BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

MDL DOCKET NO. 2323 - IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION

Dave Pear et al. v. Nat'l Football League, et al., C.D. California, No. 2:11-cv-08395
Vernon Maxwell et al. v. Nat'l Football League, et al., C.D. California, No. 2:11-cv-08394
Barnes et al. v. Nat'l Football League, et al., C.D. California, No. 2:11-cv-08396

THE RIDDELL DEFENDANTS' OPPOSITION TO THE NFL'S MOTION FOR TRANSFER AND COORDINATION OR CONSOLIDATION PURSUANT TO 28 U.S.C. § 1407

Defendants Riddell, Inc., All American Sports Corporation, Riddell Sports Group, Inc., Easton-Bell Sports, Inc., Easton-Bell Sports, LLC, EB Sports Corp., and RBG Holdings Corp. (the "Riddell Defendants")[1] oppose the motion by the National Football League ("NFL") to transfer and coordinate or consolidate four actions pursuant to 28 U.S.C. § 1407. The Riddell Defendants oppose the NFL's present motion, because motions to dismiss and to sever in three of the four actions are scheduled to be heard on January 3, 2012 in the Central District before a single judge (the Honorable Manuel L. Real). In addition, transfer of the actions involving the Riddell Defendants is inappropriate because they do not currently present a predominance of common questions of fact as to the Riddell Defendants. The Riddell Defendants are not parties to one of the actions sought to be consolidated through transfer, and the remainder involve

[1] Referring to these Defendants collectively does not imply or concede that they are properly joined or named as Defendants, and the "Riddell Defendants" reserve the right to move to dismiss some or all of them. The collective reference is merely for convenience.

differing questions of fact as to the claims against the Riddell Defendants. Further, transfer would neither enhance convenience of parties or witnesses nor promote the just and efficient conduct of the actions. Finally, if transfer were ordered, the Riddell Defendants respectfully submit that the venue requested by the NFL is not the most appropriate.

BACKGROUND

The three California actions – *Maxwell*, *Pear*, and *Barnes* (collectively, the "California actions") – involve 136 individual former NFL players (and 84 spouses), who played football over the course of more than fifty (50) years for many different teams, at different times, and while wearing different helmets. In addition to the NFL,[2] the three California actions name seven Defendants to whom Plaintiffs collectively refer to as the "Riddell Defendants." (*See, e.g.*, *Maxwell* Compl. ¶¶ 78-85.) According to Plaintiffs, two of these entities – Riddell, Inc. and All American Sports Corporation ("All American") – were "engaged in the business of designing, manufacturing, selling and distributing football equipment, including helmets, to the NFL and since 1989 has been the official helmet of the NFL." (*Id.* ¶¶ 78-79.) As to the other five Riddell Defendants, the Complaints contain no allegations whatsoever of any involvement in the design, manufacture, sales, or distribution of football helmets, or any affiliation with Riddell, Inc. or All American. (*See id.* ¶¶ 80-84.)

The NFL seeks to centralize the three California actions with a fourth action – *Easterling* – which is currently pending in the Eastern District of Pennsylvania. However, none of the "Riddell Defendants" are parties to the *Easterling* action.

[2] The Complaints also name a second NFL Defendant – NFL Properties, LLC ("NFLP"). Where appropriate, the NFL and NFLP will be referred to collectively as "the NFL Defendants."

In the three California actions, none of the player-Plaintiffs allege what brand of helmet they were wearing when they experienced a concussion or that they sustained a concussion while wearing a helmet manufactured by the Riddell Defendants. They fail to state any facts regarding when their alleged concussions occurred, how they occurred, where they occurred, or how any conduct on the part of any of the Riddell Defendants proximately caused their alleged injuries. Moreover, the player-Plaintiffs all played at different times over the course of the alleged 50-plus-year span and suffered different alleged injuries in different ways at different times and in different places.

Because of the deficiencies outlined above and others, the Riddell Defendants filed both motions to dismiss and to sever in the three California actions currently pending in the Central District of California. Those motions are set to be heard on January 3, 2012.[3]

In addition to the three California actions and the one Pennsylvania action, the NFL also mentioned a fifth action – *Hardman, et al. v. National Football League, et al.* – as a potential "tag-along action." (Mem. of Law in Sup. of Mot. to Transfer & Coord. or Consol. Pursuant to 28 U.S.C. § 1407 at 6 n.2.) However, the *Hardman* plaintiffs filed a request and proposed order for voluntary dismissal of the entire action on December 6, 2011, which should end that action.

ARGUMENT

Transfer to multidistrict litigation is appropriate where three elements are shown.

First, there must exist common questions of fact. 28 U.S.C. § 1407(a); *see also* 15 Charles A. Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3863, at 380 (2007). However, commonality of questions of fact is seldom

[3] Rulings from the bench at motion hearings are often made by the Court.

"sufficient, by itself, to justify granting the motion to transfer." *Id*.; *see also In re Shoulder Pain Pump-Chondrolysis Prods. Liab. Litig.*, 571 F. Supp. 2d 1367, 1368 (J.P.M.L. 2008). Second, consolidation must "serve the convenience of the parties and witnesses." 15 Wright, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3863, at 407. Third, and perhaps most importantly, it must appear "that the just and efficient conduct of the actions will be served" by transfer and centralization. *Id*. at 413; *see also In re Eli Lilly & Co. Oraflex Prods. Liab. Litig.*, 578 F. Supp. 422 (J.PM.L. 1984).

Moreover, this court has explained that "the crucial issue in determining whether to grant pretrial consolidation is not whether there are common questions or whether the parties will be inconvenienced, but whether the economies of transfer outweigh the resulting inconvenience to the parties." 15 Wright, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3863, at 414-15 (quotations omitted) (emphasis added); *see also In re G. D. Searle & Co. "Copper 7" IUD Prods. Liab. Litig.*, 483 F. Supp. 1343, 1345 (J.P.M.L. 1980).

These three elements are lacking here, making transfer inappropriate. In addition, the NFL Defendants' request to centralize is premature, given the imminent rulings on motions to dismiss and to sever expected in the three California actions in less than a month. Moreover, the requested transfer destination is inappropriate and inconvenient for the Riddell Defendants. For these reasons, the Riddell Defendants oppose the motion to transfer at this time.

A. Transfer is Premature.

In the three California actions, Defendants' various motions to dismiss and sever are all set for hearing together on January 3, 2012 before Judge Manuel L. Real as related matters in the Central District of California. On December 5, 2011, that court denied Plaintiffs' motions to remand all three actions, ruling that at least some of Plaintiffs' claims are preempted by § 301 of

the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. The full scope of that preemption will not be determined until the hearing on January 3, 2012, when the court reaches the preemption issues raised by Defendants' motion to dismiss. Once the full preemptive effect of LMRA § 301 on the California actions is determined, a significant portion of those Plaintiffs' claims may be dismissed. In addition, both the NFL Defendants and the Riddell Defendants have already briefed and presented numerous other grounds on which the California court should dismiss those actions in full, potentially mooting transfer and centralization. At this point, the efficiencies weigh in favor of proceeding with those pending motions as scheduled for hearing in the Central District of California on January 3, 2012, i.e., the parties have already briefed the issues there, and the court will be poised to rule on them.[4]

B. The Cases Do Not Present a Predominance of Common Questions of Fact as to the Riddell Defendants.

This litigation presently involves highly individualized issues of liability and causation as to the Riddell Defendants, making common treatment of Plaintiffs' claims inappropriate, if not unpermitted as a matter of law. For example, this Court has explained that divergence in the injuries, medical histories, products used, and claimed resultant injuries evinces a fundamental lack of commonality and, thus, a lack of proper basis for centralization:

> [I]ndividual facts contained in these actions will predominate over any alleged common fact questions. For instance, discovery and motion practice may be expected to concern (1) the particular product each plaintiff purchased, (2) any injuries that [use] of the product caused, (3) whether the product [was defective], and/or (4) what advertising or other representations were made to each particular plaintiff (and, relatedly, whether the plaintiff relied upon those representations).

[4] Plaintiffs' responses to the Riddell Defendants' motions are due December 13, 2011, with the Riddell Defendants' replies due December 20, 2011.

In re Abbott Labs., Inc., Similac Prods. Liab. Litig., 763 F. Supp. 2d 1376, 1376-77 (J.P.M.L. 2011).

Here, the three actions as to the Riddell Defendants involve exactly those sorts of divergent factual issues, given the 136 individual player-Plaintiffs involved and the more than half-century span of the claimed conduct and alleged injuries. And, the fourth action – *Easterling* – is not even a products liability suit and does not involve either the Riddell Defendants or the product liability claims found in the *Maxwell*, *Barnes* and *Pear* cases. While it is true, as the NFL points out, that transfer has been ordered in a variety of product liability cases over the years, none has involved as many different defendants and products over as long a period and with such divergent facts as in the claims against the Riddell Defendants in the California actions.

C. Centralization of These Cases as to the Riddell Defendants Will Not Promote Convenience, Economy, or Efficiency.

At the present time, centralization would not appreciably enhance convenience for the all of the parties and witnesses. Discovery has not yet commenced. Documents may be filed electronically through the federal courts' ECF/CM system. And there is no prejudice, harm or inefficiency that would result from denying the NFL's request at this time and allowing Defendants' motions to dismiss and sever to be heard on January 3, as noticed, by a judge already familiar with the issues, so that preempted and unsupported claims may be dismissed and improper parties may be severed.

Further, the California actions are all assigned to a single judge. The NFL and the Riddell Defendants are represented by national counsel. Plaintiffs are currently represented by only a handful of overlapping firms working in conjunction to prosecute this litigation. *See In re*

American-Manufactured Drywall Prods. Liab. Litig., 716 F. Supp. 2d 1367, 1368 (J.P.M.L. 2010) (denying transfer after finding, "with only one exception, the actions against each manufacturer are already pending in the same district, and plaintiffs in many of the actions share counsel, which should further facilitate cooperation among the parties and coordination of the actions"). Thus, at present, transfer will provide little, if any, additional convenience – certainly not as to the Riddell Defendants. *Cf. In re Zimmer, Inc., Centralign Hip Prosthesis Prods. Liab. Litig.*, 237 F. Supp. 2d 1376, 1377 (J.P.M.L. 2002) (denying transfer, in part, because one attorney represented multiple plaintiffs in separate districts).

D. The Eastern District of Pennsylvania Is Not the Most Appropriate Forum.

The Riddell Defendants respectfully submit that the Eastern District of Pennsylvania is not the most appropriate forum for centralized pre-trial proceedings. Plaintiffs live all over the country, which does not weigh in favor of Pennsylvania. The Riddell Defendants have no base of operations in Pennsylvania, nor are they parties to the lone action pending there.

It is also premature to determine the most appropriate forum for any properly centralized actions, given that the pending motions in the three California actions may significantly reduce the number of claims, Plaintiffs, and Defendants. In the event that transfer and centralization is appropriate after the Defendants' motions in the California actions are decided on or shortly after January 3, 2012, and should the Riddell Defendants remain in any of those actions, they respectfully request to reserve the right to propose a more convenient forum than the Eastern District of Pennsylvania for any remaining litigation.

CONCLUSION

Significant issues with Plaintiffs' pleadings will soon be resolved, claims will be dismissed, improperly joined Defendants may be dismissed, and Plaintiffs may be severed. At

this stage in these actions, given the imminence of a ruling on those issues, the convenience, fairness, and efficiency of transfer and centralization at this time are not manifest.

For the preceding reasons, the Riddell Defendants oppose centralization at this time. The Riddell Defendants further respectfully request the right to propose an alternative forum for any such transfer and consolidation, if appropriate and necessary after January 3, 2012.

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Respectfully submitted,

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