IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, on its own Behalf and on behalf of EZEKIEL ELLIOTT,	§	
Petitioner,	§	
v.	§	**No. 4:17-CV-00615-ALM**
NATIONAL FOOTBALL LEAGUE and NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,	§	
Respondents.	§	

RESPONDENTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

In an improper race to the courthouse, Petitioner National Football League Players Association (the "NFLPA") has defied binding precedent squarely foreclosing its premature suit. This Court lacks jurisdiction and the NFLPA lacks standing to raise the claims or seek the relief set forth in the Petition.

Rather than awaiting the completion of the pending arbitration proceeding and filing a Federal Arbitration Act challenge in "the United States court in and for the district wherein the award was made," 9 U.S.C. § 10—here, the Southern District of New York—the NFLPA asks this Court to restrain a "forthcoming" award. But abundant and consistent Fifth Circuit precedent confirms that federal courts lack power to *vacate* an award that has not yet been "made."

The NFLPA also lacks standing to seek a contingent order preemptively challenging an award that clearly has not yet (and may never) cause it or Ezekiel Elliott any harm. And the

NFLPA's claim is unripe to boot, as even the NFLPA acknowledges that the Arbitrator's forthcoming award *could still afford the NFLPA all the relief it seeks*.

The NFLPA's flagrant evasion of these fundamental jurisdictional limits is apparently founded on the belief that, in a strategic attempt to obtain "first-filed" status, it is free to file a "placeholder" complaint—ostensibly to be pursued if it is dissatisfied with the arbitration award, and simply abandoned if it wins. The NFLPA makes this clear in its application for a TRO: "Although the Court *need not act until the Award is issued*," the NFLPA will "satisfy the requirements for preliminary injunctive relief *should Elliott's appeal be denied*." (ECF #5, NFLPA Emergency Motion for Temporary Restraining Order or Preliminary Injunction (herein, "TRO Motion") at 1 (emphases added).) In other words, the NFLPA has moved for a TRO while acknowledging that there is not yet any basis to award one. Needless to say, federal court jurisdiction—including the limits set forth in Article III of the U.S. Constitution—is not so easily manipulated. There is no such thing as a placeholder complaint: "Because the district court must have jurisdiction 'at the commencement of the suit,'" "the amendment process [for pleadings] cannot be used to create jurisdiction retroactively where it did not previously exist." *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 328 (5th Cir. 2011) (formatting modified; quoting *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 775 (5th Cir. 1986)). Nor can a party "rely on events that unfolded after the filing of the complaint to establish its standing." *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 458 (5th Cir. 2005).

Not only does the NFLPA concede it knows better, it has made precisely this argument in almost identical litigation brought *against* the NFLPA. Late last year, the NFLPA criticized a player for filing a federal lawsuit over his "pending arbitration concerning his potential discipline," arguing that he should have "file[d] a petition to vacate the arbitration decision *after*

it is issued rather than asking a Court to intrude upon an ongoing labor arbitration proceeding." (Defendant National Football League Players Association's Position Statement [Corrected] (herein, "NFLPA Position Statement") at 6, *Michael Pennel, Jr. v. NFLPA*, No. 5:16-CV-02889-JRA (N.D. Ohio Nov. 30, 2016, ECF #8) (emphasis in original).) The player's lawsuit, the NFLPA emphasized, asked the federal district court "to prematurely and improperly invade the labor and arbitral processes for which the NFL and NFLPA bargained." (*Id*.) (Of course, filing a premature lawsuit lacking in subject matter jurisdiction is also a significant waste of the Court's—and all parties'—time and resources.)

The NFLPA was right the first time. "After" the award issues—and *if* it sustains Elliott's suspension in whole or in part—a federal district court with jurisdiction over an action by a party with standing may consider whether the arbitration award should be vacated, modified, or confirmed in a new suit filed at that time. But this Court plainly lacks jurisdiction to adjudicate this petition to vacate the forthcoming award in *this* suit—regardless of when the award comes down. Because Plaintiffs cannot resuscitate jurisdiction based "on events that unfolded after the filing of the complaint," this Court lacks jurisdiction, the NFLPA lacks standing, and this Court should immediately dismiss the Petition.

STATEMENT OF ISSUES FOR DECISION

The issue for decision is whether this Court has subject matter jurisdiction to decide Petitioner NFLPA's Petition to Vacate. The NFLPA seeks vacatur of a "forthcoming" arbitration award that has not yet issued. This Court lacks subject matter jurisdiction over the hypothetical award (which is determined as of the commencement of the lawsuit), the NFLPA lacks standing to seek vacatur of a hypothetical award, and any dispute over the hypothetical award is not ripe.

BACKGROUND

On August 11, 2017, the NFL Commissioner suspended Elliott for six games for conduct detrimental to the NFL in violation of Article 46 of the parties' collective bargaining agreement ("CBA"). (ECF #1, Petition to Vacate Arbitration Award ("Pet.") ¶ 28.) Elliott's suspension followed a year-long investigation into domestic violence allegations, which compiled information from twenty-two NFL interviews, reviews of photographic and other documentary evidence from law enforcement authorities, and opinions from two medical examiners, and resulted in the issuance of a 164-page investigative report. (Pet. ¶¶ 33, 36.) The Commissioner's disciplinary decision found "substantial and persuasive evidence that [Elliott] engaged in physical violence" against the victim, Tiffany Thompson, on at least three separate occasions. (*Id.* ¶ 28.)

Elliott appealed pursuant to the CBA's collectively bargained internal grievance process. (*Id.* ¶ 8.) By operation of the CBA, the suspension cannot go into effect until that process is complete. (*Id.* ¶ 28.) Pursuant to those collectively bargained procedures, the NFL Commissioner appointed a designee, Harold Henderson, to serve as Arbitrator. (*Id.* ¶¶ 27-28.) The Arbitrator has authority under the CBA to affirm, reduce, or vacate Elliott's suspension. (ECF #1-62, (Kessler Decl., Ex. A-NFLPA-58), Art. 46.) The Arbitrator's appeal decision—known as an award—must be rendered "[a]s soon as practicable." (*Id.* Art. 46 § 2(d)). Once issued, that award constitutes "full, final and complete disposition of the dispute" that is "binding" on all parties, as well as the NFL Management Council ("NFLMC") and the NFLPA. (*Id.*) No further appeal or process is contemplated or permitted.

The NFLPA's appeal hearing lasted three days, from August 29 through 31. (Pet. ¶ 68.) The NFLPA asked the Arbitrator to "overturn [the suspension] because there's no credible evidence." (ECF #2-13, Kessler Decl, Ex. C, Hearing Tr. (Day 1) at 77.). In the alternative, the

NFLPA asked the Arbitrator to reduce Elliott's suspension on the grounds that the victim's conduct and behavior provoked Elliott and should be a mitigating factor. (*Id.* at 77-80.) Counsel for the NFLMC argued that the six-game suspension should be affirmed.

On the same day the appeal hearing concluded—but before the Arbitrator issued his award—the NFLPA filed the instant suit seeking to "vacate" the "forthcoming Arbitration Award." (Pet. at 1.) The following day, the NFLPA filed an application for a Temporary Restraining Order, which clarified that it actually seeks to vacate the forthcoming award only to the extent it loses in arbitration: "the NFLPA respectfully requests that the Court preliminarily enjoin *any suspension of Elliott affirmed by the Award*[.]" (TRO Motion at 15 (emphasis added).) As of the time of this filing, no award has been issued.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE PETITION FOR LACK OF SUBJECT MATTER JURISDICTION

This Court lacks subject matter jurisdiction over this Petition: no statute provides jurisdiction to review a hypothetical award, the NFLPA lacks standing to seek vacatur of a hypothetical award, and a dispute over the hypothetical award is not ripe. Accordingly, this Court should dismiss for lack of jurisdiction and failure to state a claim on which relief can be granted. *See* FED. R. CIV. P. 12(b)(1), (6).

A. No Statute Grants Federal Jurisdiction To Review "Forthcoming" Awards.

Neither The Federal Arbitration Act ("FAA"), nor the Labor Management Relations Act ("LMRA"), provides this Court with jurisdiction to review "forthcoming" arbitration awards.

1. The FAA permits parties to vacate arbitration "awards" that have been "made." 9 U.S.C. § 10. It does not permit parties to file placeholder petitions to vacate "forthcoming," hypothetical awards that do not yet exist.

That commonsense conclusion follows from the FAA's text, which permits district courts to "vacat[e] *the award*" in the district "wherein *the award was made.*" 9 U.S.C. § 10 (emphasis added). Thus, "[b]y its own terms, § 10 authorizes court action only after a final award is made by the arbitrator." *Folse v. Richard Wolf Med. Instruments Corp.*, 56 F.3d 603, 605 (5th Cir. 1995); *see, e.g.*, *Howard v. Volunteers of Am.*, 34 F. App'x 150, 2002 WL 493896, at *1 (5th Cir. Mar. 11, 2002) ("[W]e do not have jurisdiction" to reach merits of § 10 claim "[b]ecause no final award has been issued."); *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980) (district court is "without authority to review the validity of arbitrators' rulings prior to the making of an award"); *Northland Truss Sys., Inc. v. Henning Const. Co., LLC*, 808 F. Supp. 2d 1119, 1123-24 (S.D. Iowa 2011) (same; granting motion to dismiss).

The NFLPA concedes that there is no "final" award here, but rather merely a "forthcoming" one. (*See* Pet. at 1 (defined term "Award" actually refers to "*forthcoming* arbitration award"); *id.* (noting that award "*will be issued* by Arbitrator Harold Henderson imminently"); TRO Motion at 1 ("The NFLPA *expects that* on or before September 5, Arbitrator Harold Henderson *will issue* an arbitral decision (the 'Award') . . . ."); *id.* at 8 ("The Award *will rest* . . . .") (emphases added).) Where, as here, a petitioner concedes that there is "no final award," the FAA provides no relief. *See Folse*, 56 F.3d at 606 ("[O]ur directive in this case is clear: these facts do not permit us to intervene until the parties see this arbitration through to a final award."). And because "the amendment process [for pleadings] cannot be used to create jurisdiction retroactively where it did not previously exist," *Jamison*, 649 F.3d at 328 (quotation marks omitted), the NFLPA cannot cure this fatal jurisdictional defect by attempting to amend after the award issues.

The NFLPA seems to suggest that its petition should survive because it is challenging the forthcoming award on "fairness" grounds. That argument, too, is squarely foreclosed by binding precedent: Because "objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance," any "[f]airness objections should generally be made to the arbitrator subject only to limited post-arbitration judicial review as set forth in section 10 of the FAA." *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 487 (5th Cir. 2002) (quoting *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940–41 (4th Cir. 1999)). Simply put, there is "no authority under the FAA for a court to entertain such [fairness] challenges prior to issuance of the arbitral award." *Id.* at 488.

2. Nor can the NFLPA sidestep the FAA's plain terms by seeking vacatur under Section 301 of the LMRA, 29 U.S.C. § 185 ("LMRA"). The law is clear that "[f]ederal courts *lack jurisdiction* to decide cases alleging violations of a collective bargaining agreement under the Labor Management Relations Act by an employee against his employer unless the employee has exhausted contractual procedures for redress." *Meredith v. Louisiana Fed'n of Teachers*, 209 F.3d 398, 402 (5th Cir. 2000) (emphasis added; citation omitted). Where, as here, an arbitration procedure "is the exclusive and final remedy for breach of the collective bargaining agreement, the employee may not sue his employer under § 301 until he has exhausted the procedure." *Daigle v. Gulf State Utilities Co., Local Union No. 2286*, 794 F.2d 974, 977 (5th Cir. 1986). Such a procedure is not "exhausted" until the arbitration award has become final and complete. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562–63 (1976) ("Congress has specified . . . that (f)inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes," and that policy can only be effectuated if the grievance procedure "is given full play." (quotations omitted)); *see, e.g., Johnson v. Ceres Gulf,*

Inc., No. 4:13-CV-1851, 2015 WL 1518955, at *2 (S.D. Tex. Mar. 31, 2015) ("It is undisputed that Johnson did not complete the arbitration procedure pursuant to the CBA and that she has not exhausted her administrative remedies."). Yet the NFLPA filed this lawsuit despite *admitting* that it has failed to fully exhaust Article 46's exclusive grievance procedures.

The NFLPA can hardly claim to be unaware of this finality requirement. Barely nine months ago, the NFLPA criticized a plaintiff who filed an action challenging "the pending arbitration concerning his potential discipline" on the ground that he was "seek[ing] to stop the arbitration appeal process in its tracks." (NFLPA Position Statement at 6.) The NFLPA continued:

> The normal course would be for Plaintiff to file a petition to vacate the arbitration decision *after* it is issued rather than asking a Court to intrude upon an ongoing labor arbitration proceeding. *** Plaintiff asks this Court to *prematurely and improperly invade the labor and arbitral processes for which the NFL and NFLPA bargained*.

Id. (first emphasis in original). Those words are just as true today as when the NFLPA wrote them last year. By asking this Court to "intrude upon an ongoing labor arbitration proceeding," the NFLPA is now the one improperly invading the parties' collective bargaining agreement—and flouting Fifth Circuit precedent in the process. This action should be dismissed immediately.

B. The NFLPA Lacks Standing To Vacate A Hypothetical Award.

The NFLPA lacks standing to challenge the forthcoming award regardless. The Constitution's "cases and controversies" restriction requires any party invoking federal jurisdiction to demonstrate "standing"—*i.e.*, the "personal interest that must exist at the *commencement of the litigation*." *Davis v. FEC*, 554 U.S. 724, 732 (2008) (emphasis added; quotation omitted); *see Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (jurisdiction "depends upon the state of things at the time of the action brought"). In *Lujan v. Defenders of Wildlife*, the Supreme Court explained that demonstrating the "irreducible constitutional

minimum of standing" requires a plaintiff to show an "injury in fact" that is "fairly traceable" to the defendant's actions, and that will "likely . . . be redressed by a favorable decision." 504 U.S. 555, 560-61 (1992) (citations and quotation marks omitted). Moreover, each "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis*, 554 U.S. at 734 (quotation marks omitted).

Here, the NFLPA brings only one claim and seeks only one form of relief: vacatur of the forthcoming award under 9 U.S.C. § 10. (*See* Pet. ¶¶ 85-87 (Prayer for Relief).) But the NFLPA lacks standing to seek that "form of relief." Under the parties' CBA, Elliott's suspension is enjoined until after an award is issued. Until then, the NFLPA and Elliott have suffered no injury whatsoever—never mind one traceable to a phantom award that has yet to be issued. Nor could any decision of this court "redress" that supposed injury, considering there is no award to vacate. Because the NFLPA lacks standing, its lone claim, and lone request for relief, must be dismissed. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) ("Article III demands that an 'actual controversy' persist throughout all stages of litigation.").

Perhaps recognizing this deficiency, the NFLPA emphasizes that it "expects" the award to issue imminently and therefore "the Court need not act until the award is issued." (TRO Motion at 1.) The NFLPA, in other words, has demanded a TRO before there is anything for the Court to enjoin. But the issuance of the award in the *future* is irrelevant to whether the NFLPA has standing *now*. Because standing is "determined as of the commencement of the suit," "the party invoking the jurisdiction of the court *cannot rely on events that unfolded after the filing of the complaint to establish its standing*." *Kitty Hawk*, 418 F.3d at 458 (emphasis added). As the Fifth Circuit and others have squarely held, alleged injuries that occur for the first time after a complaint was filed simply have no bearing on the standing inquiry. *See id.* at 459-60 (because

"the contract had not yet been terminated when Kitty Hawk filed this suit and Kitty Hawk had not assumed liability for any back pay," "Kitty Hawk's assumption of the Postal Service's liability for back pay is *not relevant* to the standing analysis" (emphasis added)); *see, e.g.*, *Yamada v. Snipes*, 786 F.3d 1182, 1203, 1203 (9th Cir. 2015) (rejecting plaintiff's argument "that it now has standing" after a change in law because "[s]tanding is determined as of the commencement of litigation" (alteration in original)); *Utah Ass'n of Counties v. Bush*, 455 F.3d 1094, 1101 (10th Cir. 2006) (noting "glaring problem" that alleged injury "could not have occurred until *after* the 'time th[is] action [wa]s brought'" (alterations in original)); *Park v. Forest Serv. of U.S.*, 205 F.3d 1034, 1037 (8th Cir. 2000) (events occurring after plaintiff filed her original complaint not "relevant on the issue of standing" to seek injunction); *Perry v. Village of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999) ("It is not enough for Perry to attempt to satisfy the requirements of standing as the case progresses. The requirements of standing must be satisfied from the outset and in this case, they were not.").

Once a final award issues, and *if* it actually affirms Elliott's suspension as the NFLPA "expects," the NFLPA could try again to petition to vacate the award—just as Respondents may petition to confirm it. *See Yamada*, 786 F.3d at 1204 & n.15 ("Nothing we say today . . . precludes [plaintiff] from bringing a future challenge" given plaintiff's argument that it "now has standing."). As a matter of law, however, the NFLPA cannot cure the fatal standing defect that currently exists based on events that post-date its Petition. *See Camsoft Data Sys v. S. Elecs. Supply, Inc.*, 756 F.3d 327, 337 (5th Cir. 2014) ("'Although 28 U.S.C. § 1653 and [Rule] 15(a) allow amendments to cure defective jurisdictional allegations, these rules do not permit the creation of jurisdiction when none existed at the time the original complaint was filed[.]'") (quoting *Arena v. Graybar Elec. Co.*, Inc., 669 F.3d 214, 218 (5th Cir. 2012)).

C. The Petition To Vacate A Hypothetical Award Is Not Ripe.

Even if the NFLPA could surmount the foregoing hurdles, its claims are not ripe. Like standing, "[r]ipeness is a component of subject matter jurisdiction, because a court has no power to decide disputes that are not yet justiciable." *Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010); *see Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008) (ripeness "overlaps" with standing); *LeClerc v. Webb*, 419 F.3d 405, 413 (5th Cir. 2005) ("Standing and ripeness are two doctrines of justiciability that assure federal courts will only decide Article III cases or controversies."). Ripeness prevents "'premature' adjudication by distinguishing matters that are 'hypothetical' or 'speculative' from those that are poised for judicial review." *LeClerc*, 419 F.3d at 413–14.

"To determine whether claims are ripe, [courts] evaluate (1) the fitness of the issues for judicial resolution, and (2) the potential hardship to the parties caused by declining court consideration." *Lopez*, 617 F.3d at 341. The NFLPA cannot satisfy either prong.

First, the issues before the Court are obviously not yet fit for judicial resolution. It is well-settled that "[a] court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987)). The NFLPA freely admits that its suit is based on hypothetical events—its position is that the Court will have some role at some unknown time in the future if certain contingent events occur. The NFLPA "expects" that a decision will come down soon, and further "expects" that it will "prevent Ezekiel Elliott from participating in League games or practices." (TRO Motion at 1.) It emphasizes that there is a "threat" of a suspension if the Arbitrator does not rule in its favor. (*Id.*

at 7-8.) And it points out that "*if*" Elliott's suspension is sustained by the award, it "will have devastating effects" on the NFLPA and Elliott. (Pet. ¶ 69.)

Yet during the underlying arbitration proceeding, the NFLPA urged the Arbitrator to "*overturn* [the suspension] because there's no credible evidence." (ECF #2-13 (Kessler Decl, Ex. C, Hearing Tr. (Day 1) at 77).) The NFLPA participated in the arbitration and urged the Arbitrator to rule on the evidence before him. Indeed, the NFLPA argued that the Arbitrator should reduce or vacate Elliott's discipline *based on the very same procedural and "fairness" claims made here.* (*See, e g.*, ECF #2-13 (Kessler Decl, Ex. C, Hearing Tr. (Day 2) at 364-76).) The Arbitrator has taken the NFLPA's request for relief under advisement. Accordingly, it is plainly "hypothetical" and "speculative"—not to mention an utter waste of judicial resources—for this Court to adjudicate whether to vacate a hypothetical award that might still grant the NFLPA the very relief it sought in arbitration. "If the purported injury is 'contingent [on] future events that may not occur as anticipated, or indeed may not occur at all,' the claim is not ripe for adjudication." *Lopez*, 617 F.3d at 341–42 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)). That the NFLPA still does not (and cannot) know whether its claims in arbitration will prevail—or whether Elliott's suspension will "occur at all"—confirms that its claims are unripe. *See Dealer Comp. Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 562 (6th Cir. 2008) (holding petition to vacate interlocutory ruling unripe given uncertainty as to anticipated final ruling by arbitration panel, as relief sought was "anchored in future events that may not occur as anticipated, or at all" (quotation omitted)); *Camsoft Data Sys*, 756 F.3d at 336 (no jurisdiction over inventorship dispute before patent issues because "we are unable to establish jurisdiction based on the theory that a disputed pending patent might eventually ripen into a patent controversy that Congress has authorized the federal courts to adjudicate").

Second, given that the suspension cannot go into effect until the award issues, the NFLPA and Elliott will suffer no hardship if this Court merely awaits the final award. Indeed, the NFLPA concedes this point. (*See* TRO Motion at 1 (because the award will not inflict harm unless it affirms suspension, "the Court need not act until the Award is issued").) After all, the NFLPA does not truly seek to vacate the award; it seeks to vacate the award *if it loses in arbitration.* Thus, the NFLPA asks the Court to enjoin "any *suspension* of Elliott [that is] *affirmed by the Award*." (TRO Motion at 15; *see also* Pet. ¶ 9 (the NFLPA will file "a motion for a temporary restraining order and preliminary injunction to be decided *before any suspension of Elliott can go into effect*").)

Once the award issues—and *if* it harms the NFLPA and Elliott—they may attempt to seek relief by filing a new action *at that time*. Until then, the NFLPA cannot "graft a provision for interlocutory judicial review onto the otherwise straight-forward regime contemplated by the FAA[.]" *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg, PA*, 748 F.3d 708, 722 (6th Cir. 2014). Saving all judicial review until a final award issues "is consistent with the structure of the [FAA] and with the strong federal policy favoring arbitration as an alternative means of dispute resolution." *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 900 (2d Cir. 2015) (quotations omitted). By contrast, the NFLPA's concededly premature filing, which seeks interlocutory relief contingent on the possibility that the Arbitrator does not grant the NFLPA all the relief it seeks, is foreign both to the FAA and LMRA and to the strong federal policies those laws embody.

CONCLUSION

For the foregoing reasons, the Petition to Vacate should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2017, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record in this case who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Eric Gambrell