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VIA CM/ECF

Mr. Michael E. Gans, Clerk
United States Court of Appeals
for the Eighth Circuit
Thomas F. Eagleton Courthouse
Room 24.329
111 South Tenth Street
St. Louis, Missouri 63102

Re: *Brady v. National Football League*, No. 11-1898

Dear Mr. Gans:

We write to correct a misstatement by the NFL Defendants in their reply brief.

The NFL Defendants assert that the players' motion for preliminary injunction was supported only by "conclusory opinions." Reply Br. 15 n.8. In fact, the players supported their motion with sworn declarations from their agents, who have more than 165 years of collective experience negotiating NFL players' contracts and have firsthand knowledge of the market for NFL players. *See* Lenkner Dec. Exs. 1–2, 4–9. The players also submitted multiple declarations from Richard A. Berthelsen—an attorney for the NFLPA for almost 40 years who has witnessed previous occasions when the NFL Defendants operated without a collective bargaining agreement and suffered no harm. *See id.* Exs. 3, 10–11. The NFL Defendants submitted one factual declaration to the district court—a document they do not cite in their briefing in this Court.

The district court expressly found that there were *no* material factual issues in dispute on the question of irreparable harm. *See* Op. 71 n.54. The district court noted the "extensive affidavit evidence submitted by the Brady Plaintiffs," as well as the fact that the NFL Defendants "offered little, if any, evidence to directly rebut the Players' affidavits, either in response to the motion for a preliminary injunction" or in support of their own motion for a stay pending appeal. Stay Op. 13. Faced with this evidence, the district court expressly found that "the Brady Plaintiffs have shown not only that they likely would suffer irreparable harm absent the preliminary injunction, but that they are in fact suffering such harm now." Op. 71; *see also* Stay Op. 13 ("This Court addressed, at substantial length, the irreparable injuries that the Players are *presently* incurring, and have been incurring, since the League locked them out on March 12, 2011.") (emphasis in original). The players' harm is felt "now," Op. 71, given, among other reasons, the need for professional football players to market their services, train, and participate in off-season activities, *see id.* at 73–79.

The NFL Defendants never acknowledge or dispute that the district court's findings as to irreparable harm are reviewable here only for clear error. *See, e.g.*, *Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir. 1993); *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006). Nor do the NFL Defendants address the standard that a stay pending appeal is appropriate only if they show that they "*will*" suffer irreparable harm, *Packard Elevator v. ICC*, 782 F.2d 112, 115–16 (8th Cir. 1986) (emphasis added)—a standard they do not meet.

Although the parties dispute the merits of their respective positions, there is no question that the balance of equities overwhelmingly favors the players and that the NFL Defendants cannot establish irreparable harm. On that basis alone, this Court should deny the NFL Defendants' request for the extraordinary relief that a stay pending appeal represents.

Respectfully submitted,

Theodore B. Olson

cc: Counsel of Record (via CM/ECF)