is improper at the pleadings stage, where the well-pled Petition allegations must be accepted as true. Moreover, the NFL's implausible theory and inadmissible "facts" cannot carry the NFL's burden to prove the Petition was untimely.

Lastly, there is no merit to the NFL's championing of the District Court's holding that it lacked jurisdiction to even *consider* Class Counsel's Rule 60(b) Motion. Should this Court reach the Rule 60(b) jurisdictional question, the NFL's Opposition supplies no reason to create a split with the five Circuit Courts that have reached conclusions contrary to the District Court's.

* * *

The NFL's Opposition is replete with complaints about the "inequities" of permitting Class members to "renege" on their agreement by challenging the SOD. Rule 23(e), however, is not a discretionary rule that can be dispensed with because the NFL thinks it is unfair; the District Court bears the ultimate responsibility to approve

any proposed compromise of class claims, and that responsibility is unqualified. Further, it is hardly "inequitable" to expect the NFL to recognize the need for judicial approval to dismiss unknown Class claims with prejudice. Nor should the NFL be heard to complain about equity when the SOD itself was the product of the NFL concealing a collusive scheme designed to negate the NFL's court-ordered SSA obligation to provide the Class with an uncapped year. Whether as a matter of law or equity, the SOD—which was not subjected to *any* of Rule 23(e)'s requirements—cannot be enforced to dismiss the Petition.

COUNTER-STATEMENT TO STANDARD OF REVIEW

The NFL incorrectly posits that an abuse of discretion standard applies by relying on two inapposite cases concerning appellate review on the *merits* of decisions denying post-judgment relief under Rules 59 and 60. (Opp'n 21.) In contrast, here, the Court is reviewing the District Court's purely *legal* determinations regarding the application of Rule 23(e) to the SOD and its jurisdiction to hear the Class's Rule 60(b) Motion. The Court reviews these legal issues *de novo*. (Opening 39; *cf. Vick*, 585 F.3d at 1141 (reviewing *de novo* District Court's legal analysis of the SSA).)

ARGUMENT

I. THE SOD IS LEGALLY INVALID BECAUSE IT WAS NOT JUDICIALLY APPROVED

A. The NFL Does Not Dispute That The SSA's Expiration Did Not Terminate Either Rule 23(e)'s Application Or The District Court's Jurisdiction

The linchpin to the Order Denying Petition was the District Court's incorrect holdings that "no Rule 23(e) approval was required, because the SOD was executed after the expiration of the 2006 SSA,"[2] and therefore "the court is without jurisdiction to enforce the [SSA]." (JA 101-102, R.740.) The NFL's Opposition does not attempt to defend either aspect of this erroneous ruling.

First, the NFL offers *no* response to the showing in Appellants' Opening Brief (Section II.A) that there is no "on/off" switch for Rule 23(e)'s requirement that *any* dismissal or compromise of class claims or issues must receive judicial approval, *e.g.*, Rule 23(e) recognizes no distinction between class claims asserted before or after the expiration of a class action settlement agreement. The plain language of the Rule, as well as its legislative history and underlying policies, uniformly

[2] (*See also* JA 100, R.740 (holding judicial approval of the SOD "unnecessary, as the . . . SSA lapsed"); JA 100 n.7.)

compel this conclusion. To be sure, the NFL endorses the District Court's view that the SOD dismissed the Petition claims, but *not* on the ground that Rule 23(e) ceased to apply once the SSA expired. Accordingly, if this Court concludes, as it must (Section I.B, *infra*), that the SOD sought to compromise or dismiss the claims or issues of a certified class, then the Court must reverse the Order Denying Petition.

Second, with respect to the District Court's erroneous conclusion that it is "without jurisdiction to enforce the [SSA]," the NFL argues that Appellants "fixate" on that phrase but what the District Court *really* meant is that "the Petition was futile." (Opp'n 40.) In fact, the District Court repeated *three times* in its Order Denying Petition that the SOD had deprived it of "jurisdiction." (JA 101 n.8, JA 102 & n.9, R.740.) There is no way to reconcile this conclusion with the undisputed fact that "[t]he District Court did not vacate the [FCJ]" (the consent decree which vested the District Court with exclusive jurisdiction to enforce the SSA). (Opp'n 41; *see also* Opening 50-57; Opp'n 1 (acknowledging District Court's jurisdiction).) Contrary to the Order Denying Petition, there is no dispute that the District Court maintains jurisdiction to enforce pre-expiration breaches of the SSA.

B. The SOD Sought To Dismiss And Compromise *White* Class Claims And Thus Was Subject To Rule 23(e)

Unlike the NFL, the District Court never suggested that the SOD did not implicate "claims" or "issues" of the *White* Class. The court simply (and erroneously) ruled that the Class no longer enjoyed the protections of Rule 23(e) once the SSA expired. (Opening 39-45.) The NFL tries to circumvent this legal error by contending that the SOD did not concern claims or issues of the Class and, therefore, the SOD did not require Rule 23(e) approval. (Opp'n 25-30.) The NFL is wrong.

The SOD purported to absolve known and unknown violations of the injunctive relief in the SSA, which was imposed on the NFL and granted to the *White* Class, in exchange for, *inter alia*, the Class's agreement to dismiss its antitrust claims against the NFL. Those SSA rights were merged into the FCJ entered in favor of the Class. As the District Court acknowledged in approving the SSA, *White* was settled based on the NFL's promise to modify its conduct for the benefit of then-current *and future* players:

> [T]he present dispute could not be settled solely by an agreement to award class members monetary relief for alleged past liability. To be effective, any settlement must also address the NFL "structural" rules that will govern players in

> future years. Thus, a comprehensive agreement or order must encompass such future rules *in order to afford appropriate relief to plaintiffs* . . . .

White v. NFL, 822 F. Supp. 1389, 1407-08 (D. Minn. 1993) (emphasis added; internal quotations omitted).

Two of the most important injunctive concessions that the NFL promised to the Class were (i) to refrain from collusion, and (ii) to impose no salary cap in the SSA's final year. (Opening 20-22.) The SSA also contains express provisions for compensatory and non-compensatory damages for violations of the anti-collusion provisions. (Art. XIII § 9, JA 1967-68, R.524.) However, the SSA contains no provision extinguishing, upon its expiration, breaches accrued during its term. This is why the NFL sought to modify the SSA through the SOD after the SSA expired.

The SOD purported to absolve breaches of the injunctive relief awarded *to the certified Class*, such as the breaches alleged in the Petition. The right to redress these violations is a "claim" and "issue" *of the Class*. It can be nothing else.

In support of its argument that the SOD did not implicate Class claims, the NFL offers four points, which simply ignore the plain

language and underlying policies of Rule 23(e), and, taken to their logical conclusion, would eviscerate that Rule.

1. The NFL wrongly argues that only the original antitrust claims can be "Class claims"

The NFL argues that Rule 23(e) approval is required only for the dismissal or compromise of the original "class action itself," which the NFL describes as the "antitrust claims" asserted in the *White* lawsuit. (Opp'n 26-27.) In the NFL's view, Rule 23(e) does not apply to a dismissal or compromise of claims or issues arising from a class settlement agreement (here, the SSA) or corresponding consent decree (here, the FCJ), because a class settlement is not the "class action itself." (*Id.*)

To establish the predicate for this argument, the NFL relies on an *outdated* version of Rule 23, which referred to dismissal of the "class action." (*Id.* at 26 (quoting *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 4 (1st Cir. 1999); *Rodgers v. U.S. Steel Corp.*, 70 F.R.D. 639, 642 (W.D. Pa. 1976)).) Putting aside whether the prior version of Rule 23(e) limited its reach to "the class action itself" (it did not), the *current* version of Rule 23(e) does not limit its applicability to a compromise or dismissal of "the class action." Rather, Rule 23(e)—as

amended in 2003—broadly provides that "[t]he *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). The broader limitation on Rule 23(e) relied on by the NFL does not exist.

Nor would such a severe limitation make any sense. Rule 23(e) was designed to "protect the rights . . . of absent class members." *Jenson v. Cont'l Fin. Corp.*, 591 F.2d 477, 482 n.7 (8th Cir. 1979). 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 Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). Absent class members have as much interest in the enforcement, modification, and continued vitality of a class settlement agreement and corresponding consent judgment as they do in the compromise of the underlying claims. Therefore, it has always been the case—even under the prior version of Rule 23(e)—that "[i]n a class action, the district court has a duty to class members to see that any settlement it approves is completed, and not merely to approve a promise . . . ." *In re*

Corrugated Container Antitrust Litig., 752 F.2d 137, 141 (5th Cir. 1985).

In prior proceedings, *White v. NFL (Vick)*, 585 F.3d 1129 (8th Cir. 2009), the NFL argued that the District Court's oversight of the SSA (and its Rule 23 responsibilities) should end, in part, because the original antitrust claims were no longer at issue. *Id.* at 1137-38.[3] This Court, rejecting the NFL's argument, held that the cases cited by the NFL "addressed antitrust liability, whereas the question presented here is whether a district court may maintain oversight pursuant to the terms of an antitrust settlement." *Id.* at 1137. The same analysis disposes of the NFL's argument on this appeal.

2. The argument that purportedly few Class members were affected by the secret salary cap is misplaced

The NFL acknowledges that, even under its extremely narrow view of *White* Class membership, during the 2010 NFL season there "could have been" what it describes as a "handful" of active player

[3] *See also* NFL Br. at 24-25, *White v. NFL (Vick)*, No. 08-2001 (8th Cir. filed July 7, 2008) ("Judge Doty assumed that 'this court's jurisdiction is grounded in [Rule] 23 and such jurisdiction is unrelated to enforcement of the antitrust laws.' That premise is simply incorrect . . . jurisdiction arose instead under the antitrust laws, which are no longer applicable to the parties' relationship and this industry[.]").

members of the Class directly injured by the alleged collusion. (Opp'n 27.) In that event, even the NFL must concede that, to the extent the SOD dismissed the Petition claims, it compromised Class "claims" and "issues." This alone renders the SOD ineffective.

That said, the NFL's argument about the diminishing size of the Class turns on the following false premise: Class members who were not active players during the 2010 NFL season had zero interest in a modification of the bargain *they* struck with the NFL in exchange for *their* agreement to, among other things, dismiss *their* antitrust claims. It is immaterial whether 2,000 or two Class members were the *direct* victims of the NFL's 2010 secret salary cap. The SOD was invalid without Rule 23(e) approval because it purported to modify—indeed, extinguish—SSA promises made by the NFL to the *White* Class.

It is thus not surprising that this Court previously rejected the NFL's "dwindling class" theory. In *Vick*, the NFL argued that the District Court's oversight over the SSA should end because of "the diminishing number of original class members." 585 F.3d at 1137. This Court rejected that argument, noting, *inter alia*, that "the gradual retirement of class members was anticipated in 1993, as it has been

each time the settlement agreement has been amended" pursuant to Rule 23(e). *Id*. at 1138.

Finally, the NFL's narrow construction of the *White* Class is incorrect. Consistent with the District Court's holding in 1993 that the SSA was structured to benefit then-current players and "players in future years," *White*, 822 F. Supp. at 1407-08, the class definition was forward-looking and broadly encompassed individuals playing football as of the date of the last appeal from the *White* judgment (June 12, 1995)[4] who "[would] be" eligible to play in the NFL *in the future*:

> (i) all players who have been, are now, or will be under contract to play professional football . . . *and* (ii) all college *and other football players* who, as of August 31, 1987, through the date of final approval of the settlement of this action and the determination of any appeals therefrom, have been, are now, *or will be* eligible to play football as a rookie for an NFL team.

(JA 118 (emphases added), R.67.) There was thus a multitude of *White* Class members, playing in the NFL in 2010, directly affected by the secret salary cap.[5]

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[4] (Opp'n 7-8.)

[5] Nor, under the Class definition, do original Class members cease to be Class members with the passage of time.

3. Individual players' ability to initiate SSA enforcement proceedings is irrelevant to Rule 23(e)'s application to the SOD

The NFL's argument that, because individual players could bring SSA claims, no SSA claims could ever be "class claims," is a non-sequitur. (Opp'n 28-29.)

The SSA expressly provides that "Class Counsel" may bring a collusion claim (JA 1964, R.524)—which necessarily means *on behalf of class members*—and Class Counsel were, in fact, signatories to the Petition. (JA 92, R.703.) That the SSA *also* permitted individual "player[s]" and "any Players Union" to initiate SSA enforcement proceedings is beside the point. The Petition was brought on behalf of the Class by Class Counsel (in addition to the NFLPA). The SOD, in turn, purported to dismiss all claims, including Class claims, under the SSA—necessitating Rule 23(e) compliance. There is simply *no* authority for the NFL's position that the mere *availability* of individual relief under the SSA is a basis to conclude that Rule 23(e) has no application even though Class claims would be compromised.[6]

[6] The NFL cites *Duhaime* and *Rodgers* as support for a "peripheral agreement exception," whereby agreements affecting a class can escape Rule 23(e) if deemed "peripheral." *Duhaime* and *Rodgers* stand for no

4. Requiring Rule 23(e) compliance for any modification of SSA rights is consistent with past practice

The NFL's contention that subjecting the SOD to judicial approval would depart from past practice in *White* is itself a departure from reality. The District Court preliminarily approved, ordered notice to the Class, held a fairness hearing, and finally approved as "fair and reasonable" to the Class each prior SSA modification—*except for* the SOD. (Opening 18-20.)

Moreover, notwithstanding the extreme positions the NFL advances on appeal, the NFL conceded below that attempts to "change" "the SSA *itself*" would require Rule 23(e) approval. (R.729 at 9 ("Only an amendment of the SSA could trigger a requirement of court approval."); *id.* ("the question is whether there was any material change *to* the SSA *itself*").) It is hard to fathom a more "material" change to the SSA than a dismissal with prejudice of all known and unknown claims

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such thing. Rather, those cases addressed side settlements by *individuals* that had "no effect upon the rights of others" in the class, and correctly recognized that even the prior version of Rule 23(e) applied where (as here) a class would "be bound or affected by a settlement of their claims by their class representatives." *Rodgers*, 70 F.R.D. at 642; *see also Duhaime,* 183 F.3d at 4.

thereunder, yet the SOD—which purported to do just that—was never approved by the District Court.[7]

* * *

Under the NFL's view, district courts would cease to have any function in a class action once a settlement agreement is signed. The NFL apparently contends that absent class members have an interest in due process with respect to settling a class action, but have no such interest in the injunctive, court-ordered performance of obligations under their settlement. If that were the law, defendants, class counsel, and named plaintiffs would have *carte blanche* to renegotiate judicially approved class settlements while district courts would be powerless to protect the claims of absent class members. This Court has previously recognized that this is not the law. *See, e.g., Vick*, 585 F.3d at 1136-38 (affirming District Court's continuing jurisdiction to enforce the SSA, which had been first agreed to fifteen years earlier); *Jenkins v. Kan. City Mo. Sch. Dist.*, 516 F.3d 1074, 1081 (8th Cir. 2008) (affirming

[7] Even if the SSA *did* purport to empower the parties to dismiss Class claims without judicial approval (the SSA did no such thing), "the requirements of Rule 23 cannot be circumvented via contract or settlement agreement." *Benway v. Res. Real Estate Servs., LLC*, No. 05-3250, 2011 WL 1045597, at *5 (D. Md. Mar. 16, 2011).

district court's exercise of jurisdiction in 2006 to enforce a 1996 settlement agreement of a 1977 lawsuit).

C. The NFLPA Did Not And Could Not Dismiss *White* Class Claims Without Judicial Approval

The NFL argues (Opp'n 31-35) that, as an exercise of the NFLPA's statutory authority under federal labor law, the union could—and did—dismiss in *White* the claims of Class members who were members of the NFLPA at the time it signed the SOD. The NFL's view of the NFLPA's supposedly limitless authority to dismiss the non-CBA claims of its members is legally incorrect.

To begin, Rule 23(e)'s unqualified terms contain no exception allowing a union—under the guise of collective bargaining, federal labor law, or anything else—to dismiss or compromise the claims of certified class members merely because they are also members of the union.

Under the NFL's view—for which it offers *no* authority—Rule 23(e) would be meaningless in every class action involving class members who were also union members.[8] Suppose, for example, that a

[8] No authority cited by the NFL involves unions compromising claims of their members outside the context of a collective bargaining relationship with management, let alone without judicial approval in a class action. (Opp'n 31-32.)

certified class of workers—some or all of whom were unionized—brought a products liability claim against the manufacturer of a hazardous substance used on the job. Their union could not, of course, unilaterally and without judicial approval step in and settle the class members'/union members' claims against the manufacturer.

In *Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc.*, a union sought to represent its stewardess members in bringing, and then settling, class discrimination claims against the employer-airlines. 490 F.2d 636 (7th Cir. 1973). There was no question in that case—as there should be none here—that the litigation compromise negotiated by the union was subject to judicial approval and Rule 23, notwithstanding the union's status as the stewardesses' collective bargaining representative. *See id.* at 638-42. In fact, the Seventh Circuit *rejected* the settlement class certified by the district court on the ground that the "ordinary" class certification requirements should have been applied:

> [E]xcept for the area of collective bargaining and its necessary incidents, the union has no unique authority to compromise the rights of its members. Its adequacy as a representative party in a class suit, and its authority to compromise the rights of its members in a class suit when

> such rights do not arise out of collective bargaining agreements are to be tested and judged in the ordinary way.

Id. at 642.

The NFL manufactures from whole cloth its position that when class members are represented by a union, Rule 23(e)'s protections are a nullity. Specifically, the NFL argues that because "there were no unrepresented *absent* class members with potential claims," there was "no need for the procedures of Rule 23(e)." (Opp'n 34-35.) This argument is another non-sequitur. Rule 23 requires that to be certified as a class action, the class must be "fairly and adequately represent[ed]" by class representatives and class counsel. Fed. R. Civ. P. 23(a)(4), (g). Rule 23 *additionally* imposes the protections of Rule 23(e) for any compromise of class claims and issues. Thus, the fact that a *White* Class member is ably represented by Class Counsel and the NFLPA does not, under the plain text of the Rule, negate his *further* right to notice, a hearing, and judicial approval of any proposed dismissal of his claims. As the Seventh Circuit held in *Air Line Stewardesses*, Rule 23 must be satisfied "in the ordinary way" regardless of a union's involvement on behalf of class members. 490 F.2d at 642; *see also*

Mungin v. Fla. E. Coast Ry. Co., 318 F. Supp. 720, 732 (M.D. Fla. 1970) (applying Rule 23 to proposed class action settlement notwithstanding intervention and involvement of plaintiffs' union), *aff'd*, 441 F.2d 728 (5th Cir. 1971).

Finally, even *if* the Court were to agree with the NFL that the NFLPA could dismiss the claims of its members in a class action without judicial approval, that conclusion would still not dispose of the Petition. Many NFL players who were injured by the NFL's collusion in 2010 retired after that season (the "2010-11 Retirees").[9] Such players were not NFLPA members on August 4, 2011 when the NFLPA signed the SOD.[10] It is thus beyond dispute that when the SOD was executed, the NFLPA no longer had authority to bind the 2010-11 Retirees to *anything*.

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[9] For example, Alan Faneca signed an NFL player contract for the 2010 NFL season on April 27, 2010, and then retired after the 2010 season, before the CBA release was executed. *Guard Faneca headed to Arizona*, ESPN.com (Apr. 27, 2010), http://sports.espn.go.com/nfl/news/story?id=5140938; *Alan Faneca retires from NFL*, ESPN.com (May 10, 2011), http://sports.espn.go.com/nfl/news/story?id=6521398.

[10] NFL Players "who have been previously employed by a member club of the National Football League" but are no longer "seeking employment with an NFL Club" are excluded from the NFLPA's bargaining unit. (*See* CBA, Preamble.)

D. Equity Requires Adherence To Rule 23(e)

This Court should reject out of hand the NFL's perverse argument (Opp'n 35-37) that it would be "inequitable" to comply with the Federal Rules and require judicial approval of a stipulation purporting to dismiss with prejudice unknown class claims, including claims for affirmatively concealed conduct that gutted key features of a class action settlement agreement.

This argument fails at the threshold. The NFL offers no authority for the proposition that Rule 23(e) can be discarded on the basis of what Class Counsel supposedly did or did not do.[11] The District Court's role as ultimate guardian of the class cannot simply be disregarded. *Cf. Miller v. Mackey Int'l, Inc.,* 452 F.2d 424, 428 (5th Cir. 1971) ("This Court cannot, however, rewrite the Federal Rules of Civil Procedure and seriously undermine the class action device in order to avoid dubious harm to these defendants.").

[11] The NFL's cited cases are inapposite. *See Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 127 (2d Cir. 2009) (considering equities under Rule 60(b)); *Fleming v. U.S. Postal Serv. AMF O'Hare*, 27 F.3d 259, 260-61 (7th Cir. 1994) (same); *Smith v. World Ins. Co.*, 38 F.3d 1456, 1463 (8th Cir. 1994) (considering equitable estoppel affirmative defense).

Further, even *if* the District Court had discretion to forsake Rule 23(e) compliance on equitable grounds, this would not be a case in which to do so. Having, for its own purposes, sought to evade Rule 23 judicial scrutiny of the SOD, the NFL should not now be heard to blame Class Counsel for the consequences. As the "proponent" of the SOD, the NFL should have secured Rule 23 compliance if it wanted the SOD to be enforceable. *See Blanchard v. Edgemark Fin. Corp.*, 175 F.R.D. 293, 300 (N.D. Ill. 1997) ("under Rule 23(e), the Defendants, as the proponents of the settlement, bear the burden of showing that the settlement was fair"), *adopted in full*, No. 94-1890, 1998 WL 988958, at *6 (N.D. Ill. Sept. 11, 1998). (*See also* Opening 28-29.)

More fundamentally, it was the District Court's independent duty to the Class to enforce Rule 23(e). *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 n.5 (1980); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995); *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 20 (2d Cir. 1981). Inaction by the parties does not excuse inaction by the court. *See Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)

("The court cannot accept a settlement that the proponents have not shown to be fair, reasonable, and adequate.").

The sole case the NFL cites suggesting that it was *Appellants'* responsibility to invoke Rule 23(e) procedures for *Appellees'* benefit is inapposite. In *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3d Cir. 1973), the Third Circuit stated that class counsel had the responsibility to provide notice to the class *after* being so "ordered by the district court." *Id.* at 826; *see also* Fed. R. Civ. P. 23(e)(1) ("*The court must* direct notice . . . .") (emphasis added). Moreover, *Greenfield* underscores the settled tenet that "[t]he ultimate responsibility" for Rule 23 compliance "is committed to the district court . . . as the guardian of the rights of the absentees." 483 F.2d at 832.

II. THE SOD IS ALSO INVALID UNDER RULE 41

The NFL attempts to brush aside the fact that the SOD did not obtain Rule 23(e) court approval by declaring that "[a] stipulation of dismissal operates automatically, without any further action by the court." (Opp'n 38.) Not so in a certified class action. Pursuant to Rule 41, stipulated dismissals are "[s]ubject to Rule[ ] 23(e)." Fed. R. Civ. P.

41(a)(1)(A). *See also* 7B C. Wright, et al., Federal Practice and Procedure § 1797 (3d ed. 2013); (Opening 45-49).

The NFL offers three lines of response to Appellants' further argument that, in addition to non-compliance with Rule 23(e), the SOD was not a valid Rule 41(a) dismissal because it did not purport to dismiss the "entire action," as required by Rule 41. (*Id.*) *First*, the NFL claims this argument was not raised below. (Opp'n 38.) The NFL is mistaken. (*See* R.758 at 5-6.)

Second, the NFL incorrectly argues that, because the SSA describes a claim for breach as "an action," the voluntary dismissal of any particular claim may be deemed the dismissal of "an action" within the meaning of Rule 41. (Opp'n 38.) Rule 41 plainly refers to dismissal of the entire "action," *i.e.*, the lawsuit; it does not turn on how parties privately describe the underlying claims. Regardless, the SSA also refers to the prosecution of Class claims as "proceedings" and "disputes"—"action" is merely another word used with no specialized meaning tied to Rule 41. (*See*, *e.g.*, Art. XIII § 3 ("proceeding"), JA 1963, R.524; Art. X § 10 ("dispute"), JA 1948, R.524.)

Third, the NFL suggests that Rule 41 requirements should not be applied because there was "no viable complaint to amend under Rule 15(a)." (Opp'n 39.) The Rules, however, provide no such exception. *See Pratt v. S. Cnty. Motor Sales, Inc.*, 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)). Put simply, "Rule 41(a) is applicable only to the voluntary dismissal of all the claims in an action." 9 Wright et al., *supra*, § 2362. The SOD fails that test.

III. THE SOD DID NOT EXTINGUISH THE DISTRICT COURT'S JURISDICTION TO RULE ON APPELLANTS' ALTERNATIVE RULE 60(B) MOTION[12]

The sole Rule 60(b) issue before this Court is whether the District Court erred when it ruled it lacked jurisdiction to even consider Class Counsel's alternative Rule 60(b) Motion. The overwhelming weight of appellate authority supports the sound conclusion that district courts retain jurisdiction to vacate a Rule 41 stipulation of dismissal procured through misconduct.

[12] If the Court concludes that the SOD is invalid, then Class Counsel's alternative Rule 60(b) Motion for relief from the SOD will become moot.

The NFL incorrectly maintains that, even though the SOD purported to dismiss Class claims with prejudice, it is not "a final judgment, order, or proceeding" for the District Court to overturn. (Opp'n 42-45.) In support, the NFL cites *dicta* from *State Treasurer of Michigan v. Barry*, 168 F.3d 8 (11th Cir. 1999). In *Barry*, however, the court never decided whether a voluntary dismissal constitutes a final judgment, order, or proceeding. *See id.* at 19 n.9 ("[Rule] 60(b) may provide such relief."). By contrast, the Ninth Circuit and other courts have *explicitly* recognized that "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). (*See also* Opening 62-65.)

The NFL's (and District Court's) form-over-substance reading of the interplay between Rules 41 and 60 is misguided. In the context of a stipulation of dismissal under Rule 41(a)(1)(A)(ii), a court order is superfluous because the dismissal is self-effectuating. The only reason to file "a piece of paper designated as a final judgment in each case" would be to "avoid any argument that the faulty stipulation did not terminate the suit, or any other potential complications." *Federated Towing & Recovery, LLC v. Praetorian Ins. Co.*, 283 F.R.D. 644, 659-60

(D.N.M. 2012). This entirely *precautionary* measure was recently adopted by the Tenth Circuit in part to protect against the same hyper-textual reading of Rule 60(b) advanced by the NFL here. *See id.* (explaining that the Tenth Circuit does not distinguish between judgments and dismissals under Rule 41).

Appellants' Opening Brief (63-65) demonstrated that five Circuit Courts of Appeal agree that Rule 60 jurisdiction applies, and, as the NFL has discovered, "[n]o [contrary] case exists because 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). To conclude otherwise would absolve parties who improperly procure stipulations of dismissal by misconduct—including fraud.

The NFL is wrong in claiming that if "fraud in the inducement" could serve as a basis for vacating a stipulation of dismissal, then "it would be impossible to release unknown claims." (Opp'n 51.) Of course, district courts are perfectly capable of denying Rule 60(b) motions where that is the proper, equitable result.

NFL protestations aside, this Court is not bound by unpublished decisions.[13] Accordingly, the Court should avoid creating an unnecessary circuit split, adopt the persuasive reasoning of five other Circuit Courts, and rule that the District Court retains jurisdiction to vacate the SOD under Rule 60(b).[14]

IV. THE NFL'S COLLATERAL ATTACKS ON THE PETITION ALSO FAIL

A. The CBA Could Not And Did Not Release *White* Class Claims

The NFL is wrong multiple times over in arguing that the CBA Release disposed of the Petition claims.

First, as with the SOD, the NFL's CBA Release argument has no legal force because the NFLPA could not dismiss or compromise *White* Class claims absent judicial approval. It is irrelevant under Rule 23 whether the purported dismissal is memorialized in a stipulation, a CBA, or something else; if the document purports to dismiss or compromise Class claims or issues, then Rule 23(e) compliance is mandatory. Unions have no authority to release their members' claims in a class action without judicial approval. *Air Line Stewardesses*, 490

[13] "Unpublished opinions . . . are not precedent." 8th Cir. R. 32.1A.

[14] The NFL's arguments about the *merits* of the Rule 60(b) Motion—which was not briefed below—should be ignored.

F.2d at 642 ("except for the area of collective bargaining and its necessary incidents, the union has no unique authority to compromise the rights of its members").

Second, the CBA Release does not cover the Petition claims. By its terms, the CBA Release applies only to two specifically enumerated categories of claims: (i) claims "asserted" in *White* or *Brady*, and (ii) claims that "could have been asserted" in *White* or *Brady*. CBA, Art. 3, § 3(a). The Petition claims were never "asserted" in *White* or *Brady*, nor could they have been, because such claims were unknown to NFL players until March 2012. (*See infra* Section IV.B.)

The NFL strains to construe the CBA Release as releasing all unknown claims–regardless of whether they could have been asserted in *White* or *Brady*—by citing *Kakani v. Oracle Corp.*, No. 06-6493, 2007 WL 1793774 (N.D. Cal. June 19, 2007) for the proposition that "could have been asserted" language covers unknown claims. *Kakani*, however, is inapposite because the release provision in that case expressly applied to "unknown" claims. *Id.* at *2. The CBA Release, on the other hand, omits the word "unknown."

By contrast, the SOD—signed the same day as the CBA Release—specifically purports to dismiss "all claims, known and *unknown*." (JA 2159, R.701 (emphasis added).) If the parties to the CBA Release had intended to release "unknown" claims through the CBA, then they would have used the same language as the SOD. *White v. NFL (Lelie)*, No. 92-906, 2007 WL 939560, at *4 (D. Minn. Mar. 26, 2007) ("deliberate use of two different terms . . . demonstrates that the drafters intended two different standards").

Third, under no interpretation could the CBA Release support dismissal of the Petition because the CBA Release did not compromise any claims of the 2010-11 Retirees, who were no longer members of the NFLPA's bargaining unit on August 4, 2011. (*Supra*, Section I.C.) Indeed, by its express terms, the CBA Release "does not cover any claim of any retired player." (CBA, Art. 3, § 3(a).)

Finally, interpretation of the CBA Release is subject, exclusively, to CBA arbitration. (*See* CBA Art. 43.) In fact, *the NFL initiated such an arbitration one year ago*. The Court thus should reject out of hand the NFL's attempt to rely upon the CBA Release, which is not susceptible to judicial review, to support the erroneous decision below.

B. The Petition Was Timely

Finally, the NFL's "statute of limitations" defense is both procedurally improper and factually unsupported. (Opp'n 56-57.)

The Petition alleges specific facts of the NFL's affirmative concealment of a secret salary cap during the 2010 NFL season. (JA 83-84, R.703.) NFL players thus did not "know," and could not "reasonably . . . have known with the exercise of due diligence," information sufficient to put them on notice of the Petition claims prior to NFL owners publicly acknowledging their collusion in March 2012. (*Id.* at 81-85.)[15] The NFL hid that truth for nearly two years—until after the SSA expired, the "lockout" was imposed, *Brady* was settled, the SOD was secured, and a new CBA was consummated—before punishing the Cowboys and Redskins for not complying with the secret salary cap back in 2010. (*Id.* at 83-84.) These factual allegations must be accepted as true at the pleadings stage and are more than sufficient to establish

[15] (SSA, Art. XIII, § 17 (providing, as relevant here, that collusion claims must be asserted within 90 days of "when the player knows or reasonably should have known with the exercise of due diligence that he had a claim"), JA 1971, R.524.)

the Petition's timeliness. *See, e.g., Weizmann Inst. of Sci. v. Neschis,* 229 F. Supp. 2d 234, 252 (S.D.N.Y. 2002).[16]

Indeed, it is the NFL that bears the burden on its "statute of limitations" defense. *See Minichello v. N. Assur. Co. of Am.*, 758 N.Y.S. 2d 669, 670 (App. Div. 2003). The NFL cannot carry its burden merely by raising in its Opposition conclusory and implausible factual assertions based on inadmissible evidence. For example, the NFL cites to a March 2010, newspaper hearsay statement supposedly made by NFLPA Executive Director DeMaurice Smith that team payrolls had decreased. (Opp'n 57.) But neither Mr. Smith nor anyone else could have known in March 2010—the first month of the 2010 League Year—whether Club payrolls would increase or decrease over the course of the next eleven months.[17]

Further, the narrow collusion claims Class Counsel brought in 2010—alleging collusion to "(i) limit Offer Sheets to Restricted Free

[16] The SSA is governed by New York law. (Art. XXVII, JA 2016, R.524.)

[17] Hearsay statements of NFL player agents (Opp'n 11-12) are likewise untrustworthy and unavailing. Moreover, to the extent agents were complaining about the lack of offers to *restricted free agents*, these concerns would not put anyone on notice of a secret cap on *all* player compensation.

Agents ('RFAs') . . . and (ii) fix trigger dates in 2010 Player Contracts to which the payment of 2011 option bonuses are linked"—do not in any way demonstrate that NFL players were on notice at that time of the secret salary cap conspiracy alleged in the Petition two years later. (JA 86-87, R.703; JA 2238, R.721.)

At bottom, the NFL's untimeliness argument rests on the factually disputed and implausible premise that NFL players knew of—and thus could have asserted—a billion dollar claim on the eve of the NFL's "lockout" but chose not to do so. The NFL offers no coherent explanation for why players would not have asserted the Petition claims in 2010 or 2011 to help them fight off the lockout if they had known about such claims. In all events, the NFL's timeliness defense is not ripe on this appeal in the face of the well-pled, pre-discovery, and contrary factual allegations of the Petition.

CONCLUSION

For all of the above reasons, the District Court's Order Denying Petition and Order Denying Rule 60 Motion should be reversed.

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I hereby certify that this document, including all headings, footnotes, and quotations, but excluding summary of the case, the table of contents, table of authorities, any addendum containing statutes, rules or regulations, and any certificates of counsel, contains 6,961 words, as determined by the word count of the word-processing software used to prepare this document, specifically Microsoft Word 2010 in Century Schoolbook, 14 point font, which is no more than 7,000 words permitted under Federal Rules of Appellate Procedure 32(a)(7)(B)(ii).

Dated: July 12, 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 version of the reply brief has been scanned for viruses and is virus-free.

Dated: July 12, 2013

Respectfully Submitted,

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Certificate of Service

The undersigned hereby certifies that on July 12, 2013, I electronically filed the foregoing Reply 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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