

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

<b>STEPHEN D. ATWATER, et al.,</b>	)
	)
<b>Plaintiffs,</b>	)
	)
<b>v.</b>	)
	)
<b>THE NATIONAL FOOTBALL</b>	)
<b>LEAGUE PLAYERS ASSOCIATION,</b>	)
<b>THE NATIONAL FOOTBALL</b>	)
<b>LEAGUE, ABC CORPORATION and</b>	)
<b>XYZ CORPORATION,</b>	)
	)
<b>Defendants.</b>	)
	)

**Civil Action No.  
1:06-CV-1510-JEC**

**MEMORANDUM IN SUPPORT OF  
DEFENDANT NATIONAL FOOTBALL LEAGUE PLAYERS  
ASSOCIATION’S MOTION TO DISMISS**

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

The plaintiffs in this action assert five state law claims against defendants.

Federal labor law preempts all of those claims.

Six of the plaintiffs in this case are current or former National Football League (“NFL”) players and members of a union, Defendant National Football League Players Association (“NFLPA”). The Player-Plaintiffs and plaintiffs in privity with them allege that the NFLPA owed them a duty to administer the NFLPA’s Registered Financial Advisors Program (“Program”) with care.

Plaintiffs allege that the NFLPA breached that duty by negligently registering Kirk Wright and Nelson Bond, the principals of International Management Associates (“IMA”), as financial advisors, and that plaintiffs suffered harm as a result.

Plaintiffs’ claims fail as a matter of law because if any duty to administer the Program with care existed, that duty arose in connection with the collective bargaining agreement between the NFL and the NFLPA. A provision of the collective bargaining agreement states that the NFL and the NFLPA will “provide information to players on handling their personal finances, it being understood that players shall be solely responsible for their personal finances.” Exhibit A, Art. LV, § 12.

As a matter of federal labor law, when an alleged duty arises in connection with a collective bargaining agreement, any claim for breach of that duty must be pursued under federal law, and all state law claims are preempted. Further, state law claims, such as plaintiffs’, that require interpretation or application of the terms of a collective bargaining agreement, are preempted. The United States Supreme Court set forth these principles in *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990), which held that federal law preempted state law negligence claims based on a union’s alleged failure to adequately perform its duty under a collective bargaining agreement to inspect a mine. *Id.* at 366 (preemption

applies and “resolution of a state-law tort claim must be treated as a claim arising under federal labor law when it is substantially dependent on construction of the terms of a collective-bargaining agreement”).

In *Jackson v. National Football League Players Association*, No. 92-2134 (W.D. Pa. Jan. 20, 1993) (attached as Exhibit B), *aff’d*, 26 F.3d 122 (3d Cir. 1994), a federal district court applied *Rawson* to hold that federal law preempted state law claims very similar to those at issue here. In *Jackson*, several players alleged that they had been defrauded by an NFLPA-certified Contract Advisor and claimed that the NFLPA had negligently administered its Contract Advisor regulations, which govern agents who negotiate with NFL clubs on behalf of players. The court held that federal law preempted all of the plaintiffs’ state law negligence, breach of fiduciary duty and negligent misrepresentation claims. *Rawson* and *Jackson* foreclose plaintiffs’ claims here.

The only way plaintiffs could attempt to sue the NFLPA would be to assert federal claims, but any potential federal claims are also barred as a matter of law. Under the National Labor Relations Act, the only duty the NFLPA owed the Player-Plaintiffs was a duty to fairly represent them in the negotiation and administration of a collective bargaining agreement. But the Supreme Court expressly held in *Rawson* that negligence, which is all plaintiffs allege here, does

not violate the federal duty of fair representation (“DFR”). 495 U.S. at 372-73.<sup>1</sup> Moreover, any DFR claims are barred by the statute of limitations. Under federal law, DFR claims must be brought within six months. According to the allegations in the Amended Complaint, plaintiffs were aware of their claims more than six months before they filed this action.

Further, plaintiffs are contractually barred from asserting any claims against the NFLPA. The NFLPA Constitution is a contract that precludes a player from suing the NFLPA unless he has exhausted all remedies provided by the Constitution. The Player-Plaintiffs failed to satisfy this exhaustion requirement. Moreover, in the Program regulations, which are binding on the Player-Plaintiffs, the NFLPA expressly disclaims any liability for the misconduct of any registered financial advisor. Exhibit C at § 7 (“The NFLPA is not endorsing any Registered Player Financial Advisor, and is not responsible for, and disclaims, any liability for the acts or omissions of any Registered Player Financial Advisor.”). Accordingly, the Court should dismiss this action with prejudice.

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<sup>1</sup> See also *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65 (1991) (negligence does not constitute a breach of the DFR). Indeed, there are over 200 reported federal cases holding that allegations of negligence do not state a claim against a union for breach of the duty of fair representation. See, e.g., *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11<sup>th</sup> Cir. 1988); *Higdon v. United Steelworkers of Am.*, 706 F.2d 1561, 1562 (11<sup>th</sup> Cir. 1983) (citing *Harris v. Schwerman Trucking Co.*, 668 F.2d 1204 (11<sup>th</sup> Cir. 1982)).

## II. FACTUAL BACKGROUND

### A. The NFLPA Is the Collective Bargaining Representative for the Player-Plaintiffs.

All of the Player-Plaintiffs (Atwater, Bishop, Crockett, Emmons, Simmons and Smith) are members of the NFLPA and were members of the NFL bargaining unit when the 2002-2008 collective bargaining agreement (Exhibit A) was negotiated and the Registered Financial Advisor Program was implemented. Amended Complaint ¶¶ 6, 10-11, 13-14, 16. As the exclusive collective bargaining representative of NFL players, the NFLPA represents its members in the negotiation and administration of collective bargaining agreements.<sup>2</sup>

### B. The Registered Financial Advisors Program Arises out of the NFL-NFLPA Collective Bargaining Agreement.

Pursuant to its authority to represent NFL players, the NFLPA permits players to conduct individual negotiations with their respective NFL clubs and, during periods of free agency, to market their services among the various NFL clubs. In these individual negotiations, players are typically represented by NFLPA-certified Contract Advisors, to whom the union has delegated some of its exclusive bargaining rights. These individual negotiations often involve the payment and receipt of large sums of money and various types of bonuses. Before

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<sup>2</sup> The NFLPA was certified as the exclusive representative of NFL players by the National Labor Relations Board.

2002, NFLPA-designated Contract Advisors in varying degrees assisted player-clients in their financial affairs. On occasion, that practice led to fraud and other abuses. Amended Complaint ¶¶ 25-28. Moreover, most NFL Players are young undergraduates or recent college graduates without extensive financial experience who confront “retirement” much sooner than other professionals.

The NFLPA and the NFL agreed in the 2002-2008 collective bargaining agreement to a “comprehensive Career Planning Program” that is designed to assist players in their transition to a career after football. Exhibit A, Art. LV, § 12. The collective bargaining agreement provides:

The parties will use best efforts to establish an in-depth, comprehensive Career Planning Program. The purpose of the program will be to help players enhance their career in the NFL and make a smooth transition to a second career. ***The program will also provide information to players on handling their personal finances, it being understood that players shall be solely responsible for their personal finances.***

*Id.* (emphasis added). In 2002, the NFLPA established a Registered Financial Advisors Program to allow players to choose financial advisors from among a diverse group registered in the Program or from persons not in the Program. Amended Complaint ¶¶ 24-25; Exhibit D (SEC No Action Letter) at 19. The Program at issue in this case thus arises out of the NFLPA’s performance of its duties under the NFL-NFLPA collective bargaining agreement and as the collective bargaining representative of its members. Amended Complaint ¶ 24

(“One service the NFLPA provides to Plaintiffs and other members is a non-public list of pre-screened, ‘registered’ financial advisors whom Plaintiffs may retain to provide them with financial and other investment advice.”).

The SEC approved the Program with the condition, also contained in the Program regulations, that the NFLPA would not be liable for the actions of registered financial advisors:

The NFLPA is not endorsing any Registered Player Financial Advisor, and is not responsible for, and disclaims, any liability for the acts or omissions of any Registered Player Financial Advisor. The NFLPA is also not responsible for, and makes no representation concerning, the skill, honesty, or competence of any Registered Player Financial Advisor, or any other person. The Program is also not intended to displace laws or governmental or other regulations applicable to financial advisors, and each financial advisor is responsible for ensuring his/her/its compliance with such laws and/or regulations.

The NFLPA and the Program will not advise players about the merits or shortcomings of any particular registered advisor or recommend the selection, retention or dismissal of any particular registered advisor or type of advisor over another.

Exhibit D at 20.

Further, contrary to the cropped language from the SEC’s No-Action letter quoted in the Amended Complaint, the SEC limited the qualifications the NFLPA could use to screen applications for registration in the Program. “Applicants Deemed Unqualified” under the SEC-approved Program did not include persons

with judgments or tax liens against them, as plaintiffs suggest. *Compare* Amended Complaint ¶ 39 *with* Exhibit D at 10-11. Rather, the SEC approved the Program based on the representation that applicants would be deemed unqualified only for certain defined criminal indictments or convictions, other felony convictions and civil judgments “finding fraud, breach of fiduciary duty, false statements or omissions, misrepresentation, theft, conversion, misappropriation” and similar conduct. *Id.* at 34.

### **III. ARGUMENT AND CITATION OF AUTHORITY**

#### **A. Plaintiffs Fail to State a Claim for Relief Because Federal Law Preempts Their State Law Claims.**

In considering this motion, the Court must, of course, accept as true the allegations of fact in the Amended Complaint. Because plaintiffs can prove no set of facts, however, that would surmount the NFLPA’s preemption defense or establish cognizable claims under federal law, the Court should grant this motion.

##### **1. The Court May Properly Consider the Documents Submitted with this Motion.**

With this motion, the NFLPA has submitted four documents that are central to plaintiffs’ claims, namely: (1) the current NFL-NFLPA collective bargaining agreement (Exhibit A); (2) the Program Regulations, from which plaintiffs quote in the Amended Complaint and which plaintiffs claim the

NFLPA negligently administered (Exhibit C); (3) the SEC No-Action Letter, from which plaintiffs also quote throughout the Amended Complaint (Exhibit D); and (4) the NFLPA Constitution, which contains the duties and obligations of the union and its members (Exhibit E).

The Court may consider these documents without converting this motion into a motion for summary judgment. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11<sup>th</sup> Cir. 1997). The Eleventh Circuit articulated its position concerning the consideration of matters outside the pleadings on a motion to dismiss in *Horsley v. Feldt*, 304 F.3d 1125 (11<sup>th</sup> Cir. 2002), where the Court of Appeals declared:

Our Rule 12(b)(6) decisions have adopted the ‘incorporation by reference’ doctrine, *see In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970 (9<sup>th</sup> Cir. 1999), under which a document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment only if the attached document is: (1) central to the plaintiff’s claim; and (2) undisputed. *See Harris v. Ivax Corp.*, 182 F.3d 799, 802 at n. 2 (11<sup>th</sup> Cir. 1999). ‘Undisputed’ in this context means that the authenticity of the document is not challenged. *See, e.g., Beddall v. State Street Bank and Trust Co.*, 137 F.3d 12, 16-17 (1<sup>st</sup> Cir. 1998); *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10<sup>th</sup> Cir. 1997); *Branch v. Tunnell*, 14 F.3d 449, 454 (9<sup>th</sup> Cir. 1994).

304 F.3d at 1134. Here, all four documents the NFLPA has submitted are central to plaintiffs’ claims and their authenticity cannot be credibly questioned.

## 2. Federal Law Preempts Plaintiffs' Claims.

It is no accident or coincidence that plaintiffs have sued both the NFLPA and the NFL. The NFLPA represents plaintiffs in collective bargaining with the NFL, and the actions or omissions about which plaintiffs complain arise out of the bargaining relationship between the NFLPA and NFL and require interpretation and application of the collective bargaining agreement.<sup>3</sup> It is the collective bargaining agreement that provides that the NFL and NFLPA will “*provide information to players on handling their personal finances, it being understood that players shall be solely responsible for their personal finances.*” Exhibit A, Art. LV, § 12 (emphasis added). The question of whether the NFL and NFLPA owe plaintiffs a duty of care in connection with the provision of such information thus involves interpretation and application of the collective bargaining agreement.

Accordingly, under *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990), plaintiffs’ state law claims are preempted:

Because resolution of the [state] tort claim would require a court to “ascertain, first, whether the collective bargaining agreement in fact placed an implied duty of care on the Union . . . , and second, the nature and scope of that duty, we held that the tort claim was not sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of § 301 [of the Labor Management Relations Act].”

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<sup>3</sup> The collective bargaining agreement expressly provides that “all players, Clubs, the NFLPA, the NFL and the Management Council will be bound hereby.” Exhibit A, Art. II, § 1.

*Id.* at 369 (discussing *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851 (1987)).

*Rawson* also establishes that plaintiffs cannot maintain state law tort claims when those claims arise out of a union's performance of its duties under a collective bargaining agreement. In *Rawson*, a wrongful death case, the plaintiffs alleged that a union had assumed a duty of care under a collective bargaining agreement to inspect a mine. The plaintiffs alleged that the union negligently performed that duty, resulting in a mine explosion and the deaths of ninety-one miners. The Supreme Court held that if the union had failed to perform any duty in connection with the inspection of the mine, that duty arose out of the collective bargaining agreement, and as such, any claim for breach of that duty had to be pursued under federal, not state, law:

If the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective-bargaining agreement signed by the Union as the bargaining agent for the miners. Clearly, the enforcement of that agreement and the remedies for breach are matters governed by federal law. “[Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.” ***Pre-emption by federal law cannot be avoided by characterizing the Union’s negligent performance of what it does on behalf of the members of the bargaining unit pursuant to the terms of the collective-bargaining contract as a state-law tort.***

*Id.* at 371-72 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985)) (emphasis added).

Indeed, the Supreme Court expressly rejected the plaintiffs' argument that the union had an independent duty of care under state law. No such independent duty existed because the plaintiffs' tort claims were not independent of the collective bargaining agreement and because the duty alleged was a duty to the union members, not to society at large:

[R]espondents' tort claim cannot be described as independent of the collective-bargaining agreement. This is not a situation where the Union's delegates are accused of acting in a way that might violate the duty of reasonable care owed to every person in society.

*Id.* at 371.

Similarly, the Program at issue here arises out of the NFL-NFLPA collective bargaining agreement and is not independent of that agreement. The duty alleged requires interpretation of the provision in the collective bargaining agreement that states that the NFL and NFLPA will "provide information to players on handling their personal finances, it being understood that players shall be solely responsible for their personal finances." Exhibit A, Art. LV, § 12. Further, the duty plaintiffs allege is a duty of care to union members, not a duty of care to society in general. Amended Complaint ¶ 24 ("One service the NFLPA provides *to Plaintiffs and other members* is a *non-public* list of pre-screened, 'registered' financial

advisors”) (emphasis added). Thus, under *Rawson*, plaintiffs’ state law claims are preempted.

In *Jackson v. NFLPA*, No. 92-2134 (W.D. Pa. Jan. 20, 1993) (Exhibit B), *aff’d*, 26 F.3d 122 (3d Cir. 1994), the court, applying *Rawson*, held that federal law preempted state law claims very similar to those at issue here. In *Jackson*, several NFL players alleged that their NFLPA-certified Contract Advisor, Joseph Senkovich, had defrauded them. The players sued the NFLPA, alleging that it had negligently certified Senkovich and negligently administered its Contract Advisor regulations. The players asserted state law negligence, breach of fiduciary duty and negligent misrepresentation claims.

The district court held that federal law preempted the plaintiffs’ claims. *Id.* at 3-4. Because the duty the plaintiffs alleged related to the NFL-NFLPA collective bargaining agreement and was a duty only to union members, not to the general public, plaintiffs could not assert state law claims:

[T]he only relationship Plaintiffs had with the NFLPA in 1988 is drawn from their status of being union members and the NFLPA’s status as bargaining representative. Plaintiffs have pointed to no language in the 1982 CBA expanding any obligation owed to Plaintiffs by the NFLPA beyond the statutory duty of fair representation. As in *Rawson*, Plaintiffs have not alleged that the NFLPA acted in a manner which would violate the duty of care owed to all persons in the community. There is no suggestion that the NFLPA’s manner of certifying its contract advisors was for the benefit of the general public.

*Id.* at 6. Similarly, the NFLPA's registration of financial advisors was not for the benefit of the general public. As in *Rawson* and *Jackson*, the union established the Program in connection with its collective bargaining responsibilities to its members, and, in so doing, did not owe a duty to "every person in society." *Rawson*, 495 U.S. at 371. Thus, federal law preempts plaintiffs' state law claims.

The Supreme Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), also establishes that federal law preempts plaintiffs' claims. There, the Court held "that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as preempted by federal labor-contract law." 471 U.S. at 220 (citation omitted). The Court held that federal law preempted a state law bad faith tort claim because that claim was not "sufficiently independent" of the interpretation of a collective bargaining agreement. *Id.* at 213.

Here, the provision of the collective bargaining agreement that states that "players shall be solely responsible for their personal finances" defeats plaintiffs' claims, all of which involve attempts to hold the NFL and NFLPA liable for lost financial investments. At an absolute minimum, the Court would have to interpret this provision – and the provision of the collective bargaining agreement requiring

the NFL and NFLPA “to provide information to players on handling their finances” – to determine the nature and scope of the duty plaintiffs allege in this case. As in *Allis-Chalmers*, “evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract.” 471 U.S. at 213; *id.* at 218 (“any attempt to assess liability here inevitably will involve contract interpretation”). The collective bargaining agreement “will necessarily be relevant to any allegation that” the NFL and NFLPA are liable for players’ lost financial investments. Thus, the “tort claim[s] cannot be described as independent of the collective bargaining agreement” and are preempted. *Rawson*, 495 U.S. at 371; *Clarke v. Laborers’ Int’l Union*, 916 F.2d 1539, 1542 (11<sup>th</sup> Cir. 1990) (“As in the *Rawson* case, the claim in the instant case cannot be considered independent of the collective bargaining agreement since the claim would necessarily require an examination of the parties’ obligations under the agreement.”).

As the foregoing cases establish, it is well-settled that federal law preempts state law claims of the type plaintiffs assert. The leading labor law treatise also catalogues the types of state law claims that federal courts have found preempted:

Since *Allis-Chalmers*, lower courts applying the standard in that case have held that Section 301 preempts claims for fraud and ***misrepresentation***, invasion of privacy, defamation, intentional infliction of emotional distress, ***negligence***, tortious drug testing, tortious interference with contract, violation of an implied covenant of good faith and fair dealing, fraud, violation of worker compensation

law, race and sex discrimination under state law, breach of a trust agreement, breach of contract, and wages due.

2 ABA, *The Developing Labor Law* (4<sup>th</sup> ed. 2001), at 2232-34 (footnotes omitted) (emphasis added).

The courts continue to hold that contract, tort, or other claims and theories nominally derived from state law are preempted when in fact they are premised on the duty of fair representation or a related breach of contract. *The preemption rule has blocked actions by employees based on state law claims of* (1) fraudulent *misrepresentation*, tortious interference, and civil conspiracy; (2) breach of a settlement agreement, covenant of good faith and fair dealing, *promissory estoppel*, *breach of fiduciary duties*, and retaliation and gender discrimination; and (3) religious discrimination, state wrongful discharge, and civil conspiracy claims.

ABA, *The Developing Labor Law* (2005 Cum. Supp.), at 549 (footnotes omitted)

(emphasis added).<sup>4</sup> Federal law preempts plaintiffs' state law claims, and thus the Amended Complaint does not state a claim for relief.

## **B. Plaintiffs Cannot State Cognizable Claims Under Federal Law.**

As in *Rawson*, "this suit, if it is to go forward at all, must proceed as a case controlled by federal, rather than state, law." 495 U.S. at 372. The problem for plaintiffs is that they cannot state claims under federal law. The only two federal claims possible are a claim for violation of the federal duty of fair representation

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<sup>4</sup> See also *Smith v. Houston Oilers*, 87 F.3d 717, 720-21 (5<sup>th</sup> Cir. 1996) (finding preempted claims of coercion, duress, extortion and assault and battery arising from allegedly abusive rehabilitation plan imposed by Club because resolution of the claims was dependent on analysis of the collective bargaining agreement).

(“DFR”) and a claim for violation of § 301 of the Labor Management Relations Act. *See Rawson*, 495 U.S. at 372-75. Plaintiffs cannot maintain a DFR claim because (1) it is well-settled that claims based on allegedly negligent conduct do not state a DFR claim; and (2) the statute of limitations on any DFR claim has expired. Nor can plaintiffs meet the requirements for asserting a § 301 claim.

Under federal labor law, a collective bargaining agent such as the NFLPA possesses “a wide range of reasonableness” in exercising its duties to its members. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (“[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents....”). A union’s duty of fair representation is a duty “to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct....” *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). A union only violates this duty of fair representation if it intentionally acts in bad faith or acts in an outrageously irrational manner:

We hold that the rule announced in *Vaca v. Sipes* [ ] – that a union breaches its duty of fair representation if its actions are either “arbitrary, discriminatory, or in bad faith” – applies to all union activity, including contract negotiation. We further hold that a union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the Union’s actions, the union’s behavior is so far outside a “wide range of reasonableness,” as to be irrational.

*Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991) (citation omitted).<sup>5</sup>

In accordance with this caselaw, *Rawson* holds that negligence does not violate the DFR: “The courts have in general assumed that mere negligence, even in the enforcement of a collective bargaining agreement, would not state a claim for breach of the duty of fair representation, and we endorse that view today.” 495 U.S. at 372-73; *id.* at 376 (“allegation of mere negligence will not state a claim for violation of that duty”); *see supra* n.1 (collecting cases holding that negligence does not violate the DFR). Here, of course, plaintiffs allege that the NFLPA negligently administered the Program, causing them financial harm. Even assuming, however, that the NFLPA owed each of the plaintiffs a duty of care and erred in implementing the Program with respect to Wright, Bond and IMA, such allegations do not state a claim for breach of the DFR. Plaintiffs can no more make out a breach of DFR claim than could the plaintiffs in *Rawson*.<sup>6</sup>

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<sup>5</sup> The plaintiffs in *O'Neill* included retirees. On remand, the Fifth Circuit assumed that the pilots union owed a duty of fair representation to those retirees and found that the duty had not been breached. *O'Neill v. Air Line Pilots Ass'n*, 929 F.3d 1199, 1203-04 (5<sup>th</sup> Cir. 1991).

<sup>6</sup> The Eleventh Circuit has followed *Rawson* in two cases holding that state law tort claims by injured employees were preempted and rejecting the claims in both cases under federal law. *Hester v. Int'l Union of Operating Eng'rs*, 941 F.2d 1574 (11<sup>th</sup> Cir. 1991); *Clarke*, 916 F.2d 1539.

Plaintiffs also cannot state a DFR claim for an independent reason: such a claim is barred by the statute of limitations. The Amended Complaint alleges that on December 5, 2005, plaintiffs demanded that IMA and Wright return all of their investments. Amended Complaint ¶ 79. Thus, plaintiffs' claims had accrued at least by that date. The Supreme Court has held that a six-month statute of limitations applies to DFR actions. *Del Costello v. Int'l Bhd. Teamsters*, 462 U.S. 151 (1983) (applying limitations period in Section 10(b) of the LMRA, 29 U.S.C. § 160(b), to DFR suits); see *Clarke*, 916 F.2d at 1543; *Smallakoff v. Air Line Pilots Ass'n*, 825 F.2d 1544, 1545 (11<sup>th</sup> Cir. 1987); *Erkins v. United Steelworkers of Am.*, 723 F.2d 837, 839 (11<sup>th</sup> Cir. 1984). Thus, plaintiffs had to file any DFR claim by at least June 5, 2006. They did not file the original complaint in this action until June 23, 2006, after the statute of limitations had expired.

Plaintiffs also cannot state a claim for violation of § 301 of the LMRA. As set forth in *Rawson*, such a claim can only exist if there is language in a labor agreement "indicating an intent to create obligations enforceable against the union by the individual employees." 495 U.S. at 374. Here, the collective bargaining agreement contains no such language and expressly negates any "intent to create obligations enforceable against the union" by providing that players are responsible for their own finances.

**C. Plaintiffs Fail to State a Claim for Relief Because Their Contracts with the NFLPA Bar This Action.**

Plaintiffs have alleged that Atwater, Bishop, Crockett, Emmons, Simmons and Smith are members of the NFLPA. Amended Complaint ¶¶ 6, 10, 11, 13, 14, 16. Their claims thus implicate the NFLPA Constitution, which defines the rights and duties of NFLPA members. That Constitution precludes plaintiffs from maintaining this action because it contains an exhaustion of remedies requirement that plaintiffs have ignored. Further, the Registered Financial Advisor Program regulations, which are also a contract between the NFLPA and its members and are also binding on plaintiffs, bar this action. Those regulations disclaim the NFLPA's liability for the conduct alleged in this case.

First, plaintiffs have failed to exhaust their remedies under the NFLPA Constitution and thus may not maintain this action. The Constitution states:

No member of the NFLPA shall resort to any court or agency outside the NFLPA unless and until he has exhausted all forms of relief provided in this Constitution.

Exhibit E, Art. VIII, § 8.04. The Constitution further states:

Each member agrees to be bound by the provisions of this Constitution and by any by-laws, rules or other regulations duly adopted by the NFLPA pursuant to this Constitution or as otherwise authorized by law. ...”

*Id.*, Art. II, § 2.05.

Plaintiffs have not alleged that they have exhausted all forms of relief available under the Constitution. Days before this action was filed, plaintiffs participated in a conference call with the NFLPA's Executive Director and General Counsel to discuss the concerns that led to the filing of this case. Plaintiffs took no further steps thereafter to urge modification of the Program, as they claim in Count V, or to request monetary relief, as they claim in Counts I-IV. Plaintiffs could have petitioned the Board of Player Representatives, which has plenary authority to address these issues, (Exhibit E, Art. V, § 5.02), and could have sponsored through their Local Chapters resolutions for consideration at the Annual Convention. *See id.*, Art. II, § 2.11.

The law in this Circuit is that “[a] claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted.” *Rivera v. Allin*, 144 F.3d 719, 731 (11<sup>th</sup> Cir. 1998). The labor law analog of the statute involved in *Rivera* is 29 U.S.C. § 411(a)(4), which permits unions to impose an exhaustion requirement on union members not to exceed four months “before instituting legal or administrative proceedings against such organizations....”

Second, plaintiffs cannot maintain this action because they are bound by the Program regulations, which expressly disclaim the NFLPA's liability for the acts

of registered financial advisors. In other words, plaintiffs, through the NFLPA, have agreed that the NFLPA is not liable for injuries caused by the acts of financial advisors. The very regulations on which plaintiffs' claims are based state:

***Section Seven: No Endorsement or Representation***

***The NFLPA is not endorsing any Registered Player Financial Advisor, and is not responsible for, and disclaims, any liability for the acts or omissions of any Registered Player Financial Advisor. The NFLPA is also not responsible for, and makes no representation concerning, the skill, honesty or competence of any Registered Player Financial Advisor, or any other person.*** The NFLPA is not in a position to determine whether Applicants for Registration as Registered Player Financial Advisors that provide Broker-Dealer, Investment Adviser, insurance sales, or other regulated financial services are properly registered with, licensed by, or otherwise in compliance with all rules and regulations of the appropriate federal and/or state governmental, or semi-governmental agency, authority or organization. As a result, the NFLPA will rely entirely on the truthfulness of statements by any person or entity applying for Registration as an NFLPA Registered Player Financial Advisor that it has the necessary Broker, Dealer, or Investment Adviser registration under applicable securities or commodities laws, SRO membership, licensing or other qualifications imposed by applicable federal and/or state law to render the financial services specified in the Application. Applicants will only be registered with respect to services disclosed in the Application.

Exhibit C (NFLPA Regulations and Code of Conduct Governing Registered Player Financial Advisors) § 7 (emphasis added). Because these “regulations” were “duly adopted by the NFLPA,” each NFLPA member – including the Player-Plaintiffs – is “bound” by them under the Constitution. Exhibit E, Art. II, § 2.05.

As noted above, the NFLPA Constitution and NFLPA regulations constitute a contract between the union and its members. *United Ass'n of Journeymen & Apprentices of Plumbers & Pipefitters Indus. v. United*, 452 U.S. 615, 622 (1981) (citing *Int'l Ass'n of Machinists v. Gonzalez*, 356 U.S. 617, 618-619 (1958)); *Int'l Union of Electronic, etc., Workers v. Statham*, 97 F.3d 1416, 1421 (11<sup>th</sup> Cir. 1996) (suit by union against members to enforce the union constitution as a contract); *Int'l Bhd. of Boilermakers v. Local Lodge D111*, 858 F.2d 1559, 1560 (11<sup>th</sup> Cir. 1988) (union constitution and merger agreement were contracts).

The Player-Plaintiffs are thus foreclosed by the binding terms of the NFLPA Constitution and the Program regulations from maintaining this action against the union of which they are members. The derivative claims of the remaining plaintiffs, who are in privity with the Player-Plaintiffs, are similarly barred. *See, e.g., Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 677 (5<sup>th</sup> Cir. 2003) (when claims are derivative of the rights of others, privity exists for claim preclusion purposes); *Akin v. PAFEC, Ltd.*, 991 F.2d 1550, 1560 (11<sup>th</sup> Cir. 1993) (derivative claims are in privity with direct claims for *res judicata* purposes).

**D. Plaintiffs' "Cause of Action" for Injunctive Relief Does Not State a Claim.**

The Fifth "Cause of Action" set forth in the Amended Complaint is a claim for injunctive relief. This count does not state an independent claim for relief.

Presumably, plaintiffs are arguing that they are entitled to injunctive relief as a remedy for their claims of negligence, negligent misrepresentation, breach of fiduciary duty and promissory estoppel. Putting aside whether there is any authority for that proposition, the salient point is that federal law preempts all of those underlying state law claims, and, thus, there is no predicate for plaintiffs to obtain injunctive relief. In short, plaintiffs have not alleged a cause of action to support judicial intervention with the union's internal operations.

It is also worth noting that the relief plaintiffs seek, particularly "[i]njunctive relief to insure that Defendants fully disclose to NFL Players and NFLPA members any material adverse information concerning [any] Registered Financial Advisor," (Amended Complaint at 36), would: (a) require the NFLPA to violate the terms of the SEC No-Action Letter; (b) likely violate the Fair Credit Reporting Act; (c) potentially expose the NFLPA to liability for defamation and other claims by financial advisors; and (d) re-write the terms of the collective bargaining agreement, which makes clear that players alone are responsible for their personal finances. The No-Action Letter specifically states that "the NFLPA will not advise players as to the merits or shortcomings of any particular Listed Adviser." Exhibit D at 5. The relief requested would thus invade the exclusive province of the SEC to regulate financial advisors under the Investment Advisers Act, 15 U.S.C.

§§ 80b-1, *et seq.* Further, background checks must comply with the terms of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq.*, which has exacting requirements that could subject the NFLPA to liability for the types of disclosures plaintiffs ask this Court to order. Moreover, requiring the NFLPA to transmit to its members “any material adverse information” concerning any financial advisor could open the union up to an endless string of litigation by financial advisors whose backgrounds, credit histories, and other confidentially-obtained data would be disclosed.

Finally, the relief plaintiffs seek would impose duties and responsibilities on the NFLPA (and the NFL) that are irreconcilable with the parties’ agreement that players would be “solely responsible for their personal finances.” The “[j]udicial nullification” of this provision that plaintiffs seek would be contrary to “‘one of [the] fundamental policies’ of the National Labor Relations Act – ‘freedom of contract.’” *NLRB v. Magnavox Co.*, 415 U.S. 322, 328 (1974) (Stewart, J., concurring in part and dissenting in part) (*quoting H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)).

#### **IV. CONCLUSION**

For the foregoing reasons, Defendant NFLPA prays that the Amended Complaint be dismissed with prejudice for failure to state a claim.

Respectfully submitted, this 18<sup>th</sup> day of August, 2006.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this document was prepared in Times New Roman 14 point.

/s/Joshua F. Thorpe

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**CERTIFICATE OF SERVICE**

I hereby certify that I have electronically filed the **MEMORANDUM IN SUPPORT OF DEFENDANT NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION'S MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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