

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
CIVIL APPEAL PRE-ARGUMENT STATEMENT (FORM C)**

1. SEE NOTICE ON REVERSE.

2. PLEASE TYPE OR PRINT.

3. STAPLE ALL ADDITIONAL PAGES

Case Caption: National Football League Management Council, Plaintiff-Counter-Defendant - Appellant, National Football League, Defendant-Appellant, v. National Football League Players Association, on its own behalf and on behalf of Tom Brady, Defendant-Counter-Claimant - Appellee, Tom Brady, Counter-Claimant - Appellee.	District Court or Agency: SDNY	Judge: Richard M. Berman
	Date the Order or Judgment Appealed from was Entered on the Docket: September 3, 2015	District Court Docket No.: 1:15-cv-05916 (RMB)
	Date the Notice of Appeal was Filed: September 3, 2015	Is this a Cross Appeal? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>

Attorney(s) for Appellant(s): <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant	Counsel's Name: Daniel L. Nash Address: Akin Gump Strauss Hauer & Feld LLP 1333 New Hampshire Ave., N.W. Washington, DC 20036 Telephone No.: (202) 887-4067; (202) 887-4288; dnash@akingump.com Fax No.: E-mail:
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Attorney(s) for Appellee(s): <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant	Counsel's Name: Jeffrey L. Kessler Address: Winston & Strawn LLP 200 Park Avenue New York, NY 10166 Telephone No.: (212) 294-4698; (212) 294-4700; jkessler@winston.com Fax No.: E-mail:
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Has Transcript Been Prepared? Yes	Approx. Number of Transcript Pages: 136	Number of Exhibits Appended to Transcript: 0	Has this matter been before this Circuit previously? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes, provide the following: Case Name: 2d Cir. Docket No.: Reporter Citation: (i.e., F.3d or Fed. App.)
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ADDENDUM "A": COUNSEL MUST ATTACH TO THIS FORM: (1) A BRIEF, BUT NOT PERFUNCTORY, DESCRIPTION OF THE NATURE OF THE ACTION; (2) THE RESULT BELOW; (3) A COPY OF THE NOTICE OF APPEAL AND A CURRENT COPY OF THE LOWER COURT DOCKET SHEET; AND (4) A COPY OF ALL RELEVANT OPINIONS/ORDERS FORMING THE BASIS FOR THIS APPEAL, INCLUDING TRANSCRIPTS OF ORDERS ISSUED FROM THE BENCH OR IN CHAMBERS.

ADDENDUM "B": COUNSEL MUST ATTACH TO THIS FORM A LIST OF THE ISSUES PROPOSED TO BE RAISED ON APPEAL, AS WELL AS THE APPLICABLE APPELLATE STANDARD OF REVIEW FOR EACH PROPOSED ISSUE.

PART A: JURISDICTION

1. <u>Federal Jurisdiction</u>		2. <u>Appellate Jurisdiction</u>	
U.S. a party	Diversity	<input checked="" type="checkbox"/> Final Decision	Order Certified by District Judge (i.e., Fed. R. Civ. P. 54(b))
<input checked="" type="checkbox"/> Federal question (U.S. not a party)	Other (specify): _____	Interlocutory Decision Appealable As of Right	Other (specify): _____

IMPORTANT. COMPLETE AND SIGN REVERSE SIDE OF THIS FORM.

PART B: DISTRICT COURT DISPOSITION (Check as many as apply)

1. <u>Stage of Proceedings</u>	2. <u>Type of Judgment/Order Appealed</u>	3. <u>Relief</u>
<input checked="" type="checkbox"/> Pre-trial During trial After trial	Default judgment Dismissal/FRCP 12(b)(1) lack of subj. matter juris. Dismissal/FRCP 12(b)(6) failure to state a claim Dismissal/28 U.S.C. § 1915(e)(2) frivolous complaint Dismissal/28 U.S.C. § 1915(e)(2) other dismissal	Dismissal/other jurisdiction Dismissal/merit <input checked="" type="checkbox"/> Judgment / Decision of the Court Summary judgment Declaratory judgment Jury verdict Judgment NOV Directed verdict Other (specify):
		Damages: Injunctions: Sought: \$ _____ Preliminary Granted: \$ _____ Permanent Denied: \$ _____ Denied

PART C: NATURE OF SUIT (Check as many as apply)

1. <u>Federal Statutes</u>	2. <u>Torts</u>	3. <u>Contracts</u>	4. <u>Prisoner Petitions</u>
Antitrust Bankruptcy Banks/Banking Civil Rights Commerce, Energy Commodities Other (specify): _____	Admiralty/ Maritime Assault / Defamation FELA Products Liability Other (Specify):	Admiralty/ Maritime Arbitration Commercial Employment Insurance Negotiable Instruments Other Specify	Civil Rights Habeas Corpus Mandamus Parole Vacate Sentence Other
Communications Consumer Protection Copyright <input type="checkbox"/> Patent Trademark Election Soc. Security Environmental	Freedom of Information Act Immigration <input checked="" type="checkbox"/> Labor OSHA Securities Tax		
5. <u>Other</u> Forfeiture/Penalty Real Property Treaty (specify): _____ Other (specify): _____	6. <u>General</u> <input checked="" type="checkbox"/> Arbitration Attorney Disqualification Class Action Counsel Fees Shareholder Derivative Transfer	7. Will appeal raise constitutional issue(s)? Yes <input checked="" type="checkbox"/> No Will appeal raise a matter of first impression? Yes <input checked="" type="checkbox"/> No	

1. Is any matter relative to this appeal still pending below? Yes, specify: _____ <input checked="" type="checkbox"/> No			
2. To your knowledge, is there any case presently pending or about to be brought before this Court or another court or administrative agency which:			
(A) Arises from substantially the same case or controversy as this appeal?		<input checked="" type="checkbox"/> Yes	No
(B) Involves an issue that is substantially similar or related to an issue in this appeal?		<input checked="" type="checkbox"/> Yes	No
If yes, state whether "A," or "B," or <input checked="" type="checkbox"/> both are applicable, and provide in the spaces below the following information on the <i>other</i> action(s):			
Case Name: Nat'l Football League Players Ass'n v. Nat'l Football League Mgmt. Council	Docket No. 15-2805	Citation:	Court or Agency: Court of Appeals, 2d Circuit
Name of Appellant: National Football League Management Council, National Football League			

Date: September 17, 2015	Signature of Counsel of Record: 
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NOTICE TO COUNSEL

Once you have filed your Notice of Appeal with the District Court or the Tax Court, you have only 14 days in which to complete the following important steps:

1. Complete this Civil Appeal Pre-Argument Statement (Form C); serve it upon all parties, and file it with the Clerk of the Second Circuit in accordance with LR 25.1.
2. File the Court of Appeals Transcript Information/Civil Appeal Form (Form D) with the Clerk of the Second Circuit in accordance with LR 25.1.
3. Pay the \$505 docketing fee to the United States District Court or the \$500 docketing fee to the United States Tax Court unless you are authorized to prosecute the appeal without payment.

PLEASE NOTE: IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN 14 DAYS, YOUR APPEAL WILL BE DISMISSED. SEE LOCAL RULE 12.1.

Addendum “A”

(1) Nature of the Action

This is an appeal of a September 3, 2015 order and judgment of the U.S. District Court for the Southern District of New York, which vacated a labor arbitration award under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

Pursuant to the parties’ collective bargaining agreement (“CBA”), and following a months-long investigation, National Football League Commissioner Roger Goodell suspended New England Patriots quarterback Tom Brady for the first four games of the 2015-2016 NFL season for engaging in “conduct detrimental to the integrity of, and public confidence in, the game of professional football.” The National Football League Players Association (“NFLPA”) appealed the suspension under the terms of the parties’ CBA. In accordance with the CBA’s agreed-upon arbitration procedures, Commissioner Goodell presided over a 10-hour hearing, at which both Brady and the NFLPA offered extensive legal arguments, testimony, and evidence.

On July 28, 2015, the Commissioner issued a final and binding written award (“Award”) upholding Brady’s suspension under Article 46 of the parties’ CBA. After reviewing the extensive evidentiary record and “taking into account the credibility of the witnesses, including Mr. Brady,” the Commissioner concluded that “Mr. Brady participated in a scheme to tamper with the game balls after they had been approved by the game officials for use in the AFC Championship Game.” The Commissioner further determined that “Mr. Brady willfully obstructed the investigation” of the incident by the League and the law firm Paul, Weiss, Rifkind, Wharton & Garrison, “by, among other things, affirmatively arranging for destruction of his cellphone knowing that it contained potentially relevant information that had been requested by the investigators.” In light of his interpretation of the disciplinary provisions of the CBA and prior arbitral precedent, the Commissioner concluded that “[a]ll of this indisputably constitutes conduct detrimental to the integrity of, and public confidence in, the game of professional football.” He therefore affirmed Brady’s four-game suspension.

Soon after, the NFL commenced an action to confirm the Award in the district court. The following day, the NFLPA brought its own lawsuit in the U.S. District Court for the District of Minnesota seeking to vacate the Award. The Minnesota court immediately transferred the action to the Southern District of New York, which was assigned as “related” to the NFL’s first-filed action.

The parties cross-moved to confirm and to vacate the Award before the district court. The district court heard argument on the motions on August 12 and August 19, 2015. The district court also ordered the parties to attend settlement conferences on August 13, 18, 24, and 31. For two of the settlement conferences, the district court required attendance from not only the parties’ counsel but also their “principals,” including Commissioner Goodell, who, pursuant to the CBA, issued the arbitration award under review.

(2) The Result Below

On September 3, 2015, the district court denied the NFL's motion to confirm and granted the NFLPA's motion to vacate the Award. The district court ostensibly accepted all of the Commissioner's factual findings, including that Brady was involved "in a scheme to tamper with the game balls" and "willfully obstructed" the League investigation. Nevertheless, the court vacated the award, citing three grounds. First, the court ruled that Brady had "inadequate notice" of the fact that he could be disciplined for his "alleged misconduct" and of the scope of that potential discipline. Order at 20. Second, the court held that the Commissioner's decision not to compel the testimony of NFL General Counsel Jeff Pash rendered Brady's hearing "fundamentally unfair" in violation of the FAA, 9 U.S.C. § 10(a)(3). Order at 34. Third, the court held that the Commissioner's decision not to compel production of the Paul, Weiss attorney interview notes to Brady also rendered the hearing "fundamentally unfair." Order at 37. The district court reserved judgment on the NFLPA's remaining arguments in support of vacatur. *Id.* at 38-39.

On September 3, 2015, the NFL timely filed Notices of Appeal in both the original and transferred dockets. Those appeals were consolidated in this court.

(3) A copy of the Notice of Appeal and a current copy of the lower docket sheet

Attached hereto as Exhibit 1.

(4) A copy of all relevant opinions/orders forming the basis for this appeal, including transcripts of orders issued from the bench or in chambers.

A copy of the September 3, 2015 Order is attached hereto as Exhibit 2. Copies of the August 12, 2015 and August 19, 2015 hearing transcripts are attached hereto as Exhibits 3 and 4.

Addendum “B”

A list of issues proposed to be raised on appeal, as well as the applicable appellate standard of review for each proposed issue:

1. Whether the district court erred in vacating the labor arbitration award sustaining Tom Brady’s discipline by relying on substantive legal standards drawn from the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, rather than relying on the governing legal standard prescribed by the Labor Management Relations Act, 29 U.S.C. § 185.
2. Whether the district court erred in vacating the labor arbitration award sustaining Tom Brady’s discipline based on the district court’s disagreement with the arbitrator’s interpretation of the CBA, analysis of prior arbitration precedent, and findings of fact.
3. Whether the district court erred in vacating the labor arbitration award sustaining Tom Brady’s discipline based on the court’s disagreement with two of the arbitrator’s discretionary evidentiary rulings, which were based on the arbitrator’s interpretation of the CBA.

This Court reviews a district court’s vacatur of a labor arbitration award *de novo* when, as here, it turns entirely on questions of law. *See Wackenhut Corp. v. Amalgamated Local 515*, 126 F.3d 29, 31 (2d Cir. 1997).

Exhibit 1

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

NATIONAL FOOTBALL LEAGUE
MANAGEMENT COUNCIL,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION,

Defendant.

15-cv-5916 (RMB) (JCF)

NOTICE OF APPEAL

NOTICE OF APPEAL

Notice is hereby given that the National Football League Management Council, plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the Second Circuit from the Decision & Order, Amended Decision & Order, and the judgment entered thereto [ECF Nos. 46, 48, 50] vacating a labor arbitration award under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a), entered in this action on the 3rd day of September, 2015, as well as all orders encompassed therein.

/s/ Daniel L. Nash

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AKIN GUMP STRAUSS HAUER & FELD LLP

*Counsel for Plaintiff National Football League
Management Council*

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2015, I electronically filed the foregoing Notice of Appeal with the Clerk of Court by using the Court's CM/ECF system. All participants in this matter are registered CM/ECF users and will be served copies of the foregoing document via the Court's CM/ECF system.

_____/s/ Daniel L. Nash

Daniel L. Nash

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:15-cv-05916-RMB-JCF

National Football League Management Council v. National
Football League Players Association
Assigned to: Judge Richard M. Berman
Referred to: Magistrate Judge James C. Francis
Demand: \$0

Related Cases: [1:15-cv-05982-RMB-JCF](#)
[1:15-mc-00235-RMB](#)

Case in other court: US Court of Appeals, Second Circuit, 15-
02801

Cause: 29:185 Labor/Mgt. Relations (Contracts)

Date Filed: 07/28/2015
Date Terminated: 09/03/2015
Jury Demand: None
Nature of Suit: 720 Labor: Labor/Mgt.
Relations
Jurisdiction: Federal Question

Plaintiff

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Council**

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V.

Defendant

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Interested Party

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jeffrey L. Kessler
(See above for address)
ATTORNEY TO BE NOTICED

Counter Claimant

Tom Brady

represented by **Jeffrey L. Kessler**
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ATTORNEY TO BE NOTICED

Counter Claimant

**National Football League Players
Association**

represented by **David Greenspan**
(See above for address)
ATTORNEY TO BE NOTICED

Jeffrey L. Kessler
(See above for address)
ATTORNEY TO BE NOTICED

Jonathan J Amoona
(See above for address)
ATTORNEY TO BE NOTICED

V.

Counter Defendant

**National Football League Management
Council**

represented by **Daniel L. Nash**
(See above for address)
ATTORNEY TO BE NOTICED

Stacey R. Eisenstein
(See above for address)
ATTORNEY TO BE NOTICED

Robert Hardy Pees
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ATTORNEY TO BE NOTICED

Counter Claimant

**National Football League Players
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ATTORNEY TO BE NOTICED

Jeffrey L. Kessler
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ATTORNEY TO BE NOTICED

Jonathan J Amoon
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ATTORNEY TO BE NOTICED

V.

Counter Defendant

**National Football League Management
 Council**

represented by **Daniel L. Nash**
 (See above for address)
ATTORNEY TO BE NOTICED

Stacey R. Eisenstein
 (See above for address)
ATTORNEY TO BE NOTICED

Robert Hardy Pees
 (See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/28/2015	<u>1</u>	FILING ERROR - DEFICIENT PLEADING - FILER ERROR - COMPLAINT against National Football League Players Association. (Filing Fee \$ 400.00, Receipt Number 0208-11207400) Document filed by National Football League Management Council. (Attachments: # <u>1</u> Exhibit A)(Pees, Robert) Modified on 7/29/2015 (dgo). (Entered: 07/28/2015)
07/28/2015	<u>2</u>	FILING ERROR - DEFICIENT PLEADING - SIGNATURE ERROR - CIVIL COVER SHEET filed. (Pees, Robert) Modified on 7/29/2015 (dgo). (Entered: 07/28/2015)
07/28/2015	<u>3</u>	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by National Football League Management Council.(Pees, Robert) (Entered: 07/28/2015)
07/28/2015	<u>4</u>	COMPLAINT against National Football League Players Association. Document filed by National Football League Management Council. (Attachments: # <u>1</u> Exhibit

		A, # <u>2</u> Exhibit B)(Pees, Robert) (Entered: 07/28/2015)
07/29/2015		***NOTICE TO ATTORNEY REGARDING DEFICIENT CIVIL COVER SHEET. Notice to attorney Robert Hardy Pees to RE-FILE Document No. <u>2</u> Civil Cover Sheet. The filing is deficient for the following reason(s): No signature;. Re-file the document using the event type Civil Cover Sheet found under the event list Other Documents and attach the correct PDF. (dgo) (Entered: 07/29/2015)
07/29/2015		CASE OPENING INITIAL ASSIGNMENT NOTICE: The above-entitled action is assigned to Judge Richard M. Berman. Please download and review the Individual Practices of the assigned District Judge, located at http://nysd.uscourts.gov/judges/District . Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. Please download and review the ECF Rules and Instructions, located at http://nysd.uscourts.gov/ecf_filing.php . (dgo) (Entered: 07/29/2015)
07/29/2015		Magistrate Judge James C. Francis IV is so designated. (dgo) (Entered: 07/29/2015)
07/29/2015		Case Designated ECF. (dgo) (Entered: 07/29/2015)
07/29/2015	<u>5</u>	CIVIL COVER SHEET filed. (Pees, Robert) (Entered: 07/29/2015)
07/29/2015	<u>6</u>	REQUEST FOR ISSUANCE OF SUMMONS as to National Football League Players Association, re: <u>4</u> Complaint. Document filed by National Football League Management Council. (Pees, Robert) (Entered: 07/29/2015)
07/29/2015	<u>7</u>	MEMO ENDORSEMENT on re: <u>4</u> Complaint filed by National Football League Management Council. ENDORSEMENT: Defendant to respond by August 13, 2015 (noon). Court will set a conference following receipt of Defendant's response. (Signed by Judge Richard M. Berman on 7/29/2015) (kgo) Modified on 7/29/2015 (kgo). (Entered: 07/29/2015)
07/29/2015		Set/Reset Deadlines: National Football League Players Association answer due 8/13/2015. (kgo) (Entered: 07/29/2015)
07/29/2015	<u>8</u>	LETTER addressed to Judge Richard M. Berman from Robert H. Pees dated July 29, 2015 re: Requesting a Conference. Document filed by National Football League Management Council.(Pees, Robert) (Entered: 07/29/2015)
07/30/2015	<u>9</u>	ELECTRONIC SUMMONS ISSUED as to National Football League Players Association. (dgo) (Entered: 07/30/2015)
07/30/2015	<u>10</u>	MEMO ENDORSEMENT on re: <u>8</u> Letter filed by National Football League Management Council. ENDORSEMENT: Counsel's application (herein) has become moot by virtue of today's order by the Honorable Richard H. Kyle, U.S.D.J. District of Minnesota transferred the Minnesota case to the (1st filed) S.D.N.Y. (Signed by Judge Richard M. Berman on 7/30/2015) (kgo) (Entered: 07/30/2015)
07/30/2015	<u>11</u>	ORDER: Based upon the record herein, the Court directs as follows: 1- While this litigation is ongoing, it is appropriate (and helpful) for all counsel and all parties in this case to tone down their rhetoric; 2- The Court greatly appreciates the Hon. Richard H. Kyle's (U.S.D.J. Minnesota) involvement in and speedy review of the

		National Football League Players Association case against the National Football League filed in Minnesota. See Order dated July 30, 2015, 15 cv 3168 (RHK/HB) ("The Court appreciates no 'compelling circumstances' undermining application of the first-filed rule to transfer this action from Minnesota to New York, where the first action was filed."); 3- If they have not already done so, the parties and counsel are directed forthwith actively to begin to pursue a mutually acceptable resolution of this case; 4- The timetable set forth in the Court's July 29, 2015 memo endorsement remains in effect. Please also see the Court's individual rules regarding motion practice. (The earth is already sufficiently scorched, in the Court's view.) 5- The Court is fully prepared to devote the time and attention necessary to help the parties resolve this case via litigation and/or by mutual consent. (Signed by Judge Richard M. Berman on 7/30/2015) (kgo) (Entered: 07/30/2015)
07/30/2015	<u>12</u>	AFFIDAVIT OF SERVICE of Summons and Complaint. Document filed by National Football League Management Council. (Pees, Robert) (Entered: 07/30/2015)
07/31/2015	<u>13</u>	MOTION for Daniel L. Nash to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-11220914. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by National Football League Management Council.(Nash, Daniel) (Entered: 07/31/2015)
07/31/2015		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. <u>13</u> MOTION for Daniel L. Nash to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-11220914. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (sdi) (Entered: 07/31/2015)
07/31/2015	<u>14</u>	MOTION for Stacey R. Eisenstein to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-11221267. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by National Football League Management Council.(Eisenstein, Stacey) (Entered: 07/31/2015)
07/31/2015		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. <u>14</u> MOTION for Stacey R. Eisenstein to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-11221267. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (bcu) (Entered: 07/31/2015)
07/31/2015	<u>15</u>	NOTICE OF APPEARANCE by Jeffrey L. Kessler on behalf of National Football League Players Association. (Kessler, Jeffrey) (Entered: 07/31/2015)
07/31/2015	<u>16</u>	NOTICE OF APPEARANCE by David Greenspan on behalf of National Football League Players Association. (Greenspan, David) (Entered: 07/31/2015)
07/31/2015	<u>17</u>	JOINT LETTER MOTION for Conference <i>in regard to anticipated cross motions to vacate and confirm the July 28, 2015 arbitration award</i> , addressed to Judge Richard M. Berman from Jeffrey Kessler dated 7/31/2015. Document filed by National Football League Players Association.(Kessler, Jeffrey) (Entered: 07/31/2015)
07/31/2015	<u>18</u>	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by National Football League Players Association.(Kessler, Jeffrey) (Entered: 07/31/2015)

07/31/2015	<u>19</u>	MOTION for Jonathan J. Amoona to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-11225135. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by National Football League Players Association. (Attachments: # <u>1</u> Exhibit A - Certificate of Good Standing, # <u>2</u> Text of Proposed Order)(Amoona, Jonathan) (Entered: 07/31/2015)
07/31/2015	<u>20</u>	ORDER: Thank you for your letter, dated July 31, 2015. I found it helpful. It is "OK" to file a public version of the answer and counterclaim as you request. I always have considerable difficulty approving any sealed documents, given the keen public interest in these matters and the public's right to know. It's up to you whether to file any sealed motions or sealed document applications at this time. I have two further suggestions: First, because I already have a good understanding of your positions from your submissions to date, you need only each file a 15 page double spaced memo (further supporting your positions) by August 7, 2015. In the nature of a reply brief, perhaps. Second, I am scheduling a status/settlement conference for Wednesday, August 12,2015 at 11:00 a.m., with your principals (including, without limitation, Mr. Goodell and Mr. Brady). Let's see what we can accomplish at that conference and if there is a need for more written submissions, the August 14, 2015 submission date you propose is fine. I am also scheduling a status/settlement/oral argument conference for Wednesday, August 19, 2015 at 10:00 a.m., again with your principals (including, without limitation, Mr. Goodell and Mr. Brady). Please jointly confirm all dates by 3:00 p.m. on Monday, August 3, 2015, tel: (212) 805-6715. Lastly, I request that you all engage in comprehensive, good-faith settlement discussions prior to the conference on August 12,2015. Magistrate Judge James C. Francis, IV is available to assist you if you wish. Settlement Conference set for 8/12/2015 at 11:00 AM before Judge Richard M. Berman. Settlement Conference set for 8/19/2015 at 10:00 AM before Judge Richard M. Berman. (Signed by Judge Richard M. Berman on 7/31/2015) (kgo) (Entered: 07/31/2015)
07/31/2015	<u>21</u>	ORDER FOR ADMISSION PRO HAC VICE granting <u>13</u> Motion for Daniel L. Nash to Appear Pro Hac Vice. (Signed by Judge Richard M. Berman on 7/31/2015) (kgo) (Entered: 07/31/2015)
07/31/2015	<u>22</u>	ORDER FOR ADMISSION PRO HAC VICE granting <u>14</u> Motion for Stacey R. Eisenstein to Appear Pro Hac Vice. (Signed by Judge Richard M. Berman on 7/31/2015) (kgo) (Entered: 07/31/2015)
07/31/2015	<u>23</u>	MOTION for Andrew S. Tulumello to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-11225864. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Tom Brady.(Tulumello, Andrew) (Entered: 07/31/2015)
07/31/2015	<u>24</u>	ANSWER to <u>4</u> Complaint., COUNTERCLAIM against National Football League Management Council. Document filed by Tom Brady, National Football League Players Association.(Kessler, Jeffrey) (Entered: 07/31/2015)
07/31/2015	<u>25</u>	ORDER REFERRING CASE TO MAGISTRATE JUDGE. Order that case be referred to the Clerk of Court for assignment to a Magistrate Judge for General Pretrial (includes scheduling, discovery, non-dispositive pretrial motions, and settlement). Referred to Magistrate Judge James C. Francis. (Signed by Judge Richard M. Berman on 7/31/2015) (kgo) (Entered: 07/31/2015)

08/03/2015		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. <u>23</u> MOTION for Andrew S. Tulumello to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-11225864. Motion and supporting papers to be reviewed by Clerk's Office staff., <u>19</u> MOTION for Jonathan J. Amoona to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-11225135. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (wb) (Entered: 08/03/2015)
08/03/2015	26	ORDER granting <u>19</u> Motion for Jonathan J. Amoona to Appear Pro Hac Vice. (HEREBY ORDERED by Magistrate Judge James C. Francis)(Text Only Order) (Francis, James) (Entered: 08/03/2015)
08/03/2015	27	ORDER granting <u>23</u> Motion for Andrew S. Tulumello to Appear Pro Hac Vice. (HEREBY ORDERED by Magistrate Judge James C. Francis)(Text Only Order) (Francis, James) (Entered: 08/03/2015)
08/03/2015		Minute Entry for proceedings held before Magistrate Judge James C. Francis: Telephone Conference held on 8/3/2015. (Bacchus, Michael) (Entered: 08/03/2015)
08/04/2015	<u>28</u>	AMENDED ANSWER to <u>4</u> Complaint, <u>24</u> Answer to Complaint, Counterclaim., COUNTERCLAIM against National Football League Management Council. Document filed by National Football League Players Association. (Attachments: # <u>1</u> Exhibit 1 Part 1 of 8, # <u>2</u> Exhibit 1 Part 2 of 8, # <u>3</u> Exhibit 1 Part 3 of 8, # <u>4</u> Exhibit 1 Part 4 of 8, # <u>5</u> Exhibit 1 Part 5 of 8, # <u>6</u> Exhibit 1 Part 6 of 8, # <u>7</u> Exhibit 1 Part 7 of 8, # <u>8</u> Exhibit 1 Part 8 of 8, # <u>9</u> Exhibit 2 Part 1 of 11, # <u>10</u> Exhibit 2 Part 2 of 11, # <u>11</u> Exhibit 2 Part 3 of 11, # <u>12</u> Exhibit 2 Part 4 of 11, # <u>13</u> Exhibit 2 Part 5 of 11, # <u>14</u> Exhibit 2 Part 6 of 11, # <u>15</u> Exhibit 2 Part 7 of 11, # <u>16</u> Exhibit 2 Part 8 of 11, # <u>17</u> Exhibit 2 Part 9 of 11, # <u>18</u> Exhibit 2 Part 10 of 11, # <u>19</u> Exhibit 2 Part 11 of 11, # <u>20</u> Exhibit 3, # <u>21</u> Exhibit 4, # <u>22</u> Exhibit 5, # <u>23</u> Exhibit 6, # <u>24</u> Exhibit 7, # <u>25</u> Exhibit 8 Part 1 of 2, # <u>26</u> Exhibit 8 Part 2 of 2, # <u>27</u> Exhibit 9, # <u>28</u> Exhibit 10, # <u>29</u> Exhibit 11, # <u>30</u> Exhibit 12, # <u>31</u> Exhibit 13, # <u>32</u> Exhibit 14, # <u>33</u> Exhibit 15, # <u>34</u> Exhibit 16, # <u>35</u> Exhibit 17, # <u>36</u> Exhibit 18, # <u>37</u> Exhibit 19, # <u>38</u> Exhibit 20, # <u>39</u> Exhibit 21, # <u>40</u> Exhibit 22, # <u>41</u> Exhibit 23, # <u>42</u> Exhibit 24, # <u>43</u> Exhibit 25, # <u>44</u> Exhibit 26, # <u>45</u> Exhibit 27, # <u>46</u> Exhibit 28, # <u>47</u> Exhibit 29, # <u>48</u> Exhibit 30, # <u>49</u> Exhibit 31, # <u>50</u> Exhibit 32, # <u>51</u> Exhibit 33, # <u>52</u> Exhibit 34, # <u>53</u> Exhibit 35, # <u>54</u> Exhibit 36, # <u>55</u> Exhibit 37, # <u>56</u> Exhibit 38, # <u>57</u> Exhibit 39, # <u>58</u> Exhibit 40, # <u>59</u> Exhibit 41, # <u>60</u> Exhibit 42, # <u>61</u> Exhibit 43, # <u>62</u> Exhibit 44, # <u>63</u> Exhibit 45, # <u>64</u> Exhibit 46, # <u>65</u> Exhibit 47, # <u>66</u> Exhibit 48, # <u>67</u> Exhibit 49, # <u>68</u> Exhibit 50, # <u>69</u> Exhibit 51, # <u>70</u> Exhibit 52, # <u>71</u> Exhibit 53, # <u>72</u> Exhibit 54, # <u>73</u> Exhibit 55, # <u>74</u> Exhibit 56, # <u>75</u> Exhibit 57, # <u>76</u> Exhibit 58, # <u>77</u> Exhibit 59, # <u>78</u> Exhibit 60, # <u>79</u> Exhibit 61, # <u>80</u> Exhibit 62, # <u>81</u> Exhibit 63, # <u>82</u> Exhibit 64, # <u>83</u> Exhibit 65, # <u>84</u> Exhibit 66, # <u>85</u> Exhibit 67, # <u>86</u> Exhibit 68, # <u>87</u> Exhibit 69, # <u>88</u> Exhibit 70, # <u>89</u> Exhibit 71, # <u>90</u> Exhibit 72, # <u>91</u> Exhibit 73, # <u>92</u> Exhibit 74, # <u>93</u> Exhibit 75, # <u>94</u> Exhibit 76, # <u>95</u> Exhibit 77, # <u>96</u> Exhibit 78, # <u>97</u> Exhibit 79, # <u>98</u> Exhibit 80, # <u>99</u> Exhibit 81, # <u>100</u> Exhibit 82, # <u>101</u> Exhibit 83, # <u>102</u> Exhibit 84, # <u>103</u> Exhibit 85, # <u>104</u> Exhibit 86, # <u>105</u> Exhibit 87, # <u>106</u> Exhibit 88, # <u>107</u> Exhibit 89, # <u>108</u> Exhibit 90, # <u>109</u> Exhibit 91, # <u>110</u> Exhibit 92, # <u>111</u> Exhibit 93, # <u>112</u> Exhibit 94, # <u>113</u> Exhibit 95, # <u>114</u> Exhibit 96, # <u>115</u> Exhibit 97, # <u>116</u> Exhibit 98, # <u>117</u> Exhibit 99, # <u>118</u> Exhibit 100, # <u>119</u> Exhibit 101, # <u>120</u> Exhibit 102, # <u>121</u> Exhibit 103, # <u>122</u> Exhibit 104, # <u>123</u> Exhibit 105, # <u>124</u> Exhibit 106, # <u>125</u> Exhibit 107, # <u>126</u> Exhibit 108, # <u>127</u> Exhibit 109, # <u>128</u> Exhibit 110, # <u>129</u>

		Exhibit 111, # 130 Exhibit 112, # 131 Exhibit 113, # 132 Exhibit 114 Part 1 of 2, # 133 Exhibit 114 Part 2 of 2, # 134 Exhibit 115 Part 1 of 8, # 135 Exhibit 115 Part 2 of 8, # 136 Exhibit 115 Part 3 of 8, # 137 Exhibit 115 Part 4 of 8, # 138 Exhibit 115 Part 5 of 8, # 139 Exhibit 115 Part 6 of 8, # 140 Exhibit 115 Part 7 of 8, # 141 Exhibit 115 Part 8 of 8, # 142 Exhibit 116, # 143 Exhibit 117, # 144 Exhibit 118, # 145 Exhibit 119, # 146 Exhibit 120, # 147 Exhibit 121, # 148 Exhibit 122, # 149 Exhibit 123, # 150 Exhibit 124, # 151 Exhibit 125, # 152 Exhibit 126, # 153 Exhibit 127, # 154 Exhibit 128, # 155 Exhibit 129, # 156 Exhibit 130, # 157 Exhibit 131, # 158 Exhibit 132, # 159 Exhibit 133, # 160 Exhibit 134, # 161 Exhibit 135, # 162 Exhibit 136, # 163 Exhibit 137, # 164 Exhibit 138, # 165 Exhibit 139, # 166 Exhibit 140, # 167 Exhibit 141, # 168 Exhibit 142, # 169 Exhibit 143, # 170 Exhibit 144, # 171 Exhibit 145, # 172 Exhibit 146, # 173 Exhibit 147, # 174 Exhibit 148, # 175 Exhibit 149, # 176 Exhibit 150, # 177 Exhibit 151, # 178 Exhibit 152, # 179 Exhibit 153, # 180 Exhibit 154, # 181 Exhibit 155, # 182 Exhibit 156, # 183 Exhibit 157, # 184 Exhibit 158, # 185 Exhibit 159, # 186 Exhibit 160, # 187 Exhibit 161, # 188 Exhibit 162, # 189 Exhibit 163, # 190 Exhibit 164, # 191 Exhibit 165, # 192 Exhibit 166, # 193 Exhibit 167, # 194 Exhibit 168, # 195 Exhibit 169, # 196 Exhibit 170, # 197 Exhibit 171, # 198 Exhibit 172, # 199 Exhibit 173, # 200 Exhibit 174, # 201 Exhibit 175, # 202 Exhibit 176, # 203 Exhibit 177, # 204 Exhibit 178, # 205 Exhibit 179, # 206 Exhibit 180, # 207 Exhibit 181, # 208 Exhibit 182, # 209 Exhibit 183, # 210 Exhibit 184, # 211 Exhibit 185, # 212 Exhibit 186, # 213 Exhibit 187, # 214 Exhibit 188, # 215 Exhibit 189, # 216 Exhibit 190, # 217 Exhibit 191, # 218 Exhibit 192, # 219 Exhibit 193, # 220 Exhibit 194, # 221 Exhibit 195, # 222 Exhibit 196, # 223 Exhibit 197, # 224 Exhibit 198, # 225 Exhibit 199, # 226 Exhibit 200, # 227 Exhibit 201, # 228 Exhibit 202, # 229 Exhibit 203, # 230 Exhibit 204, # 231 Exhibit 205, # 232 Exhibit 206, # 233 Exhibit 207, # 234 Exhibit 208, # 235 Exhibit 209, # 236 Exhibit 210)(Kessler, Jeffrey) (Entered: 08/04/2015)
08/05/2015	29	MOTION for James E. Tysse to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-11241443. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by National Football League Management Council.(Tysse, James) (Entered: 08/05/2015)
08/05/2015		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 29 MOTION for James E. Tysse to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-11241443. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (bcu) (Entered: 08/05/2015)
08/06/2015	30	ORDER granting 29 Motion for James E. Tysse to Appear Pro Hac Vice. (HEREBY ORDERED by Magistrate Judge James C. Francis)(Text Only Order) (Francis, James) (Entered: 08/06/2015)
08/06/2015	31	MOTION for DeMaurice F. Smith to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-11244040. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by National Football League Players Association. (Attachments: # 1 Certificate of Good Standing, # 2 Text of Proposed Order)(Smith, Demaurice) (Entered: 08/06/2015)
08/06/2015		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding

		Document No. 31 MOTION for DeMaurice F. Smith to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-11244040. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (wb) (Entered: 08/06/2015)
08/07/2015	32	ORDER granting 31 Motion for DeMaurice F. Smith to Appear Pro Hac Vice. (HEREBY ORDERED by Magistrate Judge James C. Francis)(Text Only Order) (Francis, James) (Entered: 08/07/2015)
08/07/2015	33	MOTION to Confirm Arbitration <i>NFL Management Council's Notice of Motion to Confirm the Labor Arbitration Award Regarding Tom Brady</i> . Document filed by National Football League Management Council. Return Date set for 8/19/2015 at 10:00 AM.(Nash, Daniel) (Entered: 08/07/2015)
08/07/2015	34	MOTION to Vacate Arbitration <i>Award</i> . Document filed by Tom Brady, National Football League Players Association.(Kessler, Jeffrey) (Entered: 08/07/2015)
08/07/2015	35	MEMORANDUM OF LAW in Support re: 33 MOTION to Confirm Arbitration <i>NFL Management Council's Notice of Motion to Confirm the Labor Arbitration Award Regarding Tom Brady</i> . <i>NFL Management Council's Memorandum of Law in Support of Motion to Confirm and in Opposition to Motion to Vacate the Labor Arbitration Award Regarding Tom Brady</i> . Document filed by National Football League Management Council. (Nash, Daniel) (Entered: 08/07/2015)
08/07/2015	36	MEMORANDUM OF LAW in Support re: 34 MOTION to Vacate Arbitration <i>Award</i> . . Document filed by Tom Brady, National Football League Players Association. (Kessler, Jeffrey) (Entered: 08/07/2015)
08/07/2015	37	DECLARATION of David L. Greenspan in Support re: 34 MOTION to Vacate Arbitration <i>Award</i> .. Document filed by Tom Brady, National Football League Players Association. (Attachments: # 1 Exhibit A)(Greenspan, David) (Entered: 08/07/2015)
08/11/2015	38	ORDER: In anticipation of tomorrow's conference, counsel and the parties are requested to engage in further good faith settlement efforts today. I will meet briefly with counsel and the parties tomorrow morning at 10:30 (in the robing room) for an update on your discussions. (Signed by Judge Richard M. Berman on 8/11/2015) (ajs) (Entered: 08/11/2015)
08/13/2015		Minute Entry for proceedings held before Judge Richard M. Berman: 8/12/15Court holds settlement conference with parties in the robing room;Present for National Football League Management Council:Attorneys Daniel Nash and Stacey Eisenstein are present. Also present are: NFLCommissioner Roger Goodell, Jeffrey Pash, Gregg Levy and Adolpho Birch;Present for National Football League Players Association and Tom Brady:Attorneys Jeffrey Kessler and David Greenspan are present.Present for Tom Brady:Attorneys Donald Yee and Stephen Dubin are present.Also present for NFLPA: Tom DePas, Heather McPhee and DeMaurice Smith, Executive Director NFLPA. Also present is Tom Brady.Court holds oral argument in courtroom;Court Reporter Pamela Utter is present in courtroom.Settlement discussions continue after oral argument in robing room;Settlement discussions to continue tomorrow with counsel only in robing room.(CM) (Entered: 08/13/2015)

08/13/2015		Minute Entry for proceedings held before Judge Richard M. Berman: 8/13/15 Court continues settlement conference with attorneys only. Present for National Football League Management Council: Attorneys Dan Nash, Gregg Levy, Jeffrey Pash and Adolpho Birch. Present for National Football League Players Association and Tom Brady: Attorneys David Greenspan, Jeffrey Kessler, Tom DePaso. Present for Tom Brady: Attorney Andrew Tulumello. Parties are directed to continue settlement discussions among themselves and/or with Magistrate Judge Francis and/or the Court. Next settlement conference/oral argument is scheduled for 8/19/15 at 10:00 am. Principals are not required to attend on 8/19/15. (CM) (Entered: 08/13/2015)
08/13/2015	39	NOTICE OF CHANGE OF ADDRESS by David Greenspan on behalf of National Football League Players Association. New Address: Winston & Strawn LLP, 200 Park Avenue, New York, NY, 10166, 212 294-6700. (Greenspan, David) (Entered: 08/13/2015)
08/14/2015	40	MEMORANDUM OF LAW in Opposition re: 33 MOTION to Confirm Arbitration <i>NFL Management Council's Notice of Motion to Confirm the Labor Arbitration Award Regarding Tom Brady</i> . . Document filed by Tom Brady, National Football League Players Association. (Kessler, Jeffrey) (Entered: 08/14/2015)
08/14/2015	41	MEMORANDUM OF LAW in Opposition re: 34 MOTION to Vacate Arbitration <i>Award</i> . . Document filed by National Football League Management Council. (Nash, Daniel) (Entered: 08/14/2015)
08/18/2015		Minute Entry for proceedings held before Magistrate Judge James C. Francis: Settlement Conference held on 8/18/2015. (Bacchus, Michael) Modified on 8/25/2015 (Landers, Rigoberto). (Entered: 08/25/2015)
08/19/2015		Minute Entry for proceedings held before Judge Richard M. Berman: Oral Argument held on 8/19/2015 re: 33 MOTION to Confirm Arbitration <i>NFL Management Council's Notice of Motion to Confirm the Labor Arbitration Award Regarding Tom Brady</i> . filed by National Football League Management Council, 40 Memorandum of Law in Opposition to Motion, filed by Tom Brady, National Football League Players Association, 37 Declaration in Support of Motion filed by Tom Brady, National Football League Players Association, 36 Memorandum of Law in Support of Motion filed by Tom Brady, National Football League Players Association, 41 Memorandum of Law in Opposition to Motion filed by National Football League Management Council, 35 Memorandum of Law in Support of Motion, filed by National Football League Management Council, 34 MOTION to Vacate Arbitration <i>Award</i> . filed by Tom Brady, National Football League Players Association. Court speaks briefly with attorneys in the robing room; Present for the National Football League are: Adolpho Birch; Gregg Levy; and Dan Nash; Present for the National Football League Players Association and Tom Brady are: Jeffrey Kessler; David Greenspan; Donald Yee; DeMaurice Smith; Heather McPhee; Present for Tom Brady: Andrew Tulumello; Court speaks to parties in the courtroom; Court Reporter Mike McDaniel present; Oral argument begins; Attorney Kessler begins followed by Attorney Nash with rebuttal by Attorney Kessler. Oral argument concludes; Court takes a recess; Court meets with attorneys in the robing room; Next conference is scheduled for 8/31/15 at 11:00 am. (Court Reporter Mike McDaniel) (CM) (Entered: 08/19/2015)
08/24/2015	42	LETTER addressed to Judge Richard M. Berman from Daniel L. Nash dated August 24, 2015 Document filed by National Football League Management

		Council.(Nash, Daniel) (Entered: 08/24/2015)
08/24/2015		Minute Entry for proceedings held before Magistrate Judge James C. Francis: Settlement Conference held on 8/24/2015. (Bacchus, Michael) (Entered: 08/25/2015)
08/25/2015	43	LETTER addressed to Judge Richard M. Berman from Jeffrey L. Kessler dated 8/25/2015 re: Response to 8/24/2015 letter by NFL's counsel (docket no. 42). Document filed by Tom Brady, National Football League Players Association. (Kessler, Jeffrey) (Entered: 08/25/2015)
08/31/2015		Minute Entry for proceedings held before Judge Richard M. Berman: Settlement Conference held on 8/31/2015. Present for National Football League Management Council: Attorneys Dan Nash, Gregg Levy, Jeffrey Pash and Adolpho Birch. Also present: Roger Goodell, John Mara. Present for National Football League Players Association and Tom Brady: Attorneys David Greenspan, Jeffrey Kessler, Tom DePaso, DeMaurice Smith. Present for Tom Brady: Attorneys Andrew Tulumello, Donald Yee, Stephen Dubin. Also present: Jay Feely, Vice President Player Executive Board and Ira Fishman, Chief Operating Officer Players Association. Court speaks with counsel and parties (individually) in robing room re: settlement; Court speaks with all counsel and parties in the courtroom;No settlement was reached. (Court Reporter Pamela Utter) (CM) (Entered: 08/31/2015)
09/01/2015	45	ORDER: The Court anticipates issuing its Decision and Order by the end of the week. (Signed by Judge Richard M. Berman on 9/1/2015) (kgo) (Entered: 09/01/2015)
09/03/2015	46	DECISION & ORDER denying 33 Motion to Confirm Arbitration; granting 34 Motion to Vacate Arbitration. For the reasons stated herein, the Management Council's motion to confirm the arbitration award [ECF No.4] is denied and the Players Association's motion to vacate the arbitration award [ECF No. 28] is granted. Brady's four-game suspension is vacated, effective immediately. The Clerk is respectfully requested to close cases 15 Civ. 5916 and 15 Civ. 5982. (As further set forth in this Decision & Order.) (Signed by Judge Richard M. Berman on 9/3/2015) (mro) (Entered: 09/03/2015)
09/03/2015		Transmission to Judgments and Orders Clerk. Transmitted re: 46 Order on Motion to Confirm Arbitration, Order on Motion to Vacate Arbitration, to the Judgments and Orders Clerk. (mro) (Entered: 09/03/2015)
09/03/2015	47	TRANSCRIPT of Proceedings re: ARGUMENT held on 8/12/2015 before Judge Richard M. Berman. Court Reporter/Transcriber: Pamela Utter, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/28/2015. Redacted Transcript Deadline set for 10/8/2015. Release of Transcript Restriction set for 12/7/2015.(McGuirk, Kelly) (Entered: 09/03/2015)
09/03/2015	48	AMENDED DECISION & ORDER: For the reasons stated herein, the Management Council's motion to confirm the arbitration award [No. 33] is denied and the Players Association's motion to vacate the arbitration award [No. 34] is granted. Brady's four-game suspension is vacated, effective immediately. The Clerk is respectfully requested to close cases 15 Civ. 5916 and 15 Civ. 5982. (As further set forth in this Amended Decision & Order.) (Signed by Judge Richard M. Berman

		on 9/3/2015) (mro) (Entered: 09/03/2015)
09/03/2015		Transmission to Judgments and Orders Clerk. Transmitted re: 48 Order,,, to the Judgments and Orders Clerk. (mro) (Entered: 09/03/2015)
09/03/2015	49	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a Conference proceeding held on 8/12/2015 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days... (McGuirk, Kelly) (Entered: 09/03/2015)
09/03/2015	50	CLERK'S JUDGMENT: That for the reasons stated in the Court's Amended Decision and Order dated September 3, 2015, the Management Council's motion to confirm the arbitration award [No. 33] is denied; the Players Association's motion to vacate the arbitration award [No. 34] is granted, and Brady's four game suspension is vacated, effective immediately; accordingly, cases 15 Civ. 5916 and 15 Civ. 5982 are closed. (Signed by Clerk of Court Ruby Krajick on 9/3/2015) (Attachments: # 1 Notice of Right to Appeal, # 2 Notice of Right to Appeal)(dt) (Entered: 09/03/2015)
09/03/2015	51	NOTICE OF APPEAL from 46 Order on Motion to Confirm Arbitration, Order on Motion to Vacate Arbitration,,, 48 Order,, 50 Clerk's Judgment,,, Document filed by National Football League Management Council. Filing fee \$ 505.00, receipt number 0208-11350523. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Nash, Daniel) (Entered: 09/03/2015)
09/03/2015		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 51 Notice of Appeal,. (nd) (Entered: 09/03/2015)
09/03/2015		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 51 Notice of Appeal, filed by National Football League Management Council were transmitted to the U.S. Court of Appeals. (nd) (Entered: 09/03/2015)
09/03/2015		USCA Case Number 15-2801 from the US Court of Appeals, Second Circuit assigned to 51 Notice of Appeal, filed by National Football League Management Council. (nd) (Entered: 09/03/2015)
09/08/2015	82	MOTION to Intervene. Document filed by Michelle L. McGuirk.(man) (Entered: 09/10/2015)
09/08/2015	83	AFFIDAVIT in Support re: 82 MOTION to Intervene. Document filed by Michelle L. McGuirk. (man) (Entered: 09/10/2015)
09/08/2015	84	MEMORANDUM OF LAW in Support re: 82 MOTION to Intervene. Document filed by Michelle L. McGuirk. (man) (Entered: 09/10/2015)
09/08/2015	85	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. Document filed by Michelle L. McGuirk. (man) (Entered: 09/10/2015)
09/08/2015	86	MOTION to Reopen. Document filed by Michelle L. McGuirk.(man) (Entered: 09/10/2015)

09/08/2015	87	AFFIDAVIT OF SERVICE. Document filed by Michelle L. McGuirk. (man) (Entered: 09/10/2015)
09/09/2015	52	ENDORSED LETTER addressed to Judge Richard M. Berman from Michael Aronson dated 8/16/2015 re: I am writing to you in regards to the case before you of the National Football League Management Council (NFL) v. National Football League Players Association (NFLPA)(Civil Action No. 1:15-cv-05916-RMB). ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) ***Docket and file instructions from chambers. (tn) Modified on 9/9/2015 (tn). (Entered: 09/09/2015)
09/09/2015	53	ENDORSED LETTER addressed to Judge Richard M. Berman from Hollister Lowe dated 8/14/2015 re: I whole heartedly believe as a concerned citizen that if a settlement isn't agreed upon, a vacated decision is in the best interest of the N.F.L., Mr. Brady and most importantly the integrity of the game. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) ***Docket and file instructions from chambers. (tn) Modified on 9/9/2015 (tn). (Entered: 09/09/2015)
09/09/2015	54	ENDORSED LETTER addressed to Judge Richard M. Berman from Terri Adelman dated 8/16/2015 re: Given all the bad behavior and the concussion issues, the NFL should focus on addressing those big problems that actually are harmful. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) ***Docket and file instructions from chambers. (tn) Modified on 9/9/2015 (tn). (Entered: 09/09/2015)
09/09/2015	55	ENDORSED LETTER addressed to Judge Richard M. Berman from Chet Ogorzalek dated 8/20/2015 re: I am watching the results of the case of deflategate and tried to get an answer from the NFL people right after this came to light and would like you to ask the same question to the NFL people. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) (kgo) (Entered: 09/09/2015)
09/09/2015	56	ENDORSED LETTER addressed to Judge Richard M. Berman from Michael Bargo Jr. dated 8/21/2015 re: With regard to the Tom Brady football inflation case, I have an idea on how you may gather evidence. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) (tn) (Entered: 09/09/2015)
09/09/2015	57	ENDORSED LETTER addressed to Judge Richard M. Berman from Mak Saito dated 8/31/2015 re: Experiments conducted relating to the football inflation. ENDORSEMENT: See attached Order. Clerk to Docket. Thank you for your

		submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) ***Docket and file instructions from chambers. (kl) (Entered: 09/09/2015)
09/09/2015	58	ENDORSED LETTER from Steven E. Kramer dated 8/5/2015 re: Amicus Brief and supporting documents for submission to Judge Berman in this matter. ENDORSEMENT: See last page 5 attached. Clerk to Docket. Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) ***Docket and file instructions from chambers. (kl) (Entered: 09/09/2015)
09/09/2015	59	ENDORSED LETTER addressed to Judge Richard M. Berman from Ralph G. Waclawicz dated 8/13/2015 re: I wish that someone would ask Mr. Goodell two questions? 1. When did the National Football League become aware that there could be a problem with the psi's of the footballs used by the New England Patriots? (According to what I have read it was well before the game in question.). ENDORSEMENT: P2. Clerk to Docket. Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) (kl) (Entered: 09/09/2015)
09/09/2015	60	ENDORSED LETTER addressed to Judge Richard M. Berman from Dr. Patrick J. McGuirk dated 8/26/2015 re: I can appreciate the decision you will have to make pertaining to Brady vs. the NFL. I would like to suggest something that may help you in that regard. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) ***Docket and file instructions from chambers. (tn) (Entered: 09/09/2015)
09/09/2015	61	ENDORSED LETTER addressed to Judge Richard M. Berman from Vincent F. Femia dated 8/22/2015 re: With the understanding that you will be ruling on the suspension levied against Tom Brady by the NFL regarding the issue related to the air pressure in the footballs in the AFC Championship game, I ask you to take into account the following considerations, as further set forth in this order. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) ***Docket and file instructions from chambers. (tn) Modified on 9/9/2015 (tn). (Entered: 09/09/2015)
09/09/2015	62	ENDORSED LETTER addressed to Judge Richard M. Berman from Robert J. Wilensky re: I am not a lawyer, but I have a brief suggestion how to conclude the mess with the NFL. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) ***Docket and file instructions from chambers. (tn) (Entered: 09/09/2015)
09/09/2015	63	ENDORSED LETTER addressed to Judge Richard M. Berman from Keith D.

		Guernsey dated 8/24/2015 re: I have been an ardent NFL fan for 58 years and have never seen the level of ineptitude and incompetence displayed by Roger Goodell and his band of yes men during this whole Deflategate fiasco. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) ***Docket and file instructions from chambers. (tn) (Entered: 09/09/2015)
09/09/2015	64	ENDORSED LETTER addressed to Judge Richard M. Berman from Liz Minnerly dated 8/13/2015 re: Solution for a settlement. ENDORSEMENT: See Next Page. Clerk to Docket. Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) (kko) (Entered: 09/09/2015)
09/09/2015	65	ENDORSED LETTER addressed to Judge Richard M. Berman from William A. Keller dated 8/13/2015 re: It would seem that if the league did not know the balls were deflated, they should have, as it is their job to operate the game; thus it was dereliction of duty on their part. ENDORSEMENT: See attached page. Clerk to Docket. Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) (kko) (Entered: 09/09/2015)
09/09/2015	66	ENDORSED LETTER addressed to Judge Richard M. Berman from Vanessa Ivelich dated 8/13/2015 re: I am a teacher in Reno, Nevada. I need to tell you why "Deflategate" matters despite the absurdity that you, an esteemed Federal Judge, needs to supervise these juvenile adults. ENDORSEMENT: See last page. Clerk to Docket. Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) (kl) (Entered: 09/09/2015)
09/09/2015	67	ENDORSED LETTER addressed to Judge Richard M. Berman from P. Moham, MD dated 9/01/2015 Re: I want to expose the fraudsters and cheaters (In medicine and elsewhere) and completely understand investigating the NFL team, its employees and QB in question given the allegations of cheating. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/09/2015) (ama) Modified on 9/9/2015 (ama). (Entered: 09/09/2015)
09/09/2015	68	ENDORSED LETTER addressed to Judge Richard M. Berman from Keith D. Guernsey dated 8/24/2015 re: Please do the right thing and vacate Brady's suspension since he won't?. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/09/2015) (ama) (Entered: 09/09/2015)

09/09/2015	69	ENDORSED LETTER addressed to Judge Richard M. Berman from John Homer Hikory, a.k.a. Houk dated 9/03/2015 re: This whole controversy has been totally blown out of proportions through an unintelligent society and fan base biased against the Patriots. It is also heightened by the Patriots winning the Super Bowl when the were facing defeat. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/09/2015) (ama) (Entered: 09/09/2015)
09/09/2015	70	ENDORSED LETTER addressed to Judge Richard M. Berman from Robert F. Young dated 8/26/2015 re: While my request letter, which you received Wednesday morning, was in the mail, it emerged that new NFL filings were arguing that it is okay for the NFL to be biased and mistaken in their facts. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/09/2015) (ama) (Entered: 09/09/2015)
09/09/2015	71	ENDORSED LETTER addressed to Judge Richard M. Berman from Girstchen Sharp dated 8/13/2015 re: How can Tom Brady make a touch down pass complete to the end zone for a touch down and the receiver slams the ball hard. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/09/2015) (ama) (Entered: 09/09/2015)
09/09/2015	72	ENDORSED LETTER addressed to Judge Richard M. Berman from Albert P. Amato dated 8/27/2015 re: Brady should serve his 4 game suspension. ENDORSEMENT: Clerk to Docket. Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/9/2015) (kgo) (Entered: 09/09/2015)
09/09/2015	73	ENDORSED LETTER addressed to Judge Richard M. Berman from Terri Adelman dated 9/04/2015 re: People with so much power, who are so dictatorial and vindictive are very very scary. If not confronted, they grow stronger. ENDORSEMENT: Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/09/2015) (ama) (Entered: 09/09/2015)
09/10/2015	74	LETTER addressed to Judge Richard M. Berman dated 8/13/2015 re: Irrelevant evidence. Clerk to Docket + file. (spo) (Entered: 09/10/2015)
09/10/2015		***DELETED DOCUMENT. Deleted document number 75 Letter. The document was incorrectly filed in this case. (spo) (Entered: 09/10/2015)
09/10/2015		***DELETED DOCUMENT. Deleted document number 76 Letter. The document was incorrectly filed in this case. (spo) (Entered: 09/10/2015)
09/10/2015	75	ENDORSED LETTER addressed to Judge Richard M. Berman from Michelle McGuirk dated 8/17/2015 re: Recognizing the integrity of the U.S. District Court

		for the Southern District of New York. ENDORSEMENT: Clerk to Docket See Attached. Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/10/2015) (spo) Modified on 9/10/2015 (spo). (Entered: 09/10/2015)
09/10/2015	76	ENDORSED LETTER addressed to Judge Richard M. Berman from Michelle McGuirk dated 8/17/2015 re: Recognizing the integrity of the U.S. District Court for the Southern District of New York. ENDORSEMENT: Clerk to Docket See Attached. Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/10/2015) (spo) Modified on 9/10/2015 (spo). (Entered: 09/10/2015)
09/10/2015	77	ENDORSED LETTER addressed to Judge Richard M. Berman from Laurence M. Russell dated 8/30/2015 re: DeflateGate Case Involving the NFL & QB Tom Brady. ENDORSEMENT: Clerk to Docket. See Attached. Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/10/2015) (spo) (Entered: 09/10/2015)
09/10/2015	78	ENDORSED LETTER addressed to Judge Richard M. Berman from J.A. Van Ostenbridge dated 9/4/2015 re: Every reasonable individual outside of the Patriot's organization realizes, and common sense dictates that Tom Brady is guilty of cheating. ENDORSEMENT: Clerk to docket. (Signed by Judge Richard M. Berman on 9/10/2015) (kgo) (Entered: 09/10/2015)
09/10/2015	79	ENDORSED LETTER addressed to Judge Richard M. Berman from Robert F. Young dated 8/25/2015 re: Permission requested to file AMICUS CURIAE IN OPPOSITION TO THE NFL'S MOTION TO CONFIRM ARBITRATION AWARD. ENDORSEMENT: Clerk to docket. Thank you for your submission - I apologize for the delay in responding. We have placed your submission on the court dockets for the NFL v. NFLPA (Tom Brady) matter (15 Civ. 5916 and 15 Civ. 5982). (Signed by Judge Richard M. Berman on 9/10/2015) (kgo) (Entered: 09/10/2015)

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Exhibit 2

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: **9/3/15**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

NATIONAL FOOTBALL LEAGUE
MANAGEMENT COUNCIL,

Plaintiff,

- v. -

NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION,

Defendant.

AMENDED DECISION & ORDER

15 Civ. 5916 (RMB) (JCF)

15 Civ. 5982 (RMB) (JCF)

I. Introduction

This Decision and Order resolves the parties' respective cross-motions to confirm and to vacate NFL Commissioner Roger Goodell's July 28, 2015 Arbitration Award imposing a four-game suspension on New England Patriots quarterback Tom Brady, pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10.¹

In reaching its decision, the Court has reviewed the record herein, including without limitation, (a) the investigation concerning allegedly deflated footballs used during the AFC Championship Game on January 18, 2015 between the New England Patriots ("Patriots") and the

¹ On July 28, 2015, the National Football League Management Council ("Management Council" or "Plaintiff") filed a Complaint in the United States District Court for the Southern District of New York seeking to confirm the arbitration award. On July 29, 2015, the National Football League Players Association ("Players Association" or "Defendant") filed a Petition to Vacate Arbitration Award in the United States District Court for the District of Minnesota. The Minnesota matter was immediately transferred to this district, under docket number 15 Civ. 5982, by U.S. District Judge Richard H. Kyle pursuant to the "first to file" rule. See National Football League Players Association v. National Football League Management Council, Civ. No. 15-3168 (RHK/HB), slip op. at 2 (D. Minn. July 30, 2015).

Indianapolis Colts (“Colts”), initiated by the National Football League (“NFL” or “League”) and co-led by NFL Executive Vice President and General Counsel Jeff Pash and Theodore V. Wells, Jr. of Paul, Weiss, Rifkin, Wharton & Garrison (“Pash/Wells Investigation” or “Investigation”); (b) the 139-page written report, dated May 6, 2015, which was the end product of the Pash/Wells Investigation (“Wells Report” or “Report”); (c) the letter, dated May 11, 2015, from NFL Executive Vice President Troy Vincent (“Vincent”) to Patriots quarterback Tom Brady (“Brady”) imposing a four-game suspension on Brady (“Vincent’s Disciplinary Decision Letter” or “Vincent’s Letter to Brady”); (d) the letter, dated May 11, 2015, from Vincent to Robert K. Kraft (“Kraft”), owner of the Patriots, imposing on the Patriots Club a fine of \$1,000,000 and forfeiture of the first round “pick” in the 2016 NFL draft and the fourth round “pick” in the 2017 NFL draft; (e) the transcript of the arbitration hearing that took place on June 23, 2015 before NFL Commissioner Roger Goodell (“Goodell”), who had designated himself as arbitrator of Brady’s appeal; (f) Goodell’s Final Decision on Article 46 Appeal of Tom Brady, dated July 28, 2015 (“Final Decision” or “Award”), which affirmed Brady’s four-game suspension; (g) the Management Council Complaint, dated July 28, 2015, seeking confirmation of the Award; (h) the Players Association Amended Answer and Counterclaim, dated August 4, 2015, seeking vacatur of the Award (“Def.’s Countercl.”); (i) the Players Association’s Memorandum of Law in Support of Motion to Vacate Arbitration Award, dated August 7, 2015 (“Def.’s Mem. Supp.”); (j) the Management Council’s Memorandum of Law in Support of Motion to Confirm and in Opposition to Motion to Vacate, dated August 7, 2015 (“Pl.’s Mem. Supp.”); and (k) the further written submissions of the parties. The Court has also heard helpful oral argument from counsel on August 12, 2015 and on August 19, 2015.

Based upon the foregoing and applicable legal authorities, the Court hereby denies the Management Council's motion to confirm the Award and grants the Players Association's motion to vacate the Award, thereby vacating the four-game suspension of Tom Brady, effective immediately.

II. Background

Pash/Wells Investigation & Wells Report

Shortly after the conclusion of the AFC Championship Game on January 18, 2015, senior NFL officials undertook an extensive (reportedly \$3+ million) investigation into the circumstances surrounding the use by the Patriots of seemingly under-inflated footballs during that game's first half. On January 23, 2015, the NFL publicly announced that it had retained Theodore V. Wells, Jr. and his law firm to conduct an "independent" investigation, together with NFL Executive Vice President and General Counsel Jeff Pash. Wells Report at 1.

The Investigation specifically was conducted pursuant to the NFL Policy on Integrity of the Game & Enforcement of Competitive Rules, dated February 11, 2014 ("Competitive Integrity Policy"), which provides, in part:

Policy on Integrity of the Game & Enforcement of Competitive Rules

The following updated memorandum was sent on February 11, 2014 to Chief Executives, Club Presidents, General Managers, and Head Coaches from Commissioner Goodell regarding the Policy on Integrity of the Game & Enforcement of Competitive Rules . . .

Actual or suspected violations will be thoroughly and promptly investigated. Any club identifying a violation is required promptly to report the violation, and give its full support and cooperation in any investigation. Failure to cooperate in an investigation shall be considered conduct detrimental to the League and will subject the offending club and responsible individual(s) to appropriate discipline.

Competitive Integrity Policy at A2-A3; see also Report at 22.

The Competitive Integrity Policy is found in Section A2 of the Game Operations Policy Manual for Member Clubs (2014 Edition) (“Game Operations Manual”).²

The Wells Report includes the following narrative: During the course of the January 18, 2015 AFC Championship Game, Colts linebacker D’Qwell Jackson intercepted a pass thrown by Patriots quarterback Tom Brady. The intercepted ball was apparently handed to the Colts equipment staff, who used a pressure gauge and determined that the football was inflated to approximately 11 psi, i.e., below the range of 12.5 to 13.5 psi specified in Rule 2, Section 1 of the 2014 NFL Official Playing Rules (“Playing Rules”). NFL officials collected and tested eleven Patriots game balls and four Colts game balls at halftime and concluded that all eleven of the Patriots’ game balls measured below 12.5 psi. The balls were re-inflated to approximately 13 psi and placed back in play.³ Wells Report at 63-70.

² The Game Operations Manual also provides the following as to game balls:

Once the balls have left the locker room, no one, including players, equipment managers, ball boys, and coaches, is allowed to alter the footballs in any way. If any individual alters the footballs, or if a non-approved ball is used in the game, the person responsible and, if appropriate, the head coach or other club personnel will be subject to discipline, including but not limited to, a fine of \$25,000.

Game Operations Manual at A39-A40.

³ Brady’s passing performance during the game improved during the second half, after the footballs had been re-inflated. See Wells Report at 122 n.73 (“We were not asked by the NFL to investigate the potential competitive impact of the deflation of Patriots game balls and, therefore, do not make any findings or reach any conclusions on that issue. Nevertheless, we note that Brady’s performance in the second half of the AFC Championship Game – after the Patriots game balls were re-inflated – improved compared to his performance in the first half. Specifically, in the first half, he completed 11 of 21 passes for 95 yards and one touchdown, and in the second half, he completed 12 of 14 passes for 131 yards and two touchdowns.”).

On May 6, 2015, the findings of the Pash/Wells “independent” Investigation were made public.⁴ The Investigation included reviews of player equipment, security footage, text messages, call logs, emails, press conferences, League rules and policies, and interviews with no less than sixty-six Patriots and NFL personnel. The Wells Report was accompanied by a separately commissioned analysis prepared by the consulting firm “Exponent.”

The Wells Report concluded, among other things, that “in connection with the AFC Championship Game, it is more probable than not that New England Patriots personnel participated in violations of the Playing Rules and were involved in a deliberate effort to circumvent the rules.” Wells Report at 2. It determined that Patriots employees Jim McNally (“McNally”), who was the Officials Locker Room attendant, and John Jastremski (“Jastremski”), who was a Patriots equipment assistant in charge of footballs, “participated in a deliberate effort to release air from Patriots game balls after the balls were examined by the referee [on January 18, 2015].” *Id.*

As to Brady, the Wells Report concluded that **“it is more probable than not that Brady was at least generally aware of the inappropriate activities of McNally and Jastremski involving the release of air from Patriots game balls.”** *Id.* at 17 (emphasis added). The Wells Report also concluded that “it is unlikely that an equipment assistant and a locker room attendant would deflate game balls without Brady’s knowledge and approval.” *Id.* at 19.

The Wells Report acknowledged that “there is less direct evidence linking Brady to tampering activities than either McNally or Jastremski.”⁵ *Id.* at 17. It also stated that “[t]he

⁴ Mr. Pash reviewed a draft and made written edits to the Wells Report prior to its release to the public. *See* discussion *infra* pp. 32-33.

⁵ On August 12, 2015, in response to the Court’s question “Is there any direct evidence linking Mr. Brady to tampering,” Daniel R. Nash of Akin Gump Strauss Hauer & Feld, representing the

evidence does not allow us to reach conclusions as to when McNally and Jastremski began their efforts to release air from Patriots game balls on game day . . . exactly how long those efforts have been ongoing, how frequently they occurred, how the idea originated or the full scope of communication related to those efforts.” Id. at 16-17.

Brady has denied “any knowledge of or involvement in any efforts to deflate game balls after the pre-game inspection by the game officials.” Id. at 129.

The Wells Report exonerated all (other) members of the Patriots staff. “[W]e do not believe there was any wrongdoing or knowledge of wrongdoing by Patriots ownership, Head Coach Belichick or any other Patriots coach in the matters investigated. We also do not believe there was any wrongdoing or knowledge of wrongdoing by Patriots Head Equipment Manager David Schoenfeld.” Id. at 122.

Also, after investigating questions raised during the January 18, 2015 AFC Championship Game regarding one of the kicking balls, the Wells Report concluded that there was “no evidence to support any finding of wrongdoing with respect to the kicking ball.” Id. at 132.

The Wells Report relied, in part, upon videotapes showing McNally entering and remaining inside a restroom with the game balls for approximately 1 minute and 40 seconds on his way to the playing field prior to the start of the AFC Championship Game. It also spotlighted text

Management Council, answered, “If you are asking, your Honor, is there a text or e-mail in which Mr. Brady specifically instructs somebody to put a needle in a football after the game official checked it? No, there is not such direct evidence.” Aug. 12, 2015 Hr’g Tr. 22:3-9.

Mr. Nash also stated, “[o]ne of the things that gets ignored about the Wells Report – and it is certainly true and the Commissioner’s decision explains this is the fact – that there may not be a specific smoking gun...does not mean that there is not evidence of culpability here.” Id. at 22:24-23:4.

messages between McNally and Jastremski from 2014, including, among others, several texts which date back three to eight months prior to the AFC Championship Game.

The Wells Report also summarized testing and analysis performed by Exponent.⁶ Exponent concluded that “the reduction in pressure of the Patriots game balls cannot be explained completely by basic scientific principles, such as the Ideal Gas Law, based on the circumstances and conditions likely to have been present on the day of the AFC Championship Game.” *Id.* at 130. At the same time, the Wells Report acknowledged that “[o]ur scientific consultants informed us that the data alone did not provide a basis for them to determine with absolute certainty whether there was or was not tampering, as the analysis of such data is ultimately dependent upon assumptions and information that is uncertain.” *Id.* at 131 (emphasis added).

Following the issuance of the Wells Report on May 6, 2015, both McNally and Jastremski were indefinitely suspended without pay by the Patriots.⁷

Vincent Letter to Kraft

On May 11, 2015, Vincent wrote a disciplinary decision letter to Patriots owner Robert K. Kraft. Vincent advised Kraft that “[o]n May 6, independent investigator Ted Wells issued his report regarding the footballs used by the Patriots in this year’s AFC Championship Game. That report established that the footballs used by the Patriots were inflated at a level that did not

⁶ According to the Wells Report, Exponent examined, among other things, (1) measurement of the magnitude of the reduction in air pressure of Patriots game balls compared to Colts game balls, (2) the potential impact of game-day use and other physical factors which might reasonably be expected to affect the internal air pressure of footballs, (3) the potential impact of environmental factors on the day of the AFC Championship Game, (4) a statistical and physical analysis of the gauges used to measure the air pressure of the footballs pre-game and at halftime, and (5) how quickly an individual could partially deflate footballs in a ball bag using a sports ball inflation needle. Wells Report at 9-12.

⁷ See Vincent Letter to Robert K. Kraft, discussed *infra* pp. 7-9.

satisfy the standard set forth in the NFL's Official Playing Rules and that the condition of the footballs was the result of deliberate actions by employees of the Patriots." Vincent Letter to Kraft at 1.

Vincent informed Kraft that the NFL had "determined that the Patriots have violated the NFL's Policy on Integrity of the Game and Enforcement of Competitive Rules [Competitive Integrity Policy], as well as the Official Playing Rules and the established guidelines for the preparation of game footballs set forth in the NFL's Game Operations Policy Manual for Member Clubs." Id. Vincent wrote that, "[i]n making this determination, [the NFL has] accepted the findings contained in the comprehensive report independently prepared by Mr. Wells and his colleagues." Id. (emphasis added).

Vincent explained that the NFL "regard[s] violations of competitive rules as significant and deserving of a strong sanction, both to punish the actual violation and to deter misconduct in the future." Id. Vincent described "several factors that merit strong consideration in assessing discipline. The first is the club's prior record. In 2007, the club and several individuals were sanctioned for videotaping signals of opposing defensive coaches" Id. Vincent also identified "two significant failures" concerning "the extent to which the club and relevant individuals cooperated with the [Pash/Wells] investigation," namely (1) "the refusal by the club's attorneys to make Mr. McNally available for an additional interview, despite numerous requests by Mr. Wells and a cautionary note in writing of the club's obligation to cooperate in the investigation," and (2) "the failure of Tom Brady to produce any electronic evidence (emails, texts, etc.) despite being offered extraordinary safeguards by the investigators to protect unrelated personal information." Id. at 2-3. Vincent also stated that "it remains a fundamental principle that the club is responsible for the actions of club employees." Id. at 3.

The Vincent Letter to Kraft imposed the following discipline: (1) “for the violation of the playing rules and the failure to cooperate in the subsequent investigation, the New England Patriots are fined \$1,000,000 and will forfeit the club’s first round selection in the 2016 NFL Draft and the club’s fourth round selection in the 2017 NFL Draft,” and (2) “neither [McNally nor Jastremski] may be reinstated without my prior approval. If and when he resumes working for the Patriots, Mr. Jastremski is prohibited from having any role in the preparation, supervision, or handling of footballs to be used in NFL games during the 2015 season Mr. McNally is barred from serving as a locker room attendant for the game officials, or having any involvement with preparation, supervision, or handling of footballs or any other equipment on game day.” *Id.* at 3.

Vincent Letter to Brady

On May 11, 2015, Vincent sent a (separate) “disciplinary decision” letter to Brady, stating: “The Commissioner has authorized me to inform you of the discipline that, pursuant to his authority under Article 46 of the CBA [Collective Bargaining Agreement], has been imposed on you for your role in the use of under-inflated footballs by the Patriots in this year’s AFC Championship Game. This activity represents a violation of longstanding playing rules developed to promote fairness in the game.” Vincent Letter to Brady at 1; *see also* Award at 1.

The Vincent Letter to Brady referred directly to the Wells Report and its “general awareness” finding, and stated: “With respect to your particular involvement, the [R]eport established that there is substantial and credible evidence to conclude you were at least generally aware of the actions of the Patriots’ employees involved in the deflation of the footballs and that it was unlikely that their actions were done without your knowledge. Moreover, the [R]eport documents your failure to cooperate fully and candidly with the investigation, including by

refusing to produce any relevant evidence (emails, texts, etc.) despite being offered extraordinary safeguards by the investigators to protect unrelated personal information, and by providing testimony that the [R]eport concludes was not plausible and contradicted by other evidence.” Id. Vincent concluded that: “Your actions as set forth in the [R]eport clearly constitute conduct detrimental to the integrity of and public confidence in the game of professional football.”⁸ Id.

Vincent informed Brady that “pursuant to the authority of the Commissioner under Article 46 of the Collective Bargaining Agreement and [the] NFL Player Contract, you are suspended without pay for your club’s first four games of the 2015 regular season.”⁹ Id. at 2.

The Arbitral Process

On May 14, 2015, Brady, through the Players Association, appealed the four-game suspension. Def.’s Countercl. ¶ 14. Thereupon, Commissioner Goodell designated himself as arbitrator to hear Brady’s appeal pursuant to CBA Art. 46 § 2(a), which provides that “the

⁸ Paragraph 15 of the standard NFL Player Contract states as follows:

Player recognizes the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that if he accepts a bribe or agrees to throw or fix an NFL game; fails to promptly report a bribe offer or an attempt to throw or fix an NFL game; bets on an NFL game; knowingly associates with gamblers or gambling activity; uses or provides other players with stimulants or other drugs for the purpose of attempting to enhance on-field performance; or is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.

CBA App. A, ¶ 15.

⁹ The suspension was to apply to games on September 10, 2015 (Pittsburgh Steelers); September 20, 2015 (Buffalo Bills); September 27, 2015 (Jacksonville Jaguars); and October 11, 2015 (Dallas Cowboys). See SCHEDULE & STATS, <http://www.patriots.com/schedule-and-stats>.

Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion.”

On May 19, 2015, Patriots owner Robert Kraft is reported to have stated that “I don’t want to continue the rhetoric that’s gone on for the last four months. I’m going to accept, reluctantly, what he [Commissioner Goodell] has given to us [the Patriots’ organization], and not continue this dialogue and rhetoric, and we won’t appeal.”¹⁰

Brady’s Motion for Recusal

On May 19, 2015, the Players Association filed a motion seeking Goodell’s recusal from arbitrating Brady’s appeal, arguing (1) “You cannot lawfully arbitrate whether you committed a CBA violation by delegating exclusive conduct detrimental disciplinary powers to Troy Vincent,” (2) “You cannot lawfully arbitrate a hearing in which you are a central witness,” (3) “You cannot lawfully arbitrate issues which you have publicly prejudged” [apparently referring to Commissioner Goodell’s public comments on May 6, 2015 about the Wells Report: “I want to express my appreciation to Ted Wells and his colleagues for performing a thorough and independent investigation, the findings and conclusions of which are set forth in today’s comprehensive report”], and (4) “You cannot lawfully arbitrate a matter implicating the competence and credibility of NFL staff.”¹¹ Def.’s Countercl. Ex. 157.

¹⁰ See Braden Campbell, Full text of Robert Kraft’s statement accepting NFL’s Deflategate punishment, Boston.com (May 19, 2015, 2:24 PM), <http://www.boston.com/sports/football/patriots/2015/05/19/full-text-robert-kraft-statement-accepting-nfl-deflategate-punishment/j7iIso2vPuGvdFPU6hNqRK/story.html>.

¹¹ In other NFL arbitrations, including In the Matter of Ray Rice (“Ray Rice”) and In the Matter of New Orleans Saints Pay-for-Performance (“Bounty-Gate”), Commissioner Goodell recused himself, and appointed, as **independent arbitrators**, former U.S. District Judge Barbara S. Jones and former NFL Commissioner Paul J. Tagliabue.

On June 2, 2015, Commissioner Goodell issued his “Decision on NFLPA’s Motion to Recuse,” concluding that “[o]ur Collective Bargaining Agreement provides that ‘at his discretion,’ the Commissioner may serve as hearing officer in ‘any appeal’ involving conduct detrimental to the integrity of, or public confidence in, the game of professional football. I will exercise that discretion to hear Mr. Brady’s appeal.”¹² *Id.*, Ex. 160 at 1.

Brady’s Discovery Motion(s)

On May 22, 2015, Brady, through the Players Association, requested “[a]ll Documents created, obtained, or reviewed by NFL investigators (including by Mr. Wells and his investigative team at the Paul, Weiss firm and NFL security personnel) in connection with the Patriots Investigation (including all notes, summaries, or memoranda describing or memorializing any witness interviews).” *Id.*, Ex. 159, at 2.

Brady also moved to compel the testimony of NFL Executive Vice President and General Counsel Jeff Pash (“Pash”) (and of Ted Wells) at the arbitral hearing. Mr. Pash, a Harvard-trained lawyer, former partner at Covington & Burling LLP, and a senior executive of the NFL, as noted, had been designated co-lead investigator alongside Wells. *Id.*, Ex. 166 at 3-6; Ex. 181

¹² Commissioner Goodell also determined that (1) “the identity of the person [Vincent] who signed the disciplinary letter is irrelevant,” (2) “there can be no dispute that this is an appeal of *Commissioner* discipline: as the letter signed by Mr. Vincent explains in its first sentence, ‘The Commissioner has authorized me to inform you . . .,’” (3) “I did not delegate my disciplinary authority to Mr. Vincent; I concurred in his recommendation and authorized him to communicate to Mr. Brady the discipline imposed under my authority as Commissioner,” (4) “I am not a necessary or even an appropriate witness, much less a ‘central witness’ as the NFLPA contends . . . [as] I do not have any first-hand knowledge of any of the events at issue . . . [n]or did I play a role in the investigation that led to Mr. Brady’s discipline,” and (5) “[n]or have I ‘prejudged’ this appeal. I have publicly expressed my appreciation to Mr. Wells and his colleagues for their thorough and **independent** work. But that does not mean that I am wedded to their conclusions or to their assessment of the facts. Nor does it mean that, after considering the evidence and argument presented during the appeal, I may not reach a different conclusion about Mr. Brady’s conduct or the discipline imposed.” *Id.*, Ex. 160 (emphasis added).

(January 23, 2015 NFL Press Release stating: “The investigation is being led jointly by NFL Executive Vice President Jeff Pash and Ted Wells . . .”). The NFLPA sought testimony from Pash regarding “(i) the NFL’s involvement in the Paul, Weiss firm’s work in connection with the Patriots Investigation and (ii) the League’s prior punishment or lack of punishment concerning the incidents described in Document Requests 4 and 5 . . . [Document Request 4: “All documents concerning all prior incidents – whether implicating players, Clubs, or Club personnel – involving alleged or actual violations of NFL playing rules involving equipment, apparel, or other game-day playing items (including, but not limited to, footballs, tees, gloves, helmets, pads, eyewear, and cleats/turf shoes), regardless of whether discipline was ultimately assessed.” *Id.*, Ex. 166 at 3. Document Request 5: “All documents concerning all prior incidents involving an alleged failure to cooperate (including, but not limited to, any alleged failure to produce electronic information) on the part of an NFL player in an NFL investigation, regardless of whether or not discipline was ultimately assessed.” *Id.*.”¹³ *Id.*, Ex. 166 at 4.

On June 22, 2015, Commissioner Goodell denied Brady’s document request. Goodell cited to CBA Article 46, noting “[i]n appeals under Section 1(a), the parties shall exchange copies of any exhibits upon which they intend to rely no later than three (3) calendar days prior to the hearing.” *Id.*, Ex. 208 at 4. Goodell stated that “the collective bargaining agreement provides for tightly circumscribed discovery and does not contemplate the production of any other documents in an Article 46 proceeding other than under these terms. In short, on the basis of my

¹³ At the time of the document request, the Players Association may have been unaware that Mr. Pash had “reviewed a draft of the Wells Report and provided Paul, Weiss with comments prior to the Report’s public release.” *See* Def.’s Countercl. ¶ 161 (citing Award at 19 n.21; June 23, 2015 Hr’g Tr. 268:17-25); *see also* discussion *infra* pp. 32-33.

interpretation of the Collective Bargaining Agreement, I deny the NFLPA's motion for discovery." Id.

Commissioner Goodell also identified "other independent ground" for his decision to deny discovery. "First, I did not review any of Paul, Weiss' internal interview notes or any other documents generated by Paul, Weiss other than their final report. The Paul, Weiss interview notes played no role in the disciplinary decisions; **the Wells Report was the basis for those decisions.** [Cf. discussion infra p. 17 (regarding Goodell's reliance upon "the available electronic evidence, coupled with information compiled in the investigators' interviews")]. The Management Council has produced to the NFLPA that report, which contains a detailed accounting of witness comments, and Mr. Wells will be available to testify about the substance and conclusions of the report. In addition, I understand that the Management Council produced all of the NFL documents considered by the investigators in preparing their report, including notes of interviews conducted by in-house NFL investigators **prior to the time that the Paul, Weiss investigation began.**" Id. (emphasis added).

Commissioner Goodell granted the motion to compel the testimony of Wells, but denied the motion to compel the testimony of designated co-lead investigator Pash. With regard to Pash, Commissioner Goodell contended "[b]ecause Article 46 of our Collective Bargaining Agreement does not address the permitted scope of witness testimony at appeals hearings, it is within the reasonable discretion of the hearing officer [Goodell] to determine the scope of the presentations and, where appropriate, to compel the testimony of any witnesses whose testimony is necessary for a hearing to be fair." Id. at 1. Goodell stated that "Jeff Pash, the NFL's general counsel, does not have any first-hand knowledge of the events at issue here. Nor did he play a substantive

role in the investigation that led to Mr. Brady's discipline; his role was limited to facilitating access by Mr. Wells to witnesses and documents." Id. at 2.

Arbitral Hearing

On June 23, 2015, an arbitration appeal hearing was conducted before Commissioner (and Arbitrator) Goodell. The hearing included the testimony of Vincent, Brady, and Wells, as well as Dr. Daniel R. Marlow, Professor of Physics at Princeton University, Dr. Edward A. Snyder, Dean of the Yale School of Management, Dr. Robert D. Caligiuri, Vice President of Exponent, and Dr. Duane Steffey, Director of the Statistical and Data Sciences Group at Exponent.

Paul, Weiss acted as counsel to the NFL at the hearing. See June 23, 2015 Hr'g Tr. 267:15-20, 279:14-18; see also discussion infra pp. 37-38 (regarding Paul, Weiss's dual and seemingly inconsistent roles as "independent" investigator and counsel to the NFL). Paul, Weiss partner Lorin L. Reisner, a member of the investigative team and a co-author of the Wells Report, conducted the cross-examination(s) of Brady and Dr. Snyder, and he conducted the direct examination(s) of Dr. Caligiuri, Dr. Steffey, and Dr. Marlow, on behalf of the NFL.

At the hearing, the Players Association, represented by Jeffrey L. Kessler of Winston & Strawn, argued that Brady had been disciplined pursuant to the Competitive Integrity Policy which is provided "to Chief Executives, Club Presidents, General Managers, and Head Coaches." Competitive Integrity Policy at A2. As a player, Brady was not provided with the Competitive Integrity Policy. Brady instead received the 2014 NFL League Policies for Players ("Player Policies").¹⁴ Kessler contended:

¹⁴ The Player Policies state, under the heading "Other Uniform/Equipment Violations," the following:

League discipline may also be imposed on players whose equipment, uniform, or On Field violations are detected during postgame review of video, who repeat violations on

This is called League Policies for Players [Player Policies]. This is what the players are given. And it's interesting. It said 'for players.' What is not here is the competitive integrity rule [Competitive Integrity Policy] that Mr. Wells used in his report or anything about it...and it's clear Mr. Wells didn't use this [Player Policies]; he used the other one [Competitive Integrity Policy] . . . And by the way, the fine is \$5,512 for the first offense. That's it. That's the only notice that a player has ever had about anything regarding equipment is in the [P]layer's [P]olic[ies]

June 23, 2015 Hr'g Tr. 25:12-24, 26:16-22.

Goodell's Award or Final Decision

On July 28, 2015, Commissioner Goodell published a 20-page Award or Final Decision on Article 46 Appeal of Tom Brady, which, as noted, upheld Brady's four-game suspension. In the Award, Goodell states, among other things, (1) "[i]n appeals of Commissioner discipline under Article 46, the hearing officer gives appropriate deference to the findings of the **disciplinary decision** under review; that is so even when the Commissioner serves as hearing officer [*i.e.*, as in this case],” (2) “I am bound, of course, by standards of fairness and consistency of treatment among players similarly situated,” (3) “[i]t bears emphasis [] that my finding of tampering with the game balls is not based solely on the Exponent study and the testimony of the scientific experts, but instead on consideration of all of the evidence in the record, including the conduct, text messages, and other communications discussed in both the Wells Report and at the hearing,” (4) “it is unlikely that an equipment assistant and a locker room attendant would deflate game balls without Brady's knowledge and approval and that Mr. McNally and Mr. Jastremski would not personally and unilaterally have engaged in such conduct in the absence of Brady's

the same game day after having been corrected earlier, or who participate in the game despite not having corrected a violation when instructed to do so. ***First offenses will result in fines.***

Id. at 15 (emphasis in original).

awareness and consent,” (5) “[t]he most significant new information that emerged in connection with the appeal was evidence that on or about March 6, 2015 – the very day that that he was interviewed by Mr. Wells and his investigative team – Mr. Brady instructed his assistant to destroy the cellphone that he had been using since early November 2014, a period that included the AFC Championship Game and the initial weeks of the subsequent investigation,” and (6) “the conduct at issue here – specifically the willful destruction of potentially relevant evidence – goes well beyond Mr. Brady’s failure to respond to or fully cooperate with the investigation.” Award at 1, 5, 7-9, 17 (emphasis added).

Goodell determined that **“the available electronic evidence, coupled with information compiled in the investigators’ interviews, leads me to conclude that Mr. Brady knew about, approved of, consented to, and provided inducements and rewards in support of a scheme by which, with Mr. Jastremski’s support, Mr. McNally tampered with the game balls.”** *Id.* at 10 (emphasis added). This finding by Goodell goes far beyond the “general awareness” finding in the Wells Report or in Vincent’s May 11, 2015 Disciplinary Decision Letter to Brady. Compare Award at 10 with Report at 2 and Vincent Letter to Brady at 1.

Goodell went on to say: “Neither the NFL nor any NFL member club has subpoena power or other means to compel production of relevant materials or testimony. Nonetheless, the NFL is entitled to expect and insist upon the cooperation of owners, League employees, club employees and players in a workplace investigation and to impose sanctions when such cooperation is not forthcoming, when evidence is hidden, fabricated, destroyed, when witnesses are intimidated or not produced upon reasonable request, or when individuals do not provide truthful information.” *Id.* at 13. Goodell contended: “There should be no question in anyone’s mind that active obstruction of a conduct detrimental investigation may and will itself be deemed conduct

detrimental and subject to discipline, as the standard Player Contract provides, by a fine in a reasonable amount, by suspension for a period certain or indefinitely, or by termination of the player's contract." Id. at 17.

As for discipline, Goodell stated "I am very aware of, and believe in, the need for consistency in discipline for similarly situated players." Id. at 14. **"In terms of the appropriate level of discipline, the closest parallel of which I am aware is the collectively bargained discipline imposed for a first violation of the policy governing performance enhancing drugs [four-game suspension] . . ."** Id. at 16 (emphasis added).

Commissioner Goodell concluded as follows: "(1) Mr. Brady **participated** in a scheme to tamper with the game balls after they had been approved by the game officials for use in the AFC Championship Game, and (2) Mr. Brady willfully obstructed the investigation by, among other things, affirmatively arranging for destruction of his cellphone knowing that it contained potentially relevant information that had been requested by the investigators." Id. at 13. "All of this indisputably constitutes conduct detrimental to the integrity of, and public confidence in, the game of professional football," stated Goodell. Id. (emphasis added).

III. Legal Standard

"Although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue." Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1655 (1991) (quoting Shearson/Am. Express Inc. v. McMahon, 107 S. Ct. 2332, 2340 (1987)). "The deference due an arbitrator does not extend so far as to require a district court to countenance, much less confirm, an award obtained without the requisites of fairness or due process." Kaplan v. Alfred Dunhill of London, Inc., No. 96 Civ. 259 (JFK), 1996 WL 640901, at *7 (S.D.N.Y. Nov. 4, 1996).

Under the Federal Arbitration Act (“FAA”), “the validity of an award is subject to attack only on those grounds listed in [9 U.S.C.] § 10, and the policy of the FAA requires that an award be enforced unless one of those grounds is affirmatively shown to exist.” Wall Street Assocs. L.P. v. Becker Paribas Inc., 27 F.3d 845, 849 (2d Cir. 1994). For example, FAA § 10 provides that the Court may vacate an arbitral award “where the arbitrators were guilty of . . . refusing to hear evidence pertinent and material to the controversy.” 9 U.S.C. § 10(a)(3). The Court may also vacate an arbitral award “where there was evident partiality . . .” 9 U.S.C. § 10(a)(2).

A “principal question for the reviewing court is whether the arbitrator’s award draws its essence from the collective bargaining agreement, since the arbitrator is not free to merely dispense his own brand of industrial justice.” 187 Concourse Assocs. v. Fishman, 399 F.3d 524, 527 (2d Cir. 2005) (quoting Saint Mary Home, Inc. v. Serv. Emps. Int’l Union, Dist. 1199, 116 F.3d 41, 44 (2d Cir. 1997)). “[A]s the proctor of the bar gain, the arbitrator’s task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the ‘industrial common law of the shop’ and the various needs and desires of the parties.” United States v. Int’l Bhd. of Teamsters, 954 F.2d 801, 809 (2d Cir. 1992) (quoting Alexander v. Gardner-Denver Co., 94 S. Ct. 1011, 1022 (1974)) (emphasis omitted).

It is the “law of the shop” to provide professional football players with advance notice of prohibited conduct and potential discipline. In In the Matter of Reggie Langhorne (“Langhorne”), Arbitrator Richard R. Kasher vacated the discipline of a player who had refused to take part in practice, holding that the player “was entitled at some time to be placed on notice as to what consequences would flow from his refusal to participate in . . . practice. Any disciplinary program requires that individuals subject to that program understand, with

reasonable certainty, what results will occur if they breach established rules.” Slip op. at 25 (Apr. 9, 1994). In NFLMC v. NFLPA (Ricky Brown) (“Ricky Brown”), Arbitrator Michael H. Beck vacated a fine imposed upon a player for missing a mandatory weigh-in, and observed that “adequate notice is the fundamental concept in discipline cases.” Slip op. at 10 (July 16, 2010).

In the Bounty-Gate case, former NFL Commissioner Paul J. Tagliabue, appointed as arbitrator by Commissioner Goodell after Goodell had recused himself, vacated the suspension of a player who had allegedly obstructed the League’s investigation into the New Orleans Saints’ bounty program (involving alleged monetary incentives to injure opposing players). Slip op. at 1 (Dec. 11, 2012). Tagliabue stated: “There is no evidence of a record of past suspensions based purely on obstructing a League investigation. In my forty years of association with the NFL, I am aware of many instances of denials in disciplinary proceedings that proved to be false, but I cannot recall any suspension for such fabrication. There is no evidence of a record of past suspensions based purely on obstructing a League investigation.” Id. at 13.

IV. Analysis

An arbitrator’s factual findings are generally not open to judicial challenge, and we accept the facts as the arbitrator found them. See Westerbeke Corp. v. Daihatsu Motor Co., Ltd., 304 F.3d 200, 213 (2d Cir. 2002); see also Int’l Bhd. of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp., 143 F.3d 704, 726 (2d Cir. 1998).

The Court is fully aware of the deference afforded to arbitral decisions, but, nevertheless, concludes that the Award should be vacated. The Award is premised upon several significant legal deficiencies, including (A) inadequate notice to Brady of both his potential discipline (four-game suspension) and his alleged misconduct; (B) denial of the opportunity for Brady to examine one of two lead investigators, namely NFL Executive Vice President and General

Counsel Jeff Pash; and (C) denial of equal access to investigative files, including witness interview notes.

(A) Inadequate Notice of Discipline and Misconduct

(i) No Notice of Four-Game Suspension: Steroid Use Comparison

The Court finds that Brady had no notice that he could receive a four-game suspension for general awareness of ball deflation by others or participation in any scheme to deflate footballs, and non-cooperation with the ensuing Investigation. Brady also had no notice that his discipline would be the equivalent of the discipline imposed upon a player who used performance enhancing drugs.

During the August 19, 2015 oral argument, it became apparent that no specific determination was made either in the Vincent's Disciplinary Decision Letter or the Goodell Award as to what portion of Brady's discipline was attributable to alleged ball tampering and what discipline was attributable to non-cooperation (and, for that matter, what discipline was attributable to the destruction of Brady's phone):

Q [Court]: "So which of the four games [suspension] is attributable to ball tampering, and which is attributable to failure to cooperate?"

A [Nash]: "Well, the Award doesn't specify, and I don't believe there's any requirement in the CBA to break it down that way. I think the Commissioner makes a judgment, and he says this in the Award, he says taking the record as a whole, considering all of the factors, he determined that a four-game suspension was the appropriate sanction."

Aug. 19, 2015 Hr'g Tr. 59:17-25.

At the same time, in upholding Brady's four-game suspension, Commissioner Goodell concluded that it was appropriate to apply the same discipline that the NFL metes out for steroid use:

[T]he closest parallel of which I am aware is the collectively bargained discipline imposed for a first violation of the policy governing performance enhancing drug . . . In our most recent Collective Bargaining Agreement, the parties (a) agreed to continue that level of discipline for a first violation [i.e., four-game suspension] and (b) further agreed that a player found to have used both a performance enhancing drug and a masking agent would receive a six-game suspension. **The four-game suspension imposed on Mr. Brady is fully consistent with, if not more lenient than, the discipline ordinarily imposed for the most comparable effort by a player to secure an improper competitive advantage and (by using a masking agent) to cover up the underlying violation.**

Award at 16 (emphasis added).¹⁵

The Court finds that the NFL's collectively bargained for "Policy on Anabolic Steroids and Related Substances" ("Steroid Policy") is sui generis. It cannot, as a matter of law, serve as adequate notice of discipline to Brady. It also cannot reasonably be used as a comparator for Brady's four-game suspension for alleged ball deflation by others in the first half of the AFC Championship Game and for non-cooperation in the ensuing Investigation. The Steroid Policy is incorporated into the 2014 Player Policies, which sets forth in great detail "testing procedures," "procedures in response to positive tests or other evaluation," "suspension and related discipline," "appeal right," "burdens and standards of proof," and "discovery," none of which

¹⁵ Commissioner Goodell also argued that "the discipline imposed on Mr. Brady is not excessive or without precedent, and is in fact fair and reasonable," citing to (1) a four-game suspension "recently imposed on the General Manager of the Cleveland Browns for a first violation of a league rule intended to maintain fair competition and the integrity of the game" [where General Manager Ray Farmer was disciplined for having sent player substitution and play-calling texts to coaching staff during games], and (2) "similar examples of discipline imposed on coaches for conduct detrimental that bears on the integrity of the game, including the one-year suspension of Sean Payton [Head Coach of the New Orleans Saints] and the six-game suspension of Joe Vitt [Assistant Head Coach & Linebackers Coach of the New Orleans Saints] imposed in connection with the Saints' pay-for-performance bounty program" [where Payton and Vitt were said to have concealed their involvement in the bounty program, and failed to terminate the program when the League first investigated reports of its existence]. Award at 16 n.17. **Commissioner Goodell added: "I do not rely on those examples to determine the discipline imposed on Mr. Brady, but they reinforce my conclusion, based principally on the penalties associated with violations of the steroid policy." Id. (emphasis added).**

has anything to do with Brady's conduct and/or his discipline. See NFL Policy on Anabolic Steroids and Related Substances at 5-16.

The Court is unable to perceive "notice" of discipline, or any comparability between a violation of the Steroid Policy and a "general awareness" of the inappropriate activities of others, or even involvement in a scheme by others to deflate game balls on January 18, 2015, and non-cooperation in a football deflation investigation. Oral presentations before the Court on August 19, 2015 did little to clarify the Commissioner's reliance upon Steroid Policy disciplinary measures in Brady's case:

Q [Court]: So I ask you the same question . . . how is [the Steroid Policy] like deflating a football and not cooperating? Clearly the question is a fair question to pose because clearly Mr. Goodell felt that he had to explain [Brady's] four-game suspension. And his explanation about steroid use, in my mind, only raised more questions than it answered, because I don't see – I still don't see how the four games is comparable to a player using steroids and a masking agent.

A [Nash]: I think in the Commissioner's judgment it goes to the integrity of the game.

Aug. 19, 2015 Hr'g Tr. 63:15-25.

The Award offers no scientific, empirical, or historical evidence of any comparability between Brady's alleged offense and steroid use. Often, steroid use has to do with critical issues of health, injury, addiction, and peer pressure, among other factors. See Steroid Policy at 1-2 (listing several factors related to the use of "Prohibited Substances," including "a number of physiological, psychological, orthopedic, reproductive, and other serious health problems, [such as] heart disease, liver cancer, musculoskeletal growth defects, strokes, and infertility"). None of these factors is (remotely) present here.

The Court finds that no player alleged or found to have had a general awareness of the inappropriate ball deflation activities of others or who allegedly schemed with others to let

air out of footballs in a championship game and also had not cooperated in an ensuing investigation, reasonably could be on notice that their discipline would (or should) be the same as applied to a player who violated the NFL Policy on Anabolic Steroids and Related Substances. Brady had no such notice. “When it is clear that the arbitrator ‘must have based his award on some body of thought, or feeling, or policy, or law that is outside the contract [] and not incorporated in it by reference . . . the arbitrator has failed to draw the award from the essence of the collective bargaining agreement.” In re Marine Pollution Serv., Inc., 857 F.2d 91, 94 (2d Cir. 1988) (quoting Ethyl Corp. v. United Steelworkers, 768 F.2d 180, 184-85 (7th Cir. 1985), cert. denied 106 S. Ct. 1184); see also Bounty-Gate, slip op. at 6 (“In other words, rightly or wrongly, a sharp change in sanctions or discipline can often be seen as arbitrary and as an impediment rather than an instrument of change.”).

In further support of his claim that there was no notice of his discipline, Brady points to the testimony of Mr. Wells, who acknowledged the following at the arbitration hearing:

I want to be clear -- I did not tell Mr. Brady at any time that he would be subject to punishment for not giving -- not turning over the documents [emails and texts]. I did not say anything like that.

June 23, 2015 Hr’g Tr. 336:19-23.

Brady contends that “[n]o player suspension in NFL history has been sustained for an alleged failure to cooperate with – or even allegedly obstructing – an NFL investigation.” Def.’s Mem. Supp. 9. As support, he cites to Arbitrator and former NFL Commissioner Tagliabue in the Bounty-Gate case for the following observation:

In December 2010, the NFL fined Brett Favre \$50,000 – but did not suspend him – for obstruction of a League sexual harassment investigation. Although not entirely comparable to the present matter, this illustrates the NFL’s practice of fining, not suspending a player, for serious violations of this type. There is no evidence of a record of past suspensions based purely on obstructing a League investigation. **In my forty years of association with the NFL, I am aware of many instances of denials in disciplinary proceedings that proved to be false, but I cannot recall any suspension**

for such fabrication. There is no evidence of a record of past suspensions based purely on obstructing a League investigation.

Def.'s Countercl. ¶ 129; *id.*, Ex. 113, Bounty-Gate, slip op. at 13 (emphasis in original).

It is the “law of the shop” to provide professional football players with (advance) notice of prohibited conduct and of potential discipline. *See, e.g., Langhorne*, slip op. at 25 (“Any disciplinary program requires that individuals subject to that program understand, with reasonable certainty, what results will occur if they breach established rules.”). Because there was no notice of a four-game suspension in the circumstances presented here, Commissioner Goodell may be said to have “dispense[d] his own brand of industrial justice.” 187 Concourse Assocs., 399 F.3d at 527 (citation omitted). “When the arbitrator’s words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.” United Steelworkers of Am. v. Enter. Wheel & Car Corp., 80 S. Ct. 1358, 1361 (1960).

(ii) No Notice of Any Discernible Infraction

The Players Association argues that “[t]he basis for Brady’s punishment was the very narrow finding in the Wells Report [and reiterated in the Vincent Disciplinary Decision Letter] that [Brady] was . . . ‘generally aware’ of ball deflation by two members of the Patriots equipment staff.” Def.’s Mem. Supp. 8. No NFL policy or precedent provided notice that a player could be subject to discipline for general awareness of another person’s alleged misconduct.¹⁶

¹⁶ During these proceedings, the Court acknowledged some difficulty in understanding the meaning of the Wells Report/Vincent Disciplinary Decision Letter finding of “generally aware”:

Q [Court]: I am not sure I understand what in the world that means, that phrase. So, it says: *at least generally aware of the inappropriate activities of Mr. McNally and Jastremski involving the release of air from Patriot game balls*. So, I don’t know what that is. You know, did he [Brady] know that McNally took the balls unaccompanied into the bathroom? Did he know that in the bathroom, if in fact it happened, McNally deflated the balls? Did he know that McNally then went on to the field with the balls?

The Management Council counters that “[a]ll of [Brady’s] ‘notice’ arguments were carefully considered and rejected by the Commissioner based on his assessment of the evidence – including Brady’s credibility – and his interpretation of the CBA and past precedent.” Pl.’s Mem. Supp. 5. And, it adds, “[t]he Commissioner did not discipline Brady merely for being ‘generally aware’ of a violation of the playing rules. Rather, as the Award makes clear, the Commissioner suspended Brady (1) for having ‘approved of, consented to, and provided inducements in support of’ ‘a scheme to tamper with game balls after they had been approved by the game officials for use in the AFC Championship Game’ and (2) for having ‘willfully obstructed’ the subsequent investigation.”¹⁷ Id. at 8 (quoting Award at 13, 17-18).

The record is clear that Vincent’s Letter to Brady and the Award itself rely upon the Wells Report finding that Brady was “generally aware” of the alleged ball tampering misconduct of Patriots equipment staff. Vincent’s Letter to Brady unquestionably adopts the Wells Report finding that “it is more probable than not that Tom Brady (the quarterback for the Patriots) was at least generally aware of the inappropriate activities of McNally and Jastremski involving the release of air from Patriots game balls.” Compare Wells Report at 2 with Vincent Letter to

A [Nash]: He is saying that by the evidence Mr. Brady knew that these individuals were involved in deflating the footballs.

Q [Court]: He didn’t say that . . . he didn’t say that he knew, he said that . . . he was at least generally aware of the inappropriate activities.

A [Nash]: Generally aware is knew, I believe, your Honor.

Aug. 12, 2015 Hr’g Tr. 24:12-25:17 (emphasis in original).

¹⁷ The Vincent Letter to Brady – unlike the Award – does not conclude that “Brady knew about, approved of, consented to, and provided inducements and rewards in support of a scheme by which, with Mr. Jastremski’s support, Mr. McNally tampered with the game balls.” Compare Vincent Letter to Brady with Award at 10. Nor does the Vincent Letter to Brady – unlike the Award – say that Brady “participated in a scheme to tamper with game balls after they had been approved by the game officials for use in the AFC Championship Game” Compare Vincent Letter to Brady with Award at 13.

Brady at 1 (“With respect to your particular involvement, the [R]eport established that there is substantial and credible evidence to conclude you were at least generally aware of the actions of the Patriots’ employees involved in the deflation of the footballs and that it was unlikely that their actions were done without your knowledge.”). And Goodell’s Final Decision confirms that “[t]he Wells Report and accompanying material were the product of an extensive and independent investigation and formed the factual basis for the discipline that was imposed on both the Patriots and Mr. Brady.” Award at 2.

With respect to “general awareness” of others’ misconduct – which is the principal finding in both the Wells Report and the Vincent Letter – Brady had no notice that such conduct was prohibited, or any reasonable certainty of potential discipline stemming from such conduct.¹⁸ The Court concludes that, as a matter of law, no NFL policy or precedent notifies players that they may be disciplined (much less suspended) for general awareness of misconduct by others. And, it does not appear that the NFL has ever, prior to this case, sought to punish players for such an alleged violation. See Def.’s Countercl. ¶ 104. The absence of such notice violated the “law of the shop.” See Langhorne, slip op. at 25; see also Ricky Brown, slip op. at 10 (“A rule must clearly and unambiguously establish the scope of prohibited conduct, as well as the consequences of violations, in order to be enforceable . . .”).

¹⁸ With respect to any “scheme” to deflate footballs during the AFC Championship Game, Brady had no notice of a possible four-game suspension, as required by the “law of the shop.” See discussion supra pp. 21-24. And, with respect to Brady’s non-cooperation with the Pash/Wells Investigation, Brady similarly had no notice of a four-game suspension. See discussion supra pp. 24-25.

(iii) **No Notice of Suspension as Opposed to Fine: Competitive Integrity Policy vs. Player Policies**

The Players Association argues that “[u]nder the Player Policies, Brady had notice only of fines – not suspensions – for player equipment violations designed to gain a competitive advantage.” Def.’s Countercl. ¶ 106. With respect to “Other Uniform/Equipment Violations,” and as noted supra p. 15 n.14, the Player Policies state in relevant part, the following:

League discipline may also be imposed on players whose equipment, uniform, or On Field violations are detected during postgame review of video, who repeat violations on the same game day after having been corrected earlier, or who participate in the game despite not having corrected a violation when instructed to do so. *First offenses will result in fines.*

Player Policies at 15 (emphasis in original).

Under the corresponding “2014 Schedule of Fines,” a first offense of “other uniform/equipment violations” results in a fine of \$5,512. Id. at 20.

The Players Association contends that “[i]nstead of applying the Player Policies, Vincent punished Brady pursuant to . . . violations of the Competitive Integrity Policy, which is only incorporated into the Game Operations Manual and provided to ‘Chief Executives, Club Presidents, General Managers, and Head Coaches,’” and not to players such as Brady.¹⁹ Def.’s Countercl. ¶ 113.

¹⁹ It is undisputed that the Pash/Wells Investigation was undertaken pursuant to the Competitive Integrity Policy, *i.e.*, “pursuant to the Policy on Integrity of the Game & Enforcement of Competitive Rules,” which is incorporated into Section A2 of the Game Operations Manual. Wells Report at 1. See discussion supra pp. 3-4.

Vincent’s testimony at the arbitration hearing on June 23, 2015 regarding his suspension letter to Brady confirms that the source of Brady’s discipline was the Wells Report, and that the NFL policy relied upon by Vincent was the Competitive Integrity Policy:

Q [Kessler]: So you based your recommendations of discipline in this letter solely upon reading the Wells report? That’s what I wanted to establish.

A [Vincent]: Yes.

The Management Council responds that the Players Association is “ask[ing] the Court to reevaluate the evidence and construe past arbitration precedent differently” and that Commissioner Goodell previously rejected the argument that “the Player Policy regarding ‘equipment violations’ only put Brady on notice of a potential fine.” Pl.’s Mem. Supp. 5. Goodell also contends that the Competitive Integrity Policy was “not the source or basis for the discipline imposed here.” *Id.* at 6. Rather, he says, the general “conduct detrimental” standard was the source of Brady’s discipline. *Id.* Goodell argued: “Mr. Brady had notice, and in fact was fully aware of, the established rule governing the pressure of NFL games [sic] balls . . . and [had] ample reason to expect that a violation of that rule . . . would be deemed conduct detrimental.” *Id.* (quoting Award at 18) (emphasis added).

A player’s right to notice is at the heart of the CBA and, for that matter, of our criminal and civil justice systems. While “[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause . . . there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice . . .” *Texaco, Inc.*

June 23, 2015 Hr’g Tr. 244:19-22.

Q [Kessler]: Now, the policy that you cite in your letter, in your discipline letter regarding Mr. Brady . . . [w]here do you find the policy that says that footballs can’t be altered with respect to pressure? Is that going to be in the Competitive Integrity Policy that Wells cited in his report?

A [Vincent]: Game-Day Operations Manual.

Q [Kessler]: In the manual? Okay. Is it correct, to your knowledge, that the manual is given to clubs and GMs and owners, et cetera, but the manual is not given out to players; is that correct, to your knowledge?

A [Vincent]: That’s correct, to my knowledge.

Id. at 250:13-251:1 (emphasis added).

v. Short, 102 S. Ct. 781, 795 (1982) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 70 S. Ct. 652, 656 (1950)); see also Lankford v. Idaho, 111 S. Ct. 1723, 1729 (1991).

Brady was on notice that equipment violations under the Player Policies could result in fines. See discussion supra p. 28. He had no legal notice of discipline under the Competitive Integrity Policy, which is incorporated into the Game Operations Manual and distributed solely to – and, therefore, provides notice to – “Chief Executives, Club Presidents, General Managers, and Head Coaches,” and not to players.²⁰ Game Operations Manual at A2.

NFL arbitral precedent confirms that because Brady did not have notice of the Competitive Integrity Policy, that Policy could not serve as the basis for disciplinary action against him. Judge Jones (in Ray Rice) and U.S. District Judge David S. Doty (in NFLPA v. NFL (Adrian Peterson)) (“Adrian Peterson”) each held that the increased NFL penalties set forth in a “new” policy for domestic violence [New NFL Personal Conduct Policy (Aug. 2014)] could not be applied to Rice and Peterson, respectively, because these players (only) had notice of discipline under the 2007 Personal Conduct Policy. “[T]he Commissioner has acknowledged that he did not have the power to retroactively apply the New Policy: The policy change was forward looking because the League is required to provide proper notice.” Adrian Peterson, No. Civ. 14-4990 (DSD/JSM), 2015 WL 795253, at *5 (D. Minn. Feb. 26, 2015) appeal docketed, No. 15-1438 (8th Cir. Feb. 27, 2015) (internal citations omitted); see also Ray Rice, slip op. at 7, 16 (same). Judge Doty held that “[t]his determination is consistent with prior NFL arbitration decisions recognizing the importance of notice in advance of discipline.” Adrian Peterson, 2015 WL 795253, at *5 n.4.

²⁰ As noted, the Patriots Club and its management were, in fact, sanctioned under the Competitive Integrity Agreement for “violation of the playing rules [related to ball tampering] and [] failure to cooperate in the subsequent investigation.” See discussion supra pp. 7-9.

Conduct Detrimental

Commissioner Goodell contends that Brady's discipline stems from the general CBA policy precluding players from engaging in any conduct that is "detrimental to the integrity of, or public confidence in, the game of professional football." Pl.'s Mem. Supp. 3 (citing CBA Art. 46 §1(a)). Goodell states that "[n]o prior conduct detrimental proceeding is directly comparable to this one," Award at 14, and, in doing so, he draws a distinction between "[t]he conduct at issue here" and "the [foot]ball-warming incident in Minnesota last year, in which a *Carolina Panthers* ball attendant was observed warming a ball on the *Vikings*' sideline; there was no evidence of any intentional attempt to violate or circumvent the rules, no player involvement, and no effort to conceal the ball attendant's conduct." *Id.* at 15 (emphasis in original). The Players Association counters that the Panthers matter helps to prove its point regarding notice as, "[t]he NFL sent a warning *to the Club* . . . [and] [n]o . . . players were either investigated or punished. This [] was consistent with the Competitive Integrity Policy's application to Clubs and the lack of any 'general awareness' standard." Def.'s Countercl. ¶ 117 (emphasis in original).

Commissioner Goodell contends that "[t]he conduct at issue here is also very different from the incident involving the Jets' equipment staff member who 'attempted to use' unapproved equipment in plain view of the officials to prepare kicking balls prior to a 2009 game against the Patriots. There was no evidence of any player involvement. However, it bears mention that the Jets' employee was suspended from his regular game-day duties for a period longer than the suspension under review here." Award at 15. The Players Association counters that "the Jets' kicker – the *player* who could have benefitted from the alleged 'attempt to gain a competitive advantage' – was not investigated, let alone disciplined. This was perfectly consistent with the

Competitive Policy's application to Clubs [and Club personnel], not players." Def.'s Countercl. ¶ 116 (emphasis in original).

Goodell's reliance on notice of broad CBA "conduct detrimental" policy – as opposed to specific Player Policies regarding equipment violations – to impose discipline upon Brady is legally misplaced. In both the Ray Rice case and the Adrian Peterson case, the players could, perhaps, be said to appreciate that acts of domestic violence might be deemed "conduct detrimental." And yet, in both of these cases, the players were disciplined only after findings were made under the specific domestic violence policy [New NFL Personal Conduct Policy (Aug. 2014)]. See Adrian Peterson, 2015 WL 795253, at *5-6; Ray Rice, slip op. at 16. Rightly so, because an applicable specific provision within the Player Policies is better calculated to provide notice to a player than a general concept such as "conduct detrimental." See In re Lehman Bros. Holdings Inc., 761 F.3d 303, 313 (2d Cir. 2014) cert. denied sub nom. Giddens v. Barclays Capital Inc., 135 S. Ct. 2048 (2015) ("To the extent that there appears to be conflict between these provisions, the specific governs the general."); John Hancock Mut. Life Ins. Co. v. Carolina Power & Light Co., 717 F.2d 664, 670 n.8 (2d Cir. 1983) ("Where the parties have particularized the terms of a contract an apparently inconsistent general statement to a different effect must yield.").

(B) Commissioner Goodell Improperly Denied Brady the Opportunity to Examine Designated Co-Lead Investigator Jeff Pash

The Players Association contends that Commissioner Goodell's denial of the testimony of Jeff Pash at the arbitral hearing was fundamentally unfair because (1) "the NFL publically declared that NFL Executive Vice President and General Counsel Jeff Pash was the co-lead investigator on the Wells-Pash Investigation," and (2) Pash was allowed to review a draft of the Wells Report and to provide Paul, Weiss with written comments or edits prior to the Report's

release to the public. Def.'s Countercl. ¶¶ 159, 161 (citing Award at 19 n.21; June 23, 2015 Hr'g Tr. 268:17-25).

The Management Council responds that Mr. Wells "testified that Pash had played 'no substantive role in the investigation,' and any comments he may have provided on a draft of the report 'did not impact' the Paul, Weiss findings," and that "[i]n light of the fact that 'arbitrators have substantial discretion to admit or exclude evidence,' the decision not to have **cumulative testimony from Pash** is not subject to challenge." Pl.'s Mem. of Law in Supp. at 11 (quoting Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 729 F.3d 99, 107 (2d Cir. 2013)) (emphasis added).

In determining what evidence to admit, "[a]n arbitrator need not follow all the niceties observed by the federal courts." Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) (quoting Bell Aerospace Co. Div. of Textron v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974)). "However, although not required to hear all the evidence proffered by a party, an arbitrator 'must give each of the parties to the dispute an adequate opportunity to present its evidence and argument.'" Id. (quoting Hoteles Condado Beach v. Union De Tronquistas Local 901, 763 F.2d 34, 39 (1st Cir. 1985)). "A fundamentally fair hearing requires that the parties be permitted to present evidence and cross-examine adverse witnesses." Kaplan, 1996 WL 640901, at *5; see also Tempo Shain, 120 F.3d at 20 ("[T]here was no reasonable basis for the arbitration panel to determine that . . . omitted testimony would be cumulative . . . [T]he arbitration panel must **"indicate in what respects [] testimony would be cumulative."**) (emphasis added).

NFL precedent demonstrates that, in Article 46 arbitration appeals, players must be afforded the opportunity to confront their investigators. See, e.g., Def.'s Countercl. Ex. 166D, Bounty-Gate Pre-Hr'g Order No. 4 (in which former NFL Commissioner Tagliabue, acting as arbitrator,

ordered that Jeffrey Miller, Lead Investigator and NFL Vice President of Security, be compelled to testify). In the Ray Rice case, Judge Jones held that the “key elements of a ‘fundamentally fair hearing’” include a grievant’s ability to “present evidence and cross-examine witnesses,” and that an arbitrator should “compel[] the witnesses necessary for the hearing to be fair.” Def.’s Countercl. Ex. 166E, Ray Rice Order on Discovery and Hearing Witnesses at 1-2 (quoting Kaplan, 1996 WL 640901, at *5). Judge Jones ordered Commissioner Goodell to testify in the Ray Rice arbitration and concluded that “[t]o limit the available witnesses knowledgeable about the content of that meeting to the individuals the NFL is willing to produce would prevent Mr. Rice from presenting his case and runs the risk of providing an incomplete picture of the content of a meeting that both parties have identified as critical.” Id.

The Court finds that Commissioner Goodell’s denial of Brady’s motion to compel the testimony of Mr. Pash was fundamentally unfair and in violation of 9 U.S.C. § 10(a)(3). Given Mr. Pash’s very senior position in the NFL, his role as Executive Vice President and General Counsel, and his designation as co-lead investigator with Ted Wells, it is logical that he would have valuable insight into the course and outcome of the Investigation and into the drafting and content of the Wells Report. It is also problematic to the Court that there was no specification by Goodell as to the ways Pash’s testimony would have been “cumulative.”

The Management Council does not deny that Mr. Pash provided edits to the Wells Report, in advance of its release. The testimony from Mr. Wells is illustrative:

Q [Kessler]: Do you know what the contents were of [Mr. Pash’s] comments?

A [Wells]: I do not, except to say that they couldn’t have been that big a deal because I don’t think I heard about them. But, you know, Mr. Pash is a very good Harvard-trained lawyer. If you give a Harvard-trained lawyer a report this thick, he’s going to have some kind of comment. So I assume whatever it was, it was some kind of wordsmithing. I can tell you this without waiving any privilege.

June 23, 2015 Hr'g Tr. 269:4-13.

The Court recognizes that arbitrators are “endowed with discretion to admit or reject evidence and determine what materials may be cumulative or irrelevant.” Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12 Civ. 283 (GBD), 2013 WL 789642, at *8 (S.D.N.Y. Mar. 4, 2013) aff'd, 557 F. App'x 66 (2d Cir. 2014) cert. denied, 135 S. Ct. 137, 190 L. Ed. 2d 45 (2014). However, the NFL fairly cannot suggest, without more than the testimony of the NFL's retained counsel, that the edits from Mr. Pash were not significant or that his testimony would have been “cumulative.” Pl.'s Mem. Supp. 11. Mr. Wells acknowledged that he did not know the content of Mr. Pash's pre-release edits, and thus there was simply “no reasonable basis for the arbitration panel to determine that . . . [the] omitted testimony would be cumulative.” See Tempo Shain, 120 F.3d at 20.

Denied the opportunity to examine Pash at the arbitral hearing, Brady was prejudiced. He was foreclosed from exploring, among other things, whether the Pash/Wells Investigation was truly “independent,” and how and why the NFL's General Counsel came to edit a supposedly independent investigation report. Def.'s Countercl. ¶ 162; Report at 1 (“[The Report] was prepared entirely by the Paul, Weiss investigative team and presents the independent opinions of Mr. Wells and his colleagues.”). Brady was also prejudiced because there was no other witness, apart from Pash, who was as “competent to address the substantive core of the claim.” See Commercial Risk Reinsurance Co. v. Sec. Ins. Co. of Hartford, 526 F. Supp. 2d 424, 429 (S.D.N.Y. 2007). As co-lead investigator and senior executive with the NFL, Pash was in the best position to testify about the NFL's degree of involvement in, and potential shaping of, a heralded “independent” Investigation. The issues known to Pash constituted “evidence plainly pertinent and material to the controversy,” Tempo Shain, 120 F.3d at 19 (quoting 9 U.S.C. §

10(a)(3)), and Commissioner Goodell's refusal to hear such evidence warrants vacatur of the Award under 9 U.S.C. § 10(a)(3).

(C) Commissioner Goodell Improperly Denied Brady Equal Access to Investigative Files

As noted at supra pp. 13-14, Commissioner Goodell denied the Players Association's request for documents, memoranda, summaries, or notes of witness interviews created during the Pash/Wells Investigation, contending, among other things, that "[t]he Paul, Weiss interview notes played no role in the disciplinary decisions; the Wells Report was the basis for those decisions." Def.'s Countercl. Ex. 208, at 4; but see discussion supra p. 17 (regarding information "compiled in the investigators' interviews").

Brady contends that, to his detriment, he was denied the opportunity effectively to challenge the conclusions of the Wells Report and that such denial "was especially egregious considering the NFL's counsel [the Paul, Weiss firm] at the arbitration *did* have access to the files," which Brady was seeking. Def.'s Mem. Supp. 12-14 (emphasis in original). The Court notes that the Paul, Weiss role in this case seems to have "changed" from "independent" investigators to NFL's retained counsel at the arbitral hearing. Among other things, this change in roles may have afforded Goodell (and Pash) greater access to valuable impressions, insights, and other investigative information which was not available to Brady.

Courts have held that "[t]he absence of statutory provision for discovery techniques in arbitration proceedings obviously does not negate the affirmative duty of arbitrators to insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other party. . . . [A] failure to discharge this simple duty would constitute a violation of FAA § 10(a)(3), where a party can show prejudice as a result." Home Indem. Co. v. Affiliated Food Distribs., Inc., No. 96 Civ. 9707 (RO), 1997 WL 773712, at *4 (S.D.N.Y. Dec. 12, 1997)

(citing Chevron Transp. Corp. v. Astro Vencedor Compania Naviera, S.A., 300 F. Supp. 179, 181 (S.D.N.Y. 1969)).

The Court finds that Commissioner Goodell's denial of the Players Association's motion to produce the Paul, Weiss investigative files, including notes of witness interviews, for Brady's use at the arbitral hearing was fundamentally unfair and in violation of 9 U.S.C. § 10(a)(3) and that Brady was prejudiced as a result. The interview notes were, at the very least, the basis for the Wells Report, and Brady was prejudiced by his lack of access to them. Brady was denied the opportunity to examine and challenge materials that may have led to his suspension and which likely facilitated Paul, Weiss attorneys' cross-examination of him. Because the investigative files included the unedited accounts of the witness interviews, the Wells testimony at the arbitral hearing failed to put Brady "in the same position as the document[s] would [have]." See Postlewaite v. McGraw-Hill, Inc., No. 98 Civ. 0611 (LLS), 1998 WL 751687, at *4 (S.D.N.Y. Oct. 28, 1998) aff'd sub nom. Postlewaite v. McGraw Hill, Inc., 10 F. App'x 16 (2d Cir. 2001).

Compounding Brady's prejudice is the fact that, as noted, Paul, Weiss acted as both alleged "independent" counsel during the Investigation and also (perhaps inconsistently) as retained counsel to the NFL during the arbitration.²¹ Paul, Weiss uniquely was able to retain access to

²¹ The following colloquy occurred at the arbitration hearing:

Q [Kessler]: Did you consider the NFL to be your client for purposes of the attorney-client privilege --
 A [Wells]: Yeah.
 Q [Kessler]: -- with respect to the preparation of this investigative report?
 A [Wells]: Yes.

June 23, 2015 Hr'g Tr. 267:15-20.

Q [Kessler]: And would you be paid additional amounts for the work that [Paul, Weiss partner] Mr. Reisner is doing today or others assisting the NFL? That would be additional [to the Investigation] bills, right?

investigative files and interview notes which it had developed; was able to use them in direct and cross-examinations of Brady and other arbitration witnesses; share them with NFL officials during the arbitral proceedings; and, at the same time, withhold them from Brady.

Commissioner Goodell had the “the affirmative duty . . . to insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other party.” See Home Indem. Co., 1997 WL 773712, at *4 (“A failure to discharge this simple duty would constitute a violation of [FAA § 10(a)(3)], where [as here] a party can show prejudice as a result.”); see also Def.’s Countercl. Ex. 166L, Tr. 633-34, 889, 891 (Bounty-Gate) (where Arbitrator Tagliabue ordered the production of NFL investigative reports and redacted witness memoranda).

V. Brady’s Other Claims

In view of the Court’s determinations regarding the inadequacy of notice and discovery afforded to Brady, the Court does not reach Brady’s other claims, which include the following:

A [Wells]: I hope so.

Id. at 279:14-18.

Q [Kessler]: Would your principal colleague on this case be Mr. Lorin Reisner, who is seated over there?

A [Wells]: Correct

Q [Kessler]: Now, Mr. Reisner, you observed, was representing the NFL and cross-examining Mr. Brady and Mr. Snyder in this proceeding; is that correct?

A [Wells]: That is -- I saw it. You saw it.

Q [Kessler]: Okay. So, and Mr. Reisner was one of the principal lawyers working with you on this independent investigation, right?

A [Wells]: If you read the report, it basically says that.

Id. at 270:3-14.

- a) Brady argues that Commissioner Goodell was “evidently partial” within the meaning of 9 U.S.C. § 10(a)(2), contending, among other things, that “a central ground of [his] appeal was the issue of Goodell improperly delegating to Vincent his exclusive authority to discipline players for conduct detrimental to the NFL.” Def.’s Countercl. ¶ 165.
- b) Brady argues that “Goodell purports to sustain the suspension on factual conclusions that Brady participated in ball tampering – but those factual conclusions [that “Mr. Brady knew about, approved of, consented to, and provided inducements and rewards in support of a scheme by which, with Mr. Jastremski’s support, Mr. McNally tampered with the game balls”] appear nowhere in the Wells Report and were not the basis for the discipline imposed by Vincent.” Def.’s Countercl. ¶ 126. Brady contends that “Judge Doty’s ruling in Peterson makes clear that an Article 46 arbitrator lacks CBA authority to justify discipline on a basis not found in the discipline being appealed.” Id. (citing Adrian Peterson, 2015 WL 795253, at *6).
- c) Brady also argues that “prior to serving as hearing officer, the Commissioner publicly lauded the reliability of the Wells Report [which was conducted by NFL retained counsel] – the issue at the very heart of Brady’s appeal.” This “locked him into supporting the Wells Report and rendered him incapable of reaching a contrary conclusion in Brady’s appeal, as doing so would undermine his own competency as Commissioner.” Id. ¶ 167.

VI. Conclusion & Order

For the reasons stated herein, the Management Council's motion to confirm the arbitration award [No. 33] is denied and the Players Association's motion to vacate the arbitration award [No. 34] is granted. Brady's four-game suspension is vacated, effective immediately. The Clerk is respectfully requested to close cases 15 Civ. 5916 and 15 Civ. 5982.

Dated: New York, New York
September 3, 2015



RICHARD M. BERMAN, U.S.D.J.

Exhibit 3

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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 NATIONAL FOOTBALL LEAGUE
MANAGEMENT COUNCIL,
4
Plaintiff,

5 v. 15 Civ. 5916 (RMB)

6 NATIONAL FOOTBALL LEAGUE
7 PLAYERS ASSOCIATION,
8
Defendant.

9 -----x

10 NATIONAL FOOTBALL PLAYERS
LEAGUE PLAYERS ASSOCIATION, on
11 its own behalf and on behalf
of TOM BRADY,

12 Petitioner,

13 v. 15 Civ. 5982 (RMB)

14 NATIONAL FOOTBALL LEAGUE and
15 NATIONAL FOOTBALL LEAGUE
MANAGEMENT COUNCIL,

16 Respondents.

17 -----x

18
19 August 12, 2015
11:20 a.m.

20 Before:

21 HON. RICHARD M. BERMAN,

22 District Judge

23

24

25

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

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Attorneys for Tom Brady
8 BY: DONALD YEE
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9

10 ALSO PRESENT: ROGER GOODELL
JEFFREY PASH
11 GREGG LEVY
ADOLPHO BIRCH
12 TOM DePASO
HEATHER McPHEE
13 DeMAURICE SMITH

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1 (Case called)

2 THE COURT: So, I had an opportunity to meet the
3 parties briefly and the reason you all were not and why we
4 didn't do it in the courtroom is that was in the nature of
5 settlement talk and that's always confidential and off the
6 record -- one of the few things that is.

7 So, let me give you a little background and I will
8 outline where I think we are headed today and how we are going
9 to get there.

10 First of all, I thank everybody for coming. I do know
11 everybody now at counsel table, but it might be helpful if we
12 just took a quick minute, if you would introduce yourselves.
13 We will start with Mr. Nash.

14 MR. NASH: Yes, your Honor. Daniel Nash here on
15 behalf of the National Football League Management Council. I
16 can introduce the others for you.

17 THE COURT: Or they can.

18 MS. EISENSTEIN: Your Honor, Stacey Eisenstein on
19 behalf of the National Football League Management Council.

20 MR. BIRCH: Hi, your Honor. Adolpho Birch with
21 National Football League.

22 THE COURT: Hi.

23 MR. LEVY: Your Honor, Gregg Levy of Covington &
24 Burling, legal advisor to the Commissioner.

25 MR. GOODELL: Your Honor, Roger Goodell, NFL

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1 Commissioner.

2 THE COURT: Good to see you all.

3 MR. PASH: Good morning, your Honor. Jeffrey Pash,
4 NFL general counsel.

5 MR. KESSLER: Good morning, your Honor. Jeffrey
6 Kessler of Winston & Strawn for the NFLPA and Mr. Brady.

7 MR. GREENSPAN: Good morning, your Honor. David
8 Greenspan for the NFLPA and Mr. Brady.

9 MR. BRADY: Good morning, your Honor; Tom Brady.

10 MR. YEE: Good morning, your Honor. Donald Yee, Yee &
11 Dubin, LLP, for Tom Brady.

12 MR. DUBIN: Good morning, your Honor. Stephen Dubin
13 for Tom Brady.

14 MR. SMITH: Good morning, your Honor. DeMaurice
15 Smith, NFL Players Association.

16 THE COURT: Good morning to all of you and thanks for
17 coming.

18 Probably everybody is already aware but it might be
19 useful for me just to say that, for those who may not be
20 familiar that the case that we have here, this is of course a
21 civil case and it is a type of case that most every federal
22 district judge is familiar with. We get a lot of appeals or
23 cases that come following an arbitration as this one does. So,
24 the case before me entails a review of a 20-page, July 28, 2015
25 decision or award called final decision on Article 46. Article

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1 46 refers to a provision of the parties' collective bargaining
2 agreement appeal of Tom Brady. That decision is authored by
3 NFL Commissioner Roger Goodell.

4 So, the NFL is here, or the council, and maybe at some
5 point somebody will just explain, as I understand now, the
6 distinction between the council and the NFL. The council has
7 requested me, the Court, to confirm this decision or award
8 which, as probably everybody knows, imposes upon Mr. Brady a
9 four-game suspension during the upcoming professional football
10 season, and the reason for that, as set forth in Mr. Goodell's
11 report, is what he has determined has been conduct detrimental
12 to the integrity of professional football; that conduct
13 sometimes categorized as awareness and/or a general awareness
14 and/or involvement somehow in deflating footballs during the
15 first half of the AFC championship game against the Colts on
16 January 18, 2015. And also in that report is the finding by
17 Mr. Goodell that Mr. Brady did not cooperate in subsequent
18 investigation.

19 Mr. Brady and the NFL players' Association oppose the
20 application to confirm that award and deny that Mr. Brady
21 engaged in football deflation regarding the January 18, 2015
22 game. They also deny, in large measure, that he was
23 uncooperative with the NFL and they, in turn, have asked this
24 Court to vacate the Goodell decision or award on various
25 grounds.

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1 So, these cases -- you probably all know this
2 already -- they do not go to trial. Rather, they are generally
3 resolved by the Court, which would be me, in the form of a
4 written decision if they cannot otherwise be settled by the
5 parties. And if there is no settlement, the Court's decision
6 can be appealed to the United States Court of Appeals for the
7 Second Circuit. And just so everybody is aware, the average
8 life of a civil case such as this one including the appeal, I
9 would guess, is probably around two years. Counsel may
10 disagree but it is not two months, that's for sure. And I
11 think it is fair to say that nobody here today wants to wait
12 that long.

13 So, that is sort of the litigation track or the
14 litigation aspect of this case. In addition to that, most
15 cases in federal court also proceed on a parallel track of
16 resolution if it is possible to reach resolution including the
17 terms of such resolution by agreement of the parties. That's
18 commonly known as settlement. You probably also know that the
19 vast majority of civil cases in federal court are settled and
20 the reasons people settle are numerous. Some of the most
21 common are these: One is that time is important and time is
22 sometimes of the essence so they want a dispute resolved within
23 a certain timeframe, and they think that litigation will exceed
24 that timeframe. Generally, it does. They may want to get back
25 to business, in this case the business of football as opposed

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1 to sitting in a courtroom -- albeit a federal courtroom which
2 is usually pretty comfortable. They sometimes want to avoid
3 poisoning the well, particularly where the parties are in a
4 continuous professional relationship which does not end when
5 the case is over. This is also referred to sometimes as the
6 importance of ongoing, good relationships.

7 Sometimes the issue that leads to settlement is
8 financial costs associated with the litigation and other
9 reasons for settlement are to avoid adverse publicity, to avoid
10 the unintended consequences of litigation, and then people also
11 generally settle where there are strengths and weaknesses to
12 their case. So, it is a rare situation where somebody is a
13 hundred percent right and somebody is a hundred percent wrong.
14 I think there are varying strengths and weaknesses to both
15 sides here although I caution that I have not made any legal
16 determination even in my own mind as to who would prevail in
17 the confirmation/vacatur litigation.

18 So, we are, today, proceeding on both tracks, that is
19 to say litigation and settlement. I have read and received the
20 very fine submissions by counsel for both sides. I have done
21 some preliminary research into the issues but, as I say, I have
22 not made up my mind as to which side should prevail legally.
23 So, I hope you will understand that nothing that I say or
24 anything that I do say should not be taken as an indication of
25 my ultimate legal decision.

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1 I am also of a completely open mind with respect to
2 settlement and in that regard I will be looking, at least in
3 the first instance and primarily, to the parties for ideas as
4 to how that may be accomplished assuming that is a possibility.
5 Sometimes it is not.

6 Before taking the next step I would like to -- counsel
7 and I have had this conversation earlier and I would like them
8 to indicate for the record, as has been done before, that each
9 of them, that is to say Mr. Kessler and Mr. Nash and their
10 clients are okay, so to speak, with my personal involvement,
11 along with our outstanding Magistrate Judge J. Francis. He's
12 been assigned to this case and has been working on this case as
13 well in both the settlement phase as well as the litigation
14 phase of the case. Sometimes people have a concern about that
15 so, starting with Mr. Kessler, is that okay with you that I act
16 in both roles?

17 MR. KESSLER: Yes, your Honor. We welcome the Court's
18 participation in both roles.

19 THE COURT: And Mr. Nash, is that okay?

20 MR. NASH: Yes, your Honor; as do we.

21 THE COURT: I appreciate that.

22 So, as I said, the written submissions are
23 outstanding. We will need to talk a little bit later about
24 whether there need to be more written submissions. If you feel
25 there should be there can be. I'm not sure that it is

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1 necessary but certainly if that's the way you each feel, you
2 may want to talk among yourselves later and tell me if there is
3 something more that you want to present to me. It is a pretty
4 full record that I have but it is up to you.

5 Everybody is of a view that this case should be or, if
6 it can be, resolved expeditiously so what I thought I would do
7 now, and if counsel are not entirely, perhaps, prepared for
8 that although I think at a moment's notice they can be, is to
9 speak orally about their case succinctly and briefly, and also
10 without prejudice to if you wanted a more formal oral argument
11 in a week or two weeks down the road. And I also will have
12 some questions that I would like to ask of you that would both
13 help me in being able to discuss settlement and also being able
14 to resolve the case.

15 And I know everybody knows this but judges, very
16 often, ask questions sort of as devil's advocates. That
17 doesn't mean that I think that one side or the other has the
18 stronger case so, please, take that into account when we have
19 this discussion.

20 Thereafter, when we finish this process maybe, I don't
21 know, 15, 20 minutes or so, and particularly because Mr. Brady
22 and Mr. Goodell are here, we are going to take another stab at
23 seeing if there is a basis for a mutual resolution of this
24 case. Those settlement conversations, as I said before, are
25 always confidential and are not public, and I would ask

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1 everybody to respect that they are really not supposed to be
2 discussed. It would be very unusual if they were discussed
3 publicly after today's Court session.

4 So, let me start with Mr. Nash and then Mr. Kessler,
5 if you wish to be heard, or if you just would be interested in
6 answering a couple of the questions that I have.

7 MR. NASH: Thank you, your Honor.

8 I am most interested in answering --

9 THE COURT: It is a technical matter. There is an
10 overflow room, Mr. Nash, that they may be better able to hear
11 you if you use the podium. Would that be okay with you?

12 MR. NASH: Of course. Of course. Thank you, your
13 Honor. I will be brief.

14 As I said, I am most interested in answering your
15 questions. Let me answer first the question that you had
16 before as to the distinction between the NFL Management Council
17 and the NFL Football League. The NFL Management Council is the
18 multi-employer bargaining representative of all 32 NFL teams.
19 It is the organization within the National Football League
20 responsible for negotiating with the NFL Players' Association
21 which is the exclusive representative of all NFL players a
22 collective bargaining agreement, and it is an important point
23 because we are here today, your Honor, in an action under the
24 federal labor law, specifically the Labor Management Relations
25 Act, and we are here for what we believe is the enforcement of

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1 our collective bargaining agreement, a collective bargaining
2 agreement under which the parties have agreed, including most
3 recently in 2011 where there was a hard-fought negotiation and
4 a new collective bargaining agreement in 2011 that continued
5 what has been in place in the NFL for decades, and that is that
6 the responsibility for the protection of the integrity of the
7 game of football resides with the NFL Commissioner, in this
8 case Mr. Roger Goodell.

9 The NFL Commissioner has always had, under the
10 collective bargaining agreement, both the authority and in fact
11 the responsibility to take actions to protect the integrity of
12 the game and that authority, under the collective bargaining
13 agreement, specifically includes the ability to discipline
14 players as well as other individuals within the NFL
15 specifically including by imposing suspensions and even broader
16 than that.

17 The NFL collective bargaining agreement also has
18 placed with the NFL Commissioner the responsibility not only to
19 make judgments as to what constitutes matters that affect the
20 integrity of the game, that constitute conduct detrimental and
21 to impose discipline for it, but also to hear all appeals.
22 That may be an unusual feature in collective bargaining
23 agreements but it is not an unusual feature in professional
24 sports and, as many people may be aware, there is a reason for
25 that, particularly when we are talking about the kind of matter

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1 that we are here today, matters where the integrity of the
2 competition on the playing field has been called into question.
3 It has always been the case and it is, continues to be under
4 the collective bargaining agreement, that the parties agree
5 that the judgment that matters as to protecting the game, the
6 responsibility is within the NFL Commissioner and that
7 includes, as I said, hearing all appeals and issuing a decision
8 that, under the collective bargaining agreement and under
9 federal labor law, is final and binding on the parties.

10 We are here today because Commissioner Goodell, as you
11 point out, issued such a decision with respect to Tom Brady of
12 the New England Patriots. We have asked the Court to confirm
13 that decision under labor law, under long-established federal
14 labor law principles including in the statute itself, including
15 in the Labor Management Relations Act where Congress declared
16 that it is the policy of the labor laws in the country that
17 final adjustments of labor disputes of this type should be
18 resolved internally through arbitration and that the Courts
19 should confirm those processes. And that is why we are here.

20 THE COURT: Essentially defer to the arbitrator.

21 MR. NASH: Absolutely. Absolutely, your Honor.

22 There is no question, and I don't think there can be a
23 reasonable dispute, that the collective bargaining agreement
24 was followed completely with respect to this matter regarding
25 Tom Brady. I know that there are disagreements about what the

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1 underlying facts are. There are disagreements about levels of
2 culpability and whether it should be a fine or whether it
3 should be a four-game suspension. Naturally, in cases like
4 this, sports fans debate these things all the time but there
5 can't be a dispute, there cannot be a dispute that Mr. Brady
6 was afforded every right that he has under the NFL collective
7 bargaining agreement that his union agreed to. That, again,
8 includes the agreement that it would be the NFL Commissioner
9 who has responsibility to make these judgments. He does have a
10 right to a hearing. He has a right to certain discovery. It
11 is very clearly spelled out in the NFL collective bargaining
12 agreement and there is no claim, I don't believe, or no
13 reasonable claim I should say, that Mr. Brady was not afforded
14 all of those rights. We had a lengthy hearing, he had the
15 opportunity to be represented by all of the counsel who he is
16 ably represented by here today including from the NFL Players'
17 Association as well as his personal lawyer. He had the
18 opportunity to testify and provide his views to the NFL
19 Commissioner and the Commissioner had the opportunity to assess
20 all of that.

21 THE COURT: So, could I interrupt?

22 MR. NASH: Of course.

23 THE COURT: Within that context, let's turn for a
24 minute to what is called the Wells report. This is the report
25 which is largely the basis, I think it is fair to say, for

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1 Mr. Goodell's determination and decision.

2 So, that Wells report refers to Ted Wells, one of the
3 most prominent litigators in New York, and he and his firm were
4 retained by the council, I guess it was, to do an investigation
5 and they in fact did an investigation, some 139 pages or so,
6 plus exhibits. So, there is one issue that's been raised and
7 that is that their investigation and their role has been
8 characterized as independent and that, there is some question
9 in my mind not to suggest that they would not be anything but
10 above board but I remember that, you know, I worked at a big
11 firm at one time and with respect to our clients we were
12 anything but independent, we were fierce in support of our
13 clients and in all matters. And, in fact, I think Mr. Wells
14 testified at the hearing that he was retained to support the
15 decision of Mr. Goodell in this matter.

16 So, what is meant by that? Ted Wells and Paul Weiss,
17 in this matter, are independent?

18 MR. NASH: Yes, your Honor.

19 I don't know that it is accurate to say that he was
20 retained to defend the decision. I think what the record shows
21 is that Mr. Wells and his colleagues at Paul Weiss were
22 retained to get the facts. This was a very serious allegation
23 following the AFC Championship game. Mr. Wells testified and
24 his report clearly states that his charge was not to reach any
25 predetermined conclusion, it was simply to get to the facts.

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1 As an example, one of the things that he testified to and one
2 of the things that is in his report is that there has been a
3 lot of discussion about whether or not the Patriots' footballs
4 were actually deflated. There was considerable expert
5 testimony at the hearing before Commissioner Goodell.

6 THE COURT: So, there were two roles there, first,
7 they did the report, Paul Weiss did, and then later,
8 particularly at the hearing before Mr. Goodell, they appeared
9 as counsel, did they not?

10 MR. NASH: I was the lead counsel and I was the sole
11 counsel arguing in support of the discipline that was imposed.
12 Mr. Reisner, Mr. Wells' partner, appeared to assist in the
13 questioning of witnesses in terms of getting out the facts.
14 And Mr. Wells including -- we made, at the request of the
15 players' association, Mr. Wells available to testify and to be
16 cross-examined about his report.

17 And so, I don't think there is anything in the record
18 that either Mr. Wells or Mr. Reisner were there to support the
19 particular decision by -- Mr. Wells' testified that The
20 Commissioner's decision, that's not my decision. My decision
21 was to -- what my role, Mr. Wells testified to and it is clear
22 from his report, is to get to the facts.

23 THE COURT: So, turning to there is a specific
24 intention that the work product, so to speak, or the interview
25 notes, for example, that were collected by Paul Weiss in doing

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1 their investigation, that was not made available to Mr. Brady's
2 counsel and that is something that, in some instances or many
3 instances -- I don't know, I have to make that determination,
4 ultimately, but why were those notes not equally available to
5 Mr. Kessler?

6 MR. NASH: Well, when you say they were equally
7 available one of the things that gets overlooked is that the
8 only -- the only witness at the hearing where that might have
9 been relevant was Mr. Brady and Mr. Brady was accompanied by
10 counsel during the interview with Mr. Wells and certainly had
11 notes from that interview. But more to the point, your Honor,
12 those were privileged documents and under the collective
13 bargaining agreement --

14 THE COURT: Privileged? Attorney-client privilege?

15 MR. NASH: Yes, they were work product, simply.

16 THE COURT: So who is the client and who is the
17 attorney?

18 MR. NASH: There is no question, your Honor, that Paul
19 Weiss and Mr. Wells were retained by the NFL.

20 THE COURT: Right.

21 MR. NASH: Nor is there any requirement in the
22 collective bargaining agreement that it be done any
23 differently. Under the collective bargaining agreement the
24 Commissioner, including people who work directly for the NFL,
25 often conducted investigations and get to the facts.

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1 THE COURT: Are they ever required to turn over their
2 investigatory notes?

3 MR. NASH: We have one ruling on this from Judge Jones
4 in the Ray Rice case and under the collective bargaining
5 agreement there is a specific provision entitled Discovery, it
6 is in Article 46, and it specifies what the player is entitled
7 to. As Judge Jones ruled, the player is entitled to all of the
8 exhibits that are going to be used at the hearing.

9 In this case Mr. Brady and the Players' Association
10 were provided with far more. They were provided with the
11 entire Wells report including the documents that were reviewed
12 such as the notes of the measurements of the footballs, the
13 expert analysis, the interviews that were performed by the
14 non-lawyer security people on the day of the game including the
15 interviews of Mr. McNally and Mr. Jastremski. They were
16 provided everything under the collective bargaining agreement
17 and more and so this argument about either the Wells notes or
18 the so-called independence of Mr. Wells is, in our view, a
19 complete red herring. It sounds like a good argument to make
20 in the media but under the collective bargaining agreement it
21 is not an argument that has any legal significance but, more
22 importantly, it ignores the clear record in this case.

23 Mr. Wells is a person of unquestioned integrity. He
24 testified at the hearing that he would not have accepted the
25 assignment if his charge was anything other than to find the

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1 facts. And at no time was there, there is no evidence that
2 there was any influence or pre-determination as to how he
3 should investigate the matter and what conclusions he should
4 draw.

5 I was going to use the expert as an example.
6 Mr. Wells testified about the fact that there was questions
7 raised about whether natural environmental causes may have
8 resulted in the deflation of the football. He retained an
9 expert and, as he testified at the hearing, your Honor, he said
10 to the expert: Consider yourself a Court-appointed expert. I
11 don't -- just find out whatever the facts are. If you can find
12 that it was natural causes, that's what I want to know. But,
13 he did even more than that and I think this further proves his
14 independence, he hired a second expert, the chair of the
15 physics department at Princeton to oversee what the first
16 expert was doing and told him make sure that they're getting it
17 right, we just want the facts.

18 So, I understand that there are these arguments about
19 so-called independence and the Paul Weiss firm but, your Honor,
20 I submit that they have no legal significance in view of the
21 Commissioner's decision.

22 THE COURT: Let's talk about the findings, some of the
23 findings that Wells made.

24 By no means are these all of them, but one of the
25 findings that he makes is that there is less direct evidence

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1 linking Brady to tampering activities than either McNally or
2 Jastremski. It says that on page 17, right?

3 MR. NASH: Yes.

4 THE COURT: So, my question is, is there any direct
5 evidence linking Mr. Brady to tampering?

6 MR. NASH: Your Honor, there is considerable evidence
7 and depending how you want to --

8 THE COURT: So, let me narrow it down a little bit
9 because I know what the papers say, but so we are actually
10 speaking about a finding that at the AFC Championship game on
11 January 18th, footballs which had been inspected by the
12 referees went into the game, were at half time determined to be
13 less than the league required, 12.5 to 13.5 pounds per square
14 inch. So, that's the deflation that we are talking about.

15 MR. NASH: Yes.

16 THE COURT: It is pretty specific, it is pretty
17 narrow. I think that's essentially the finding that
18 Mr. Goodell relates to; what happened in that period, right?
19 After the officials had inspected the balls and they were then
20 determined fine, where they certainly were sent out onto the
21 field at the appropriate pounds per square inch, but at
22 halftime it was determined that they were not.

23 MR. NASH: Correct.

24 THE COURT: And the allegation is, if I remember
25 correctly, that Mr. Brady was intercepted and somebody from the

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1 Colts caught the ball and determined, I guess in some fashion,
2 that this ball was unusual or underinflated, turned it over to
3 16 people up the line and they inspected it and they found that
4 that ball, and others, were deflated. That's the whole story
5 because, in fact, at the halftime after they made that
6 determination, they reinflated the balls and the game resumed
7 and, ironically or not, it turns out that Mr. Brady did better
8 with the higher inflated balls than with the underinflated
9 balls.

10 So, you might say that he got no competitive advantage
11 in one sense, from the underinflation, right? Because the
12 statistics are, I think this is from the Wells report, he says
13 specifically in the first half Mr. Brady completed 11 of 21
14 passes for 95 yards and one touchdown, and in the second half
15 he completed 12 of 14 passes for 131 yards and two touchdowns.

16 But, anyway that is right, that is the offense we are
17 talking about what happened, or Mr. Goodell is saying that in
18 that interim period Mr. McNally, perhaps with the involvement
19 of Mr. Jastremski, came up and in fact deflated those
20 footballs, in fact Mr. McNally did it in a bathroom in the
21 approximate span of a minute and 30 seconds or so. That's what
22 he found.

23 So, going back though to Mr. Brady, I am trying to
24 figure out what is the direct evidence that implicates
25 Mr. Brady in that deflation in that bathroom, presumably, if

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1 that's what happened, in the first half of that January 18th
2 game.

3 MR. NASH: Maybe the most direct evidence is what
4 Mr. Brady said at his appeal hearing to the Commissioner, and
5 that is he agreed that neither Mr. McNally nor Mr. Jastremski
6 would have deflated the footballs without his -- if they didn't
7 think he wanted them to do it.

8 THE COURT: Okay. So, is that it?

9 MR. NASH: No. Not at all. Not at all.

10 THE COURT: Because it would be hard to imagine a
11 quarterback thinking that the balls that he uses in a game, any
12 quarterback, could be inflated or deflated without his
13 involvement, right? Most people would think that, right,
14 because he is the one who throws the ball, right, and under
15 league rules has the opportunity to be involved in the
16 preparation and selection of the game balls.

17 MR. NASH: Well, under a rule that Mr. Brady himself
18 lobbied for.

19 THE COURT: Fair enough; but apparently I have
20 learned -- I didn't know this before but learned in reading
21 your fine papers, both sides -- that quarterbacks are very
22 interested in preparation and selection of game balls. Some
23 quarterbacks seem to like them inflated more, others seem to
24 like them inflated less, but it is not an unusual thing for a
25 league quarterback to be involved and be very interested in the

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1 ball that gets used or the balls that get used in that game.

2 Fair to say.

3 So, anyway, back to the direct evidence that links
4 Mr. Brady to that specific episode, presumably which took place
5 in the men's room or in the bathroom.

6 MR. NASH: If you are asking, your Honor, is there a
7 text or an e-mail in which Mr. Brady specifically instructs
8 somebody to put a needle in a football after the game official
9 has checked it? No, there is not such direct evidence. There
10 is considerable evidence documented in the Wells report and
11 relied upon by the Commissioner in his decision that Mr. Brady
12 clearly knew about this. It starts with the texts that we were
13 able to recover between Mr. McNally and Mr. Jastremski which
14 clearly indicate Mr. Brady's knowledge and encouragement of
15 this activity. There is the considerable activity following
16 the AFC Championship game where Mr. Brady repeatedly, in the
17 days ensuing, had texts and phone communications with them;
18 unprecedented. Unprecedented.

19 THE COURT: Unprecedented in that he hadn't had text
20 and phone conversations with these same individuals
21 historically?

22 MR. NASH: Yes, that is correct.

23 And then the statement that you read from the Wells
24 report about there being less direct evidence, one of the
25 things that gets ignored about the Wells report and it is

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1 certainly true and the Commissioner's decision explains this is
2 the fact that there may not be a specific smoking gun with the
3 clear instruction does not mean that there is not evidence of
4 culpability here. There is, and you know, your Honor, very
5 well I am sure, that conclusions certainly can be reached by
6 evidence like this.

7 It gets ignored that the Wells report also noted that
8 Mr. Brady's explanations for both his communications with
9 Mr. Jastremski and following the championship game were not
10 really credible. Ultimately what we are talking about here,
11 your Honor, is we understand that they have their version of
12 the facts. They say, okay, you don't have a smoking gun, you
13 don't have direct evidence therefore you can't make any finding
14 that Mr. Brady was involved. But, your Honor, the Commissioner
15 disagreed.

16 THE COURT: Yes, no.

17 MR. NASH: There was a hearing in which he listened to
18 Mr. Brady and on top of all of this, your Honor, in terms of
19 maybe it is not direct evidence but let's be clear, Mr. Brady
20 was asked for text messages, not just with Mr. Jastremski and
21 Mr. McNally but with others about this subject, and those text
22 messages were not produced, the phone was destroyed and, your
23 Honor, I would submit that a fact-finder, in this case
24 Mr. Goodell as the hearing officer, it is clearly reasonable to
25 infer that that is further evidence of culpability.

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1 THE COURT: No, I get it. I understand. I do.

2 There is another finding by Mr. Wells I wanted to ask
3 about. He says, Based on the evidence, we -- meaning Wells and
4 Paul Weiss -- have concluded that it is more probable than
5 not -- that's another phrase for what we call preponderance of
6 the evidence -- it is more probable than not that Tom Brady was
7 at least generally aware of the inappropriate activities of
8 McNally and Jastremski involving the release of air from
9 Patriot game balls. I think he is referring to that same game,
10 right, the January 18th game.

11 My question is if you know -- he said it so you may
12 not know, but -- I am not sure I understand what in the world
13 that means, that phrase. So, it says: At least generally
14 aware of the inappropriate activities of Mr. McNally and
15 Jastremski involving the release of air from Patriot game
16 balls. So, I don't know what that is. You know, did he know
17 that McNally took the balls unaccompanied into a bathroom? Did
18 he know that in the bathroom, if in fact it happened, McNally
19 deflated the balls? Did he know that McNally then went on to
20 the field with the balls? I mean, I don't know what to make of
21 that finding, of that conclusion that Tom Brady was at least
22 generally aware of the inappropriate activities of McNally and
23 Jastremski involving the release of air from the Patriot game
24 balls.

25 I don't know if you do either. It is his quote so we

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1 are just trying to figure out what is he saying.

2 MR. NASH: He is saying that by the evidence Mr. Brady
3 knew that these individuals were involved in deflating the
4 footballs.

5 THE COURT: He didn't say that. He said -- he didn't
6 say that he knew, he said that it's at least -- he was at least
7 generally aware of the inappropriate activities.

8 MR. NASH: Generally aware is knew, I believe, your
9 Honor.

10 THE COURT: I think I got the quote right. Maybe he
11 said knew some other -- he said at least generally aware. This
12 is at page 122. Yes. Page 122 of his report he said: Based
13 on the evidence, we also have concluded that it is more
14 probable than not that Tom Brady was at least generally aware
15 of the inappropriate activities of McNally and Jastremski
16 involving the release of air from Patriots game balls. He
17 didn't say knew, at least not there. Middle of the page 122 of
18 the Wells report.

19 MR. NASH: I believe he also said, and either at page
20 17 or 19, that Mr. Brady consented to or approved of these
21 activities as well.

22 The other point I would make, your Honor, is that I
23 understand we are parsing this one phrase from the Wells
24 report, but when the Wells report is read in its entirety
25 including the conclusions that the explanations from Mr. Brady

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1 were not worthy of belief --

2 THE COURT: He said that, there is no question. He
3 said that.

4 MR. NASH: -- and that Mr. Brady's failure to
5 cooperate and Mr. Wells even testified to that, it leads to an
6 inference of his involvement.

7 Now, we can parse the Wells report but --

8 THE COURT: Well, that's the basic investigation and
9 the basic document. I know that Mr. Goodell had a hearing and
10 is not just bound by the Wells report but it was pretty
11 fundamental here. Maybe he did say something stronger than
12 that but it seems to me that that's pretty much what he
13 concluded about Mr. Brady.

14 MR. NASH: And you are right, your Honor, we had an
15 extensive hearing.

16 THE COURT: Yes.

17 MR. NASH: And what we are, I believe in this case
18 here to review, are the conclusions and the assessment by the
19 NFL Commissioner of not only the Wells report but of his
20 assessment of Mr. Brady's credibility based on listening to him
21 at the appeal hearing. And as the Commissioner concluded in
22 his decision, he is convinced -- he is firmly convinced of
23 Mr. Brady's -- and, your Honor, I would -- back to the
24 fundamental point in our papers. The discussion that we are
25 now having about the specific evidence involved highlights that

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1 under the labor laws the judgment to be made, the assessment of
2 that evidence, resides under the collective bargaining
3 agreement. Commissioner Goodell and the players' association
4 had the opportunity for a lengthy hearing, they had the
5 opportunity to convince him otherwise. He said he was open to
6 it. And in fact it went the other way, as it turns out. We
7 learned at the hearing that Mr. Brady had actually destroyed
8 his phone on the day of the Wells interview.

9 Now, your Honor, I think it would, given the standard
10 of review, I would argue that that is an absolutely reasonable
11 conclusion for the Commissioner to draw based on that evidence
12 in terms of Mr. Brady's involvement but certainly under the
13 legal standard of review, you cannot possibly say that the
14 conclusion made in the Commissioner's decision doesn't have a
15 basis.

16 THE COURT: I'm not saying that.

17 By the way, after he made that statement that I quoted
18 at 122 he drops the footnote where he says: We -- meaning Paul
19 Weiss -- were not asked by the NFL to investigate the potential
20 competitive impact of the deflation of Patriots game balls and
21 therefore do not make any findings or reach any conclusions on
22 that issue.

23 So, I am interested in your opinion about whether that
24 matters or not. In other words, you are saying that --
25 Mr. Goodell is saying that the actions of McNally and

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1 Jastremski and Tom Brady were conduct detrimental to
2 professional football, as it were. Does it make any difference
3 if they were unsuccessful in that conduct? In this case it
4 looks like somebody deflated the balls but it didn't help
5 Mr. Brady any -- does that matter or is that just an
6 interesting --

7 MR. NASH: I understand that is something that's been
8 bandied about but what matters is what the Commissioner's
9 thought on that is on his judgment. I would submit, your
10 Honor, this is clearly -- not only is it reasonable but it is
11 entitled to deference. Whether or not a conspiracy to evade
12 the rules in a game like the AFC Championship game helped or
13 hurt in terms of whether it involves the integrity of the
14 game --

15 THE COURT: Well, wait a minute. Conspiracy. That is
16 sort of an interesting idea here. In Mr. Goodell's decision he
17 uses the word "scheme."

18 MR. NASH: Yes.

19 THE COURT: So I take it that's what you mean by
20 conspiracy?

21 MR. NASH: That's the wrong word. I apologize.

22 THE COURT: No, no, that's okay, but he uses it by the
23 way, if I remember correctly, eight, 10 times.

24 MR. NASH: Yes.

25 THE COURT: So that scheme or conspiracy would be

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1 among, I guess, Mr. Brady, Mr. McNally and Mr. Jastremski.

2 Now, when we talk about scheme in other cases or
3 conspiracies in federal court it is a pretty high bar; that you
4 have to show, among other things, that conspirators intended to
5 be in that conspiracy and intended the outcome of the
6 conspiracy, if it is an unlawful one, to occur. And, like I
7 say, Mr. Goodell says "scheme." Is there any meeting of the
8 conspirators before that game? Is there any written, one to
9 the other, Let's get together and have a scheme in the January
10 18 game to lower the pressure of the balls after the officials
11 look at them? I mean, what are the indicia of that scheme or
12 conspiracy? What is the evidence of the scheme or conspiracy
13 specifically related to the one game which is the subject of
14 the award and of the Wells report, that one time period of the
15 first half of the game against the Colts.

16 MR. NASH: Well, I think it starts with the texts
17 prior to the game between Mr. McNally and Mr. Jastremski in
18 which they discuss the inducements from Mr. Brady for
19 Mr. Brady's knowledge of it. There is clear indication in the
20 texts that he knew about it and --

21 THE COURT: That he knew that on January 18 they were
22 going to deflate the balls after the officials approved them?

23 MR. NASH: No, not for that specific game but there
24 are --

25 THE COURT: Ah, but that's the only game that we are

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1 talking about.

2 MR. NASH: Well, your Honor, there is a pattern of
3 evidence in the texts that starts with the -- that starts with
4 Mr. McNally calling himself the deflater and asking for needles
5 and saying if he doesn't get the inducements that he wants from
6 Mr. Brady he is going to blow up the ball.

7 THE COURT: Right.

8 MR. NASH: Or he is going to go to ESPN. There is the
9 one text that says I haven't gone to ESPN yet.

10 So, again, we can argue here about how to interpret
11 those texts, right?

12 THE COURT: That's fair. That's fair enough, but I
13 have a narrower point. So, the point I am trying to make is
14 about this deflategate. I'm not sure where the "gate" comes
15 from.

16 What I am trying to say is that the Wells report and
17 the award relates only to one game. Whether it ever happened
18 before, who knows. It is certainly not defined in either of
19 those documents. It just relates to the first half of the AFC
20 Championship game on January 18. And so, whether, you know,
21 somebody was upset about, you know, the pressure of the balls
22 in the Jets game in 2014, there is no finding in this case that
23 there was anything improper done by Mr. Brady in that game.
24 So, I am trying to figure out what is the evidence of the
25 scheme or the conspiracy that covers the January 18, 2015 game

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1 and I am having trouble finding it.

2 MR. NASH: Well I think, your Honor, you have to start
3 with the evidence that it occurred. And we understand that
4 they want to dispute that and we had a hearing over that. So,
5 there is the evidence that the balls were deflated. There is
6 the evidence that Mr. McNally went into the bathroom completely
7 breaking all protocol. The head official said it never
8 happened before, he is not supposed to do that.

9 THE COURT: Right.

10 MR. NASH: So, the relevance of the evidence earlier
11 about Mr. Brady's knowledge of this certainly bears, I think it
12 was certainly reasonable to consider, especially in light of
13 the denials, especially when fundamentally, your Honor, the
14 question at the appeal hearing is one of credibility. It is
15 certainly reasonable to consider that these things were
16 happening before.

17 THE COURT: Okay.

18 MR. NASH: I think it's -- and again, for purposes of
19 the legal standard it is certainly not unreasonable.

20 THE COURT: Right. I get it. I get it.

21 I have one more question and then I have some
22 questions for Mr. Kessler, too.

23 MR. NASH: Sure.

24 THE COURT: So, going back to your point and it is a
25 correct one, you are absolutely right, that usually when a case

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1 comes to District Court from an arbitration there is a
2 fundamental principle that there is deference to the arbitrator
3 but there is also, as you know as you pointed out, Ray Rice,
4 Adrian Peterson, other cases as well in which the Courts
5 determine or somebody determines that we should not go along
6 with the decision of the arbitrator and as far as I can see,
7 most of those situations have in common this issue and
8 Mr. Brady has raised this too, of notice. And you know from
9 the papers that that is what they're contending so that that's
10 the rule that, the law of the shop as it were, the rule in
11 labor environments that work rules must clearly and
12 unambiguously establish the scope of the prohibited conduct as
13 well as the consequences of violations in order to be
14 enforceable. Everybody agrees with that principle too, I think
15 as well.

16 So, along comes Mr. Kessler and he is arguing that the
17 league policies that relate to the player, the 2014, they do
18 get notice in situations why there are uniform and equipment
19 violations but he says that in those contexts or first offenses
20 they result in fine. Now, there is another provision in that
21 same document at page 20 which says, suggests that it could
22 also be suspension but there is a quote that says there that
23 first offenses result in fines. I don't know if that is an
24 ambiguity or what.

25 Then he goes on to say, Mr. Kessler does, argue --

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1 this is all argument -- that the league policy on integrity of
2 the game and enforcement of competitive rules and the reason we
3 are interested in this is because the Wells/Paul Weiss
4 report -- the investigation -- was explicitly based on that,
5 that is to say on the league policy on integrity of the game
6 and enforcement of competitive rules. He says, and it seems
7 like it is so, that those rules only apply to chief executives,
8 club presidents, general managers and head coaches but not to
9 players.

10 So, the last -- and then I will give you a rest. The
11 last point I want to ask is where and how does Mr. Goodell
12 satisfy -- or not he but where is the notice afforded to
13 Mr. Brady both of the offense -- in not the football context
14 but where -- the offense, where does he have notice of the
15 offense and where does he get notice of, let's say, a four-game
16 suspension that might ensue from that offense?

17 MR. NASH: Yes, and obviously we are familiar with all
18 of those arguments that the players' association has made here
19 because they made those very same arguments in the appeal
20 hearing below. As the Commissioner explained in his award, the
21 answer to all of those arguments is in the collective
22 bargaining agreement and they all critically depend on the
23 players' association's view of the facts or their
24 interpretation of the collective bargaining agreement or their
25 interpretation of the relevant documents. But, the

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1 Commissioner carefully explained that Mr. Brady's discipline
2 was based on both the collective bargaining agreement and his
3 player contract under which he has acknowledged and agreed that
4 he is subject to discipline including suspensions. And Judge
5 Jones -- you mentioned the Ray Rice case -- Judge Jones'
6 decision strongly affirms the breadth of that authority but it
7 is all in the CBA.

8 Now, they simply just misstate the facts or they
9 disagree with the facts but the Commissioner addresses each of
10 these in the award itself.

11 By the way, the Ray Rice case was not an arbitration
12 deference case. The Judge Jones ruled, we can never challenge
13 it. The final decision from the Adrian Peterson case was a
14 much different issue but I want to address it and I do want to
15 address the point you made about the law of the shop because I
16 think that's their -- that's the argument that they really base
17 their entire case on and the reason they do that is because
18 they can't base it on the CBA. They can't point to a CBA
19 provision -- the provision that I just read about notice, that
20 specific phrase is not in the collective bargaining agreement.
21 There is plenty of notice as the Commissioner interpreted the
22 CPA and as he assessed the facts including evaluating a player
23 of Mr. Brady's experience as to whether he knew that an
24 effort -- this is not a mere, in his judgment, the
25 Commissioner's judgment a mere equipment violation, whether

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1 participating in an effort that once the officials certify the
2 balls to then have them changed, whether that affects the
3 integrity of the game.

4 Now, we understand they may disagree but, under the
5 collective bargaining agreement, clearly that is within the
6 Commissioner's authority.

7 THE COURT: Right.

8 MR. NASH: So they rely on the law of the shop and the
9 reason they rely on the law of the shop is because there is
10 nothing in the CBA they can point to. But, your Honor, the law
11 of the shop principle that they rely on is a principle of
12 deference to arbitration, it is not an argument in favor of
13 court review of arbitration. It emanates from the Supreme
14 Court's decision in WR Grace decades go in which the Court
15 explained that when disputes like this are resolved, Courts
16 must defer to the arbitrator because it is the arbitrator's
17 knowledge of the industry or knowledge of the collective
18 bargaining agreement and interpretation.

19 Now, we understand that the Court in the Peterson case
20 reached a different conclusion about how to interpret past
21 precedent and that is now on appeal in the Eighth Circuit. As
22 we have pointed out, your Honor, in the Second Circuit the law
23 could not be clearer. The question of how to interpret the
24 so-called law of the shop is for the arbitrator.

25 THE COURT: I get it. Thanks. That's very helpful.

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1 MR. NASH: Thank you.

2 THE COURT: And again, I am asking these questions
3 just to help me. I don't mean to put anybody on the spot but
4 these are questions that will help me both in talking
5 settlement and also in resolving the case legally.

6 MR. NASH: Thank you very much, your Honor.

7 THE COURT: Okay.

8 Mr. Kessler? Mr. Kessler, I know that -- well, I
9 don't know but I suppose that you might be anxious to respond
10 to Mr. Nash and I would say don't, because we will spoil our
11 settlement conferences if you do. But, I do have some
12 questions for you.

13 MR. KESSLER: Certainly, your Honor. I am happy to do
14 whatever you like.

15 THE COURT: You say now but we will see.

16 So, here is the big question, obviously, and we have
17 alluded to it in discussion before so here we have
18 Mr. Jastremski and Mr. McNally. They work right for the
19 Patriots, right?

20 MR. KESSLER: Yes.

21 THE COURT: And Mr. McNally is a locker room attendant
22 and Mr. Jastremski, I guess among his duties, his principle
23 responsibilities are of preparing the game balls, right?

24 MR. KESSLER: Yes.

25 THE COURT: You may disagree or not but certainly if

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1 you read the Wells report and if you read Mr. Goodell's
2 decision they, and certainly more than Mr. Brady in terms of
3 evidence, but it looks like in a game in this AFC Championship
4 game that we are talking about, that they or one of them
5 deflated the game balls -- that the suggestion, clearly, is
6 that that was Mr. McNally.

7 Why would or would either of them ever do that without
8 Mr. Brady's consent and/or awareness? I mean, is it
9 conceivable that those Patriots officials -- I mean Mr. Brady,
10 of course, is the quarterback and he is the one who is going to
11 be throwing those balls. He, as other quarterbacks, has a keen
12 interest in how they feel and, you know, what pressure per
13 square inch to what degree they are inflated. Why would or
14 would either of those two people do that without his knowledge
15 and consent?

16 MR. KESSLER: Well, to start, your Honor -- and I will
17 answer your question -- I just want to make it clear we do not
18 believe that there is real evidence that there was such
19 deflation but I understand that's what the Wells report
20 concluded. So, my answer is going to be based on the premise
21 that that is what the Wells report concluded, not that the fact
22 that such deflation occurred.

23 THE COURT: Okay.

24 MR. KESSLER: Assuming such deflation occurred it is
25 conceivable that Mr. McNally, if he did do such deflation,

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1 thought it was something that would be good for his
2 quarterback. Okay? That makes a certain logical sense. He
3 wouldn't do something he thought was bad for his quarterback.
4 But it is a long leap from there to get to Mr. Brady asked him
5 to do it or supervised him in doing it or directed him in doing
6 it.

7 It is very interesting. We cross-examined Mr. Wells,
8 who I have great respect for, on this very issue. It is quoted
9 in the brief we just filed. We asked him: In all your
10 examination of all of the witnesses, of all the documents, did
11 you find anything beyond this general awareness finding such as
12 that Mr. Brady directed it in some way? And Mr. Wells was very
13 clear, open and honest, and the answer was no.

14 After all of this money, after all of this
15 investigation, after all of these witnesses he couldn't get
16 beyond saying the quote that your Honor read that at least he
17 was generally aware that something may have happened. That's
18 very different from inducement, encouragement, participation,
19 direction. None of that is in the Wells report.

20 Now, why does that matter? And this is very, very
21 important, your Honor: Mr. Nash and the NFL conflate the
22 Commissioner's role as arbitrator with the role of imposing
23 discipline. They are not the same and here is why: As the
24 arbitrator, the Commissioner is sitting to review the
25 discipline already in place and simply rule that that

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1 discipline can be sustained or not sustained. He has no
2 authority to come up with a new grounds of discipline. He has
3 no authority to make new findings of discipline as the
4 arbitrator. This was the direct holding by Judge Doty in the
5 Peterson case when Mr. Henderson, sitting as the arbitrator
6 tried to say, well, the discipline wasn't imposed on these
7 grounds but it could have been imposed on these grounds so I
8 will sustain it.

9 THE COURT: I got it.

10 MR. KESSLER: And Judge Doty said that exceeds your
11 authority as arbitrator.

12 Now, so I am now circling back to generally aware
13 because --

14 THE COURT: Let me ask, did you ask Mr. Wells what he
15 meant by generally aware? Did anybody ask that question?

16 MR. KESSLER: We didn't ask it precisely that way.
17 Your Honor can certainly read the transcript. We asked him
18 more the reverse, that there was no finding of participation,
19 directness, other things.

20 But what we do know, and this is very important, so
21 what is the actual discipline? The actual discipline is
22 Exhibit 10, your Honor will find, which is the letter from
23 Mr. Vincent imposing the discipline.

24 THE COURT: Right.

25 MR. KESSLER: And what Mr. Vincent did, number one, he

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1 testified the sole factual basis was the Wells report.
2 Mr. Vincent, under oath, said I did no other fact
3 investigation. So, this is it. And this is what he says:
4 With respect to your particular involvement -- that's
5 Mr. Brady -- the report established that there is substantial
6 and credible evidence to conclude that you were at least
7 generally aware of the actions of the Patriots employees
8 involved in the deflation of the footballs and that it was
9 unlikely that their actions were done without your knowledge.
10 That is it.

11 THE COURT: I got it.

12 MR. KESSLER: Why is that significant?

13 THE COURT: So people will be stunned that we have
14 gone off the question that I am asking --

15 MR. KESSLER: I'm sorry.

16 THE COURT: That's all right.

17 So, here is the bottom line: So, you're saying that
18 it's more than -- well, what are you saying? No, no, I don't
19 want to ask that question because we don't have enough time.

20 MR. KESSLER: What would you like me to say, your
21 Honor?

22 THE COURT: I want you to tell me if Mr. Brady and you
23 are saying that these two folks, Mr. Jastremski and
24 Mr. McNally, were freelancing if and when they deflated those
25 footballs.

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1 MR. KESSLER: That is our position, your Honor.

2 And the reason I was saying that is significant is
3 because even the NFL in its brief -- and this is very
4 important -- does not try to contend that any player had
5 notice, you could be disciplined for being generally aware of
6 somebody else's inappropriate conduct. There has never been a
7 punishment in the history of the NFL for that, there is no
8 notice for that. The NFL does not make a claim that there was
9 any notice of that. Even looking at the conduct detrimental
10 language they cite in the paragraph 15 of the player contract,
11 it says you can be suspended or fined for conduct detrimental
12 that you engaged in. In other words not that you were aware of
13 what somebody else did. And because there is no defense of
14 that, because it is only generally aware, just on that one
15 ground this can't survive notice under the Peterson decision.

16 The significance of Peterson -- and then I would like
17 to stop because I'm sure your Honor has other questions -- but,
18 the significance of Peterson and this is unlike the other
19 cases, it is conclusive here. Mr. Nash alluded to the fact
20 that it is on appeal to the Eighth Circuit but, as your Honor
21 knows in the Second Circuit and in the Eighth Circuit, I think
22 in every circuit, a decision that establishes the same parties
23 has issue preclusive effect during an appeal. They did not
24 seek a stay of the Peterson decision. In fact, they could have
25 sought a stay of the Peterson decision, they did not.

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1 So, right now, at the time of Brady, Commissioner
2 Goodell was legally precluded from denying that he had to apply
3 this notice and the NFL is legally precluded from doing so and
4 yet Peterson is not even discussed by Commissioner Goodell as
5 in his decision except in a footnote saying that had to do with
6 domestic violence and I don't have to discuss that. That, your
7 Honor, is a clear violation of the essence of the CBA, the law
8 of the shop, and it is manifest disregard of the law which the
9 Second Circuit still applies.

10 THE COURT: Well, Mr. Goodell in his award clearly
11 talks about notice. It may not be the notice that you're
12 talking about but he clearly establishes that or contends that
13 Mr. Brady had notice both of the conduct and of the penalty.
14 But anyway, all right. Let's move on.

15 Why did Mr. Brady not cooperate with the Wells
16 investigation in the respect of providing texts and e-mails to
17 them?

18 MR. KESSLER: Well, this is a very complicated
19 subject, your Honor, so you will forgive me for addressing it a
20 little bit at length.

21 The first point to note is that Ted Wells testified in
22 this hearing very clearly that he never gave Mr. Brady any
23 notice that if he did not provide the electronic communications
24 that were requested from his private e-mails and texts that
25 there was going to be any type of disciplinary consequence.

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1 So, at least from Mr. Wells nothing was communicated and
2 Mr. Brady testified under oath here that if Mr. Wells had said
3 to him or the league had said to him or anyone had said to him
4 if you don't turn over your e-mails that there is going to be
5 some punishment for that, he would have done so. So, that's
6 the first thing.

7 THE COURT: Well, wait a minute.

8 MR. KESSLER: The second -- I'm sorry.

9 THE COURT: I did cooperate in other respects, right,
10 he was interviewed.

11 MR. KESSLER: Yes.

12 THE COURT: He answered questions.

13 MR. KESSLER: Yes.

14 THE COURT: So how did he, Mr. Brady, draw the line?
15 Well, I'm going to cooperate with respect to all of these other
16 matters but when it comes to e-mails and texts that's where I
17 draw the line.

18 MR. KESSLER: Well, the line was actually drawn by the
19 advice he received from his agent lawyers, not the union, who
20 were --

21 THE COURT: Wait a minute. That expression is used a
22 lot in the papers. I don't know what that means. Agents are
23 sometimes also lawyers but they don't act usually as lawyers,
24 they act as agents.

25 MR. KESSLER: Yes. In this particular matter the

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1 union was not involved in counseling Mr. Brady about his
2 interview with Ted Wells or the request from Ted Wells and so
3 Mr. Yee, who is his agent who is also an attorney, concluded
4 with Mr. Brady that they would also represent him in the
5 matter. So, while you're right agents do not always act as
6 lawyers, there is nothing to prohibit them from acting as
7 lawyers and I believe they were acting as both his counsel with
8 Mr. Wells and happened to be his agents in terms of that.

9 So, they advised him that because there was no policy
10 properly invoked the only policy that was invoked, remember,
11 was the competitive integrity policy which everyone agrees,
12 including Troy Vincent, is never given to players. On its face
13 it says it doesn't apply to players, so the no proper policy
14 was invoked. Nothing was cited that they gave advice that they
15 thought because of his celebrity, because of the extremely high
16 likelihood of leaks of personal information that even -- and
17 this is not a knock at Mr. Wells, but giving it to anybody
18 because of his celebrity how this gets out, I will give your
19 Honor just a little example, that the concern was not really
20 frivolous. Even in this matter we have now put into the public
21 record all the e-mails that were responsive, you know, whatever
22 they were. And lo and behold, there are e-mails about
23 Mr. Brady's personal issues about a pool cover that appeared
24 on, like, national television --

25 THE COURT: I get it.

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1 MR. KESSLER: So, that was the concern; that given his
2 celebrity and his personal life, that just turning over
3 personal e-mails was going to raise privacy issues.

4 And so, you could --

5 THE COURT: So a lawyer could have said let's go
6 through these; these are nonresponsive, these have to do with
7 your swimming pool, we won't give them that, but why not give
8 them the ones that related to inflation or deflation of
9 footballs or his relationship to Mr. McNally and/or
10 Mr. Jastremski? You do that all the time.

11 MR. KESSLER: Your Honor, you're right. You're right,
12 it could have been done a different way. Okay? And I think
13 right now Mr. Brady has concluded that it should have been done
14 a different way because in this proceeding he did everything
15 that Mr. Wells asked for. He searched for the search terms on
16 his computer, he had a forensics person do that and turned over
17 all the e-mails and there was nothing incriminating so this was
18 all provided to Commissioner Goodell.

19 With respect to the texts there has been a huge issue
20 made by the NFL about the destruction of the phone.

21 THE COURT: Right.

22 MR. KESSLER: I want to mention that.

23 THE COURT: Yes, I was going to ask you about that.

24 MR. KESSLER: This is the most overblown issue in the
25 history of my 40 years -- almost 40 years -- of litigating

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1 cases. Why do I say that? First of all, what the NFL doesn't
2 deny is that what Mr. Wells had asked for was any text to three
3 people, that was all; he want Mr. McNally, he wanted
4 Mr. Jastremski and he wanted Schoenberg.

5 THE COURT: Schoenfeld.

6 MR. KESSLER: Right, the boss in terms of that.

7 Well, they got the phones of all three of those people
8 and recovered all the texts with Mr. Brady. How do I know
9 that? Because we produced the phone records from the phone,
10 the one that is no longer in existence, which shows every text.
11 And so, you can match up in the Wells report what were the
12 texts that the Wells report used versus all the texts that
13 existed. Only three were not used by the Wells report but we
14 have stated that's because they must have had nothing in them
15 because Ted Wells had those three also. And the NFL, by the
16 way, has never come back and said, oh no, we don't have those
17 three because they do have those three.

18 So, the point here is they have every single text.
19 The phone was discarded at a later date. Why? Because again,
20 because of his celebrity. This is not my life, your Honor; it
21 is certainly not your life. Okay? When you are Tom Brady,
22 okay, you get --

23 THE COURT: By the way, I take exception to that.

24 MR. KESSLER: I'm sorry, maybe you do this. Maybe it
25 is possible. Okay? I at least don't change telephones all

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1 that often and I don't worry about anyone looking at my
2 pictures of my wife -- they have been lovely pictures, by the
3 way, I want to say that on the record, but there is not a great
4 demand of that or my pool cover because I don't have a pool.
5 So, therefore, that wouldn't come in. But, when you are Tom
6 Brady who lives in that fish bowl what you do is that, one, you
7 get phones and, as he testified, phone companies give him
8 phones for free, okay, because they want Tom Brady to carry
9 phones. So, he gets phones all the time and whenever he gets
10 rid of -- what he does when he is done, he gives it to his
11 assistant who is told, Get rid of the phone. He doesn't even
12 know when it was gotten rid of, exactly the circumstances.

13 You know, there is this big statement, oh, it was done
14 the day of the interview. Nobody knows that. Mr. Brady didn't
15 testify to that. What happened is he said his normal practice
16 is to get rid of it when there is a new number and they said,
17 oh, you started a new phone number around that day but we don't
18 know what actually happened with the phone. Nobody knows. And
19 what is very important, Mr. Brady testified he didn't destroy
20 the phone because there was something on it he was concerned
21 about and they don't contend that there was because they had
22 all those texts.

23 The most Mr. Nash can say is, well, maybe they were
24 texts to somebody Mr. Wells didn't ask for that would be
25 incriminating. Well maybe. Maybe if my grandmother had wheels

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1 she would be a trolley car.

2 THE COURT: No.

3 MR. KESSLER: He can't base discipline on anything
4 something Mr. Wells never asked for that might exist somewhere
5 and there is no evidence of it. But what there is is
6 Mr. Brady, under oath, saying there would be no such e-mails
7 because he didn't know anything about this.

8 Again, I apologize. I know I strayed very far from
9 your question.

10 THE COURT: Yes, you did.

11 MR. KESSLER: But I think it is important to put this
12 all in context.

13 THE COURT: Even you understand why there would be so
14 much discussion about a phone which covered a period which they
15 are most concerned with which is the period of roughly November
16 2014 into March 2015, when this includes the time that is the
17 lead up time period to the game and includes the investigation
18 period after the game. You can understand why people would,
19 rightly or wrongly, draw the conclusion about, well, if we had
20 the phone, we can get to the bottom of this.

21 MR. KESSLER: I understand, your Honor, how this issue
22 out of context can be distorted and played or misunderstood
23 very well and I also understand, your Honor, I want to say
24 this, that if the league were to have concluded, as they did in
25 the case with Mr. Favre, for example, that because he refused

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1 to turn over his e-mails there should have been a fine, okay,
2 imposed which was what was imposed on Mr. Favre when he would
3 not cooperate in his investigation, of \$50,000. If that is
4 what had happened here we wouldn't be here. Okay? The problem
5 is it is more that the award seizes upon that to try to somehow
6 prop up the fact that there is no evidence or basis, legal
7 basis, for anything else that the Commissioner found.

8 THE COURT: Okay. I got it.

9 MR. KESSLER: Thank you, your Honor.

10 Just to answer your other questions?

11 THE COURT: I don't remember what it was.

12 MR. KESSLER: The ones to Mr. Nash.

13 We do think it would be beneficial and we have been
14 working on one more submission that the order allowed, and the
15 reason is the first time we have actually seen the NFL's
16 position in writing was in the brief that they filed last week
17 and so they've cited some new cases and other things that we
18 haven't had an opportunity to respond to yet. So, we are just
19 going to file an opposition brief, as your order provides, at
20 that time.

21 THE COURT: I forget the date that we set for that.

22 MR. KESSLER: You set it for this Friday, your Honor.

23 THE COURT: And, Mr. Nash, you are welcome to do the
24 same thing, if you wish to.

25 MR. NASH: Yes. Thank you.

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1 MR. KESSLER: And then you had set the 19th for oral
2 argument and I would hope, your Honor, by then you would have
3 read all of these different briefs and we can focus our next
4 argument on whatever questions you have coming out of the
5 briefs at that time, if that makes sense to you.

6 THE COURT: So, I would say I am pretty good, but.

7 MR. KESSLER: Okay.

8 THE COURT: Well, wait. So, you are talking about
9 filing on the 20th and then you want me to be ready to go --
10 no.

11 THE DEPUTY CLERK: No; the 14th, Judge.

12 THE COURT: The 14th to the 19th.

13 MR. KESSLER: The briefs are due the 14th and the
14 argument is scheduled for the 19th, according to your order.

15 THE COURT: So, do I have to read them on Saturday and
16 Sunday? Is that what you are saying? All right. We will
17 talk.

18 MR. KESSLER: We appreciate that we are putting a lot
19 of demands on the Court's schedule.

20 THE COURT: We will try and meet that schedule.

21 So, this was very helpful.

22 MR. KESSLER: Thank you.

23 THE COURT: So, what we are going to do now is talk a
24 little bit about resolution, if that's agreeable, still, to
25 both sides. So, here is the question: Do you want to have a

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1 lunch break or should we proceed right to do that?

2 MR. NASH: We would be willing to proceed.

3 THE COURT: So, we will adjourn today's conference, it
4 has been very helpful, and I will start with Mr. Nash and
5 Mr. Goodell, you are all welcome.

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Exhibit 4

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F8JTNFLA

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 NATIONAL FOOTBALL LEAGUE
4 MANAGEMENT COUNCIL,
5
6 Plaintiff,

7 v. 15 Civ. 5916 (RMB)

8 NATIONAL FOOTBALL LEAGUE
9 PLAYERS ASSOCIATION,
10
11 Defendant.

12 -----x

13 NATIONAL FOOTBALL PLAYERS
14 LEAGUE PLAYERS ASSOCIATION, on
15 its own behalf and on behalf
16 of TOM BRADY,

17 Petitioner,

18 v. 15 Civ. 5982 (RMB)

19 NATIONAL FOOTBALL LEAGUE and
20 NATIONAL FOOTBALL LEAGUE
21 MANAGEMENT COUNCIL,

22 Respondents.

23 -----x

24 August 19, 2015
25 10:05 a.m.

Before:

21 HON. RICHARD M. BERMAN,

22 District Judge

23

24

25

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

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13 DeMAURICE SMITH

HEATHER MCPHEE

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1 (In open court)

2 THE COURT: Nice to see you all.

3 I am tempted to make some comment about sketch artists
4 at the outset. Christine told me not to, keep it serious, so
5 I'll skip that conversation.

6 So here's where things stand. As all of you know, the
7 case has proceeded on two tracks since it got to federal court
8 a few weeks ago, and those two tracks are continuing, both
9 settlement discussions with the assistance of very able
10 Magistrate Judge James Francis and myself, and the legal
11 analysis goes forward by me.

12 You may remember I agreed at the outset to try to get
13 a legal ruling done before September 4, which is a pretty quick
14 turn around. That ties in with the start of the NFL season,
15 and that would be in the event that there is no settlement.
16 There is no settlement at this point, so even though it is a
17 quick turn around, my current plan is to meet that deadline.
18 But one prerogative of being the judge is you can't hold me to
19 it necessarily.

20 So I have continued my research into the legal issues
21 in this case. I continue to have an open mind about the
22 outcome, although I think I understand the record and the
23 issues in more depth than I did before, and I am still of the
24 view that there are enough strengths and weaknesses on both
25 sides which lead, in my opinion, all the more reason why a

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1 settlement seems like a logical and rational outcome; doesn't
2 mean it's going to happen, but that's my opinion.

3 Today is for the lawyers, the principals' appearance
4 was optional, and it is for the final what we call oral
5 argument of the parties' respective positions. You recall also
6 that there are cross motions here, motion by the NFL to confirm
7 an arbitration award, and a cross motion by the Players
8 Association on behalf of Mr. Brady to vacate that award. I may
9 have some questions during that oral argument. We'll switch
10 order today and have Mr. Kessler go first. Last time Mr. Nash
11 went first.

12 Following the oral argument, I will speak briefly
13 again with the lawyers privately. This will be about
14 settlement, and that will be off the record and that will
15 follow today's court session.

16 The next court appearance is likely to be August 31st
17 at 11:00 a.m. We'll talk about that schedule and some
18 flexibility, but I think that is the date that we will keep.
19 And that we will require that the principals be present, both
20 Mr. Brady and Mr. Goodell, at that court appearance.

21 So with that, let's start with Mr. Kessler.

22 MR. KESSLER: Thank you, your Honor, good morning.

23 THE COURT: Good morning.

24 MR. KESSLER: Your Honor, I'm going to start first
25 with the legal standard before you, because, as you know, the

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1 NFL's papers heavily, if not almost exclusively, revolve around
2 a single legal argument, which is that this Court should defer
3 to the arbitrator, who, according to the NFL, has virtually
4 limitless power, and the Court should basically defer to that
5 decision. So I want to spend a little bit of time on that
6 argument to start.

7 THE COURT: Just so you know, federal judges always
8 have a little difficult with deferring, but that is definitely
9 the legal standard.

10 MR. KESSLER: Thank you, your Honor.

11 The short answer to this entire point is provided by
12 the Second Circuit in the Leed Architectural Products case,
13 which I believe your Honor is familiar with because you
14 yourself have vacated a labor arbitration award within the last
15 four months.

16 So I'm not going to spend a lot of time on this, but
17 briefly, I think Leed says it all, and I'm quoting, "This great
18 defense, however, is not the equivalent of a grant of limitless
19 power. An arbitrator's authority to settle disputes under a
20 collective bargaining agreement is contractual in nature, and
21 is limited to the powers that the agreement confers. He may
22 not shield an outlandish disposition of a grievance from
23 judicial review simply by making the right noises, noises of
24 contract interpretation. Likewise, he may not dispense his own
25 brand of industrial justice."

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1 Your Honor, what we are arguing is that this case
2 fails the test laid out by the Second Circuit for where the
3 arbitrator is dispensing his own brand of industrial justice.
4 In fact, if you read the NFL's papers, what they basically say
5 is because Commissioner Goodell is the Commissioner, he is
6 entitled to dispense his own brand of industrial justice.

7 But the problem with that argument legally is that
8 there is a difference from his role as the disciplinarian at
9 the first level of discipline, which in this case he gave to
10 Mr. Vincent, when he can in fact say what he thinks is conduct
11 detrimental and make his determination, and the role at the
12 second level, which he's assuming here as the arbitrator where
13 he is limited by the law of the Federal Arbitration Act and the
14 Labor Management Relations Act. And this is not an accident,
15 it's because the NFL wants the protections of having an
16 arbitration, because otherwise your Honor knows we could sue
17 directly in federal court for a wrongful act. So they want the
18 protections of arbitration, they must also take the limitations
19 of arbitration that go with it.

20 So that is all I'm going to say about the standard.
21 We recognize it's our burden to show to you that we satisfy
22 that standard. I would note, your Honor -- and I was going to
23 hand this up, I won't -- there are at least 18 different cases
24 we cited in the Southern District or the court of appeals in
25 our brief in which arbitrations of this type have been set

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1 aside. And you can find all those citations in various
2 footnotes and parts of our brief on one of the grounds that we
3 have done.

4 So I will now move to the four grounds, your Honor,
5 and it's important to note that on any one of these four
6 grounds we believe the arbitration should be set aside. So if
7 we win on one of the four, we still think it must be set aside.
8 Obviously we only have to win on one, but your Honor, we
9 believe, should consider all four grounds if you find it
10 necessary to do so.

11 So ground number one: Is the essence of the agreement
12 based on lack of notice? And I want to start, your Honor, by
13 saying that there really is no dispute that notice is required
14 under this CBA. If you read the NFL's papers, they don't argue
15 that notice of both the discipline and the consequences is
16 required. Instead, they argue the notice has been provided.
17 And this is very significant, your Honor, because all of the
18 debate about law of the shop is really irrelevant now to this
19 issue because there's no dispute that some notice is required.
20 That goes back for 20 years under the CBA. So the question is:
21 Was it here?

22 So the first notice argument I want to address is the
23 generally aware issue, because I think, your Honor, this is
24 frankly the easiest part to concluding the notice wasn't
25 provided. Your Honor, as you know, Mr. Vincent, who was the

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1 disciplinary here, he issued the letter, and Exhibit 10 is
2 that letter, made it clear that he was imposing his discipline
3 solely based on the Wells Report's findings, not any other
4 findings. He testified that he did not do any factual
5 investigation of his own.

6 And the two findings of the Wells Report that he
7 seized upon was, number one, that Mr. Brady was generally aware
8 of inappropriate actions by others. Your Honor said: Do we
9 know what that means? We only know the words, we don't know
10 what that means, but we know it is not participation, it is not
11 supervised by, it is not directed, it is not Mr. Brady telling
12 someone to do anything. How do I know that? Because Mr. wells
13 testified to that. We did get to ask him that at the hearing
14 and he said no, he did not find any direction.

15 And number two --

16 THE COURT: Before you get to number two, you would
17 contrast the finding by Mr. Wells with the finding by
18 Mr. Goodell which would appear to be substantially broader than
19 a finding of general awareness.

20 MR. KESSLER: Yes, your Honor.

21 THE COURT: Indeed, he talks about a scheme, I think
22 he talks about participation, he talks about compensation, he
23 talks about knowledge, et cetera. So there is a bit of a
24 quantum leap, right, from the finding of Mr. Wells and the
25 finding of Mr. Goodell?

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1 MR. KESSLER: Absolutely, your Honor, and we believe
2 that quantum leap exceeded the Commissioner's authority as the
3 arbitrator on an appeal. And let me explain that argument,
4 because it's an important argument.

5 THE COURT: I interrupted you. Before you get to
6 quantum leap --

7 MR. KESSLER: The second point was there was also a
8 lack of cooperation, which I will address. In other words,
9 Mr. Vincent had two points, one was lack of cooperation and the
10 other was generally aware.

11 So your Honor has correctly pointed out that
12 Commissioner Goodell has very different findings or conclusions
13 in his award, and the question becomes: What does that mean
14 for the Court's analysis?

15 Well, of the first thing I would say, your Honor, is
16 that the Peterson decision, which is legally preclusive on this
17 issue, so they don't even get to relitigate this issue before
18 the Court because even though it's on appeal, as your Honor
19 knows, and they don't contest this, that in the Second Circuit,
20 like the Eighth Circuit, if you don't seek a stay, you are
21 legally precluded from challenging this. So the Peterson
22 decision found, in the case of Arbitrator Henderson, who was
23 sitting in the same Article 46 role as Arbitrator Goodell in
24 this matter, that Mr. Henderson had said I can justify the
25 discipline of Mr. Peterson under the old policy, because he had

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1 been disciplined by the disciplinarian under the new policy, so
2 therefore, even if you cannot apply the new policy
3 retroactively, I will justify it on that basis, we win, the NFL
4 wins.

5 Judge Doty ruled, and it's now conclusive on the NFL
6 in this case, that that exceeds the authority of the
7 arbitrator. And the reason is very simple, and there is
8 Supreme Court authority for this, an arbitrator can only decide
9 the issues presented to the arbitrator. What this is under
10 Article 46, and the language is very clear, is an appeal of
11 discipline. So what the arbitrator is deciding is was that
12 discipline correct or not; not is there some other discipline
13 that could be imposed or is there some other basis for it.

14 In fact, the way we know that, the only evidence
15 Mr. Goodell cites at the new hearing actually is Mr. Brady's
16 testimony itself, because nothing else even related to the
17 issue. Had we not called Mr. Brady, there would be no
18 evidence. And the reason I'm mentioning that, it shows you
19 that the appeal process is simply an appeal, it's not an
20 independent inquiry by the arbitrator to determine new facts.

21 And finally on this point, your Honor, and this is
22 very important, the NFL in its brief actually recognizes this.
23 At page 7 of the brief they filed last they state as follows:
24 Moreover, in no sense did the Commissioner depart from the
25 original basis for Brady's discipline as the union contends.

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1 What they end up saying is in concluding that Brady -- this is
2 the Commissioner -- knew about, proved up, consented to and
3 provided inducements in support of the ball tampering, which is
4 what the Commissioner found, the Commissioner confirmed the
5 initial basis for the discipline, this is their saying it,
6 "Brady's role in the use of underinflated footballs in
7 violation of longstanding player rules, as evidenced by
8 substantial and credible evidence, that" -- and here's the
9 punchline -- "he was at least generally aware of the actions of
10 the plaintiff's employees involved."

11 So when you circle all this back, what you come down
12 to is even they recognize all the Commissioner could do as
13 arbitrator was affirm or overturn the generally aware standard.
14 And the reason this is dispositive is the NFL does not even
15 contend there was any notice under any of the policies, under
16 conduct detrimental, under the player policies, under the
17 competitive integrity policy, that anyone told a player that
18 you could be punished for being generally aware that someone
19 else was doing something wrong.

20 As we note in our brief, it was be as if in the drug
21 policies the Commissioner had said the following: Well, taking
22 drugs, steroids, is also conduct detrimental, so in addition to
23 violating the drug policies, I think it's conduct detrimental,
24 and if you are generally aware that your teammate is taking
25 drugs, I could suspend you. I would suggest, your Honor, that

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1 decision would be contrary to essence of the CBA and the notice
2 provisions, and the same thing applies in this area.

3 If the NFL wants to -- I want to be clear, if they
4 want to publish new policies that players could be liable for
5 being generally aware, there would probably be a grievance
6 whether that's allowed under the CBA or not, but at least they
7 would provide notice to players. There's no notice of that.
8 So that's our first notice issue.

9 THE COURT: So bringing that to this case, so to
10 speak, so you're saying -- I guess you're arguing that the
11 Commissioner did not affirm the general awareness. He seemed
12 to come back to it in that statement that you read. So you're
13 saying it doesn't matter because there is no notice that
14 generally aware is an offense?

15 MR. KESSLER: That's correct, your Honor. In other
16 words, they lose either way. If their new position is he just
17 affirmed generally aware, they lose because there's no notice
18 of generally aware. If their alternative position is that the
19 Commissioner found new findings, Peterson is preclusive, he
20 can't make new findings. So either way they are blocked from
21 utilizing those findings as a substitute.

22 THE COURT: Got you. So before you said these are
23 different grounds, that if you win on one, so to speak, if you
24 are presenting the correct legal argument on one, it doesn't
25 matter what the others are. Is that your position now? If

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1 there were -- the Commissioner has its own point of view about
2 whether there was notice, but if there were no notice of the
3 generally aware or no ability of the Commissioner to come up
4 with the scheme that he did, what is the implication for the
5 award? Because as you know --

6 MR. KESSLER: The award would have to be set aside as
7 being contrary to the essence of the CBA because it didn't
8 provide the notice that everyone concedes is required under the
9 CBA. And number two, this is something that could not be
10 cured. So this would be the end of the proceedings if we win
11 on lack of notice, because obviously providing notice now is
12 going to be after the fact.

13 And I say, your Honor, we got to this point because
14 the NFL set up this structure. If they wanted to set up a
15 structure of generally aware, as I said, either it's allowed or
16 not allowed under the CBA, but they never tried to set up a
17 structure. And as you're going to see over and over again is
18 the problems with this award is it's trying to ignore all of
19 the obstacles that the NFL itself created to doing this.

20 Let me move on because I know I'm limited in time.

21 THE COURT: Go ahead, but wait, before you do, just so
22 I understand your position, another grounds that you're going
23 to come to is Mr. Brady's non-cooperation.

24 MR. KESSLER: Yes.

25 THE COURT: Last week when we spoke you acknowledged

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1 that Mr. Brady acknowledges that if he had to do that over
2 again, so to speak, there's merit to the non-cooperation
3 generally.

4 MR. KESSLER: Right.

5 THE COURT: So if there's no notice, as you point out,
6 in this very first step, what happens to non-cooperation?

7 MR. KESSLER: I will move to that now.

8 THE COURT: All right. If you are getting there, as
9 long as you cover it.

10 MR. KESSLER: I will go back to my other point, but
11 let me address your question now. Non-cooperation suffers from
12 the same fatal notice defect when we're talking about a
13 suspension for non-cooperation. So let me explain that point
14 very clearly.

15 THE COURT: But you're saying in your papers that
16 non-cooperation has its own notice requirement, right?

17 MR. KESSLER: Actually, your Honor, there's a problem
18 even at that level that I will get to.

19 THE COURT: I will agree with that, but does it fall
20 automatically if the no notice of generally aware falls? Does
21 that doom non-cooperation?

22 MR. KESSLER: No, I think I still have to address the
23 non-cooperation.

24 THE COURT: All right.

25 MR. KESSLER: So non-cooperation fails on notice at

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1 several levels, and let me explain that.

2 THE COURT: Its own notice.

3 MR. KESSLER: On notice. The first level it fails at
4 is that Mr. Wells testified that he never gave the player any
5 notice. He was very clear about this, in fact emphatic, that
6 there would be any consequences if he didn't turn over his
7 electronic information.

8 And the reason this is significant is that in every
9 other aspect of cooperation Mr. Wells said Mr. Brady was
10 cooperative. So while there is generally an understanding that
11 players have to agree to be interviewed, they have to
12 cooperate. Mr. Brady did all that. What there is not is any
13 specific notice ever given by the NFL specifically on this
14 issue of electronic communications.

15 And how do I know that? Judge, in this very case
16 there was another player on the team, the kicker, who also
17 didn't give his electronic communication that was asked for,
18 and there was no penalty imposed on the kicker at all. And
19 there's never been a case in the NFL where anybody has been
20 punished for failure to give electronic communications. So
21 there's a separate notice problem, and they could have cured
22 that. Mr. Wells could have said: Mr. Brady, I want you to
23 know that if you don't turn this over, the NFL might consider
24 this to be conduct detrimental in some way and fine you. But
25 he was never told that. So it's another thing where the NFL

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1 didn't provide the notice.

2 THE COURT: But isn't there a notice in the player
3 policy? I think you mentioned it in your earlier filing.

4 MR. KESSLER: Actually, your Honor, there is not.

5 THE COURT: Isn't there a requirement of cooperation
6 there?

7 MR. KESSLER: The requirement of cooperation in the
8 player policies are in the personal conduct policy.

9 THE COURT: Okay.

10 MR. KESSLER: The personal conduct policy specifically
11 does not apply to anything involving this type of an
12 investigation. So again, I think the player policies are very
13 important. I urge your Honor to look through Exhibit 114,
14 which is all the policies the players are given. It's
15 everything from game-related misconduct, uniform and on-field
16 policies, cooperation with the news media -- the press here
17 would be interested in that -- communications, personal conduct
18 policy, guns and weapons, substance of abuse, gambling, ticket
19 scalping, bounties. These are all the policies the players are
20 given. And your Honor is right, in the personal conduct policy
21 now, the new one, it specifically says if you don't cooperate
22 it will be conduct detrimental.

23 THE COURT: Right.

24 MR. KESSLER: Is there any such notice of any of these
25 policies that could be applicable to this conduct? The answer

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1 is no. Now again, whose failure is that? The NFL publishes
2 these policies. They give these policies to players so they
3 will have notice. It says on the bottom of them: To be
4 retained by player for the entire season. So they should know
5 about it. So this was their problem in not giving players
6 notice about it.

7 The other notice issue is even if I were to be found
8 wrong that there was somehow notice about electronic
9 communications, the problem is, as Commissioner Tagliabue ruled
10 in Bounty, that in his 40 years in the league, no player had
11 ever been suspended for obstructing -- and I use the word
12 "obstruct" specifically because Commissioner Tagliabue did --
13 obstructing or not cooperating with an investigation.

14 Why is this important? Mr. Nash argues, and as well
15 Commissioner Goodell distinguished Bounty; there was different
16 facts, the coaches were involved, so somehow you should defer
17 to that. Here's the problem with that: It's not that we're
18 arguing that Bounty is an on points case, that you can't
19 distinguish the facts, that's not the issue with Bounty, it's
20 that Commissioner Tagliabue, as the Commissioner for 40 years,
21 said that there is no history or notice of that principle of
22 this. He said I affirm Commissioner Goodell it was
23 obstruction, but I reversed Commissioner Goodell because there
24 was no notice that obstruction could lead to a suspension as
25 opposed to a fine.

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1 THE COURT: Wait, help me out here. I do have the
2 personal conduct policy dated December 2014 in front of me, and
3 it does seem to provide notice when a player is supposed to
4 cooperate with a league investigation.

5 MR. KESSLER: In a personal conduct investigation. So
6 let me be very clear, the league has a separate mechanism, and
7 its new policy, which is Exhibit -- the new policy for personal
8 conduct is Exhibit 125, because it's been updated, and it makes
9 it very clear there is a whole different set of procedures,
10 presumptions. There's a six-game minimum suspension, a whole
11 different set of rules, and it says "in these investigations."
12 So it has nothing to do with it. As you can see, the NFL has
13 numerous policies and investigations. So that's the problem.

14 Now in any event, even the personal conduct policy
15 doesn't say suspensions. So again, even if you thought the
16 personal conduct policy gave some notice that you have to
17 cooperate, there's nothing about suspensions. And that's
18 Mr. Tagliabue's observation as the Commissioner of the NFL for
19 17 years and outside counsel for another 30 years, I think, or
20 something like that. He said we never suspend for lack of
21 cooperation or for obstruction, so there can't be any notice.
22 And it doesn't matter if they distinguish the facts of Bounty,
23 they can't distinguish Commissioner Tagliabue's observation of
24 40 years of history.

25 THE COURT: In the document that I'm referring to, I

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1 don't know if it applies or doesn't apply, but on page 6 it
2 does say depending on the nature of the violation and the
3 record of the employee, discipline may be a fine, a suspension
4 for a fixed or indefinite period of time, a requirement of
5 community service, combination of three, et cetera, et cetera,
6 et cetera.

7 MR. KESSLER: Which document are you reading?

8 THE COURT: A document called "Personal Conduct."

9 MR. KESSLER: The personal conduct policy has its own
10 penalties, its own procedures, its own notice. So, for
11 example, this is basically domestic violence, it's --

12 THE COURT: Child abuse.

13 MR. KESSLER: It's off-field criminal behavior.
14 That's what that refers to. Nothing to do with the game. So
15 that's the issue.

16 So your Honor, the other reason I ask you to look at
17 this, this is the last one I will make about notice, is that if
18 you compare the league policies to the arguments they make
19 here, your Honor said: Well, is it ambiguous that the player
20 policies say first-time offense, fine, while some other parts
21 say it could be something higher?

22 I would suggest, your Honor, and if I had more time I
23 would do this with you, but if you go through all the aspects
24 of it you will see it's not ambiguous. What it does is, for
25 example, for a safety violation, safety, player safety, it

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1 actually make it clear to contrast that, and I will just do
2 this one, on page 18 of the personal conduct of the player
3 policies, it says the league has emphasized when circumstances
4 warrant, suspension even for first-time offenders is
5 appropriate. Contrast that with the specific statement two or
6 three times, two or three times that for equipment violations
7 involving competitive integrity -- I want to be very clear,
8 this is competitive integrity -- it says first-time offenses,
9 fines. And that's why the league does not claim to apply this
10 policy, because they can't apply this policy and impose a
11 suspension.

12 THE COURT: So you're saying player policies is the
13 one policy relating to equipment, uniforms, et cetera, which
14 might include deflating a game ball, is the one that players
15 are on notice of?

16 MR. KESSLER: Yes.

17 THE COURT: And if one is found to have violated that
18 policy and is a first offender, the maximum penalty is a fine,
19 is that right?

20 MR. KESSLER: Yes. And I will say two more things on
21 this. One is even the player policies don't say you could be
22 punished at all for being generally aware. So there's no
23 notice of that.

24 And number two, and this is important, the NFL's
25 argument -- and you will hear this from Mr. Nash -- is we don't

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1 need to rely on any policies because in the player contract it
2 says the Commissioner could decide what is conduct detrimental
3 and there could be a fine and suspension.

4 Let met easily demonstrate why that is wrong. The
5 Commissioner could come in tomorrow and say if you take
6 steroids that is also conduct detrimental to the league. The
7 Commissioner could not say that if you took marijuana, which
8 under the substance of abuse policy says for the first time
9 offense you get no penalty at all, you just go into a testing
10 program, he could not say because I have the power and you are
11 on notice of conduct detrimental that I could say instead of
12 you going just into a program, I'm going to say it's a game
13 suspension. In other words, once you put the players on
14 notice, everything in these policies that has specific fines
15 also could theoretically be conduct detrimental. So this is
16 the normal contract principle of New York that governs the CBA,
17 governed by New York law, which is the specific governs over
18 the general, and because they put in the fines -- this is very
19 important, your Honor, the fines in the player policies are
20 collectively bargained.

21 THE COURT: I understand that. So the direct question
22 is: Can Mr. Brady be fined under the equipment section of the
23 player policies in this case?

24 MR. KESSLER: He could be if the finding was not just
25 generally awareness but the finding was that he actually

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1 participated in altering his equipment, then as a first-time
2 offender he would be subject to the fine under the player
3 policies.

4 THE COURT: But within the context of this award, is
5 it possible for the Commissioner to fine Mr. Brady for
6 violation --

7 MR. KESSLER: I don't believe so because it's a
8 generally aware problem. That problem trumps all the other
9 problems on the notice.

10 THE COURT: You're saying he can't be punished at all
11 for ball tampering?

12 MR. KESSLER: Because of -- and remember, this wasn't
13 an accident. The Wells Report took five months of
14 investigation, spent millions of dollars, and Ted Wells, who I
15 have a lot of respect for as a lawyer, came in and honestly
16 said: You know what, I spent all this money, we did all this
17 work, I looked at, by the way, the electronic communications of
18 all the other employees, and all I could conclude was generally
19 aware. So that's -- this is not a problem in that Mr. Brady's
20 getting away with something, it's a problem that the facts did
21 not support, according to Mr. Wells, anything more. And the
22 Commissioner -- this again was the NFL's decision -- decided to
23 rely on Mr. Wells. Mr. Vincent could have done something else.
24 He could have said: You know what, generally aware is not
25 enough to discipline, but I'm not satisfied, I'm the

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1 disciplinarian, I'm going to put Mr. Wells aside and do my own
2 factual investigation. He had the authority to do that.

3 THE COURT: But he didn't.

4 MR. KESSLER: He could have called in Mr. Brady. He
5 could have called in Mr. McNally. He could have called
6 Mr. Jastremski. And Mr. Vincent could have made his own
7 findings recognizing generally aware was not enough, but the
8 NFL, again, chose not to do it. Over and over again it's the
9 consequences of their choices here.

10 Let me move on, your Honor, because I have some other
11 important articles. I'm afraid I'm straining the Court's
12 patience with time.

13 THE COURT: This is an important issue. As you point
14 out, the conclusion by Mr. Wells, or one of them, was as
15 follows: Based on the evidence, it is also our view that it is
16 more probable than not that Tom Brady, the quarterback for the
17 New England Patriots, was at least generally aware of the
18 inappropriate activities of McNally and Jastremski involving
19 the release of air from Patriots game balls.

20 So that's his key finding.

21 Now I read that, and I don't find any additional
22 comment, certainly not in that sentence, that the general
23 awareness relates to January 18, 2015 AFC game. I may be
24 making more of this than appropriate, but this says release
25 from Patriots' game balls. It does not say, which is the only

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1 finding that we're considering, is what happened in the AFC
2 game. Am I making too much of the absence?

3 MR. KESSLER: No, your Honor, I think that is an
4 outstanding observation. Because what has been lost here, and
5 your Honor is quite right to point this out, the discipline was
6 only with respect to this game. And the reason that's
7 important is much of the evidence cited by Mr. Wells, even for
8 the generally aware finding, has to do with events that have
9 nothing to do with the AFC championship game. And again,
10 Mr. Vincent could have looked at that and said: I need to do
11 more examination, I need to call more witnesses. But he did
12 not at that point.

13 And again, perhaps Mr. Wells did not get a clear
14 direction on his mission. So for example, we know he testified
15 that he thought he was proceeding under only the competitive
16 integrity policy, and that's the only policy he knew about, and
17 it was only the day of the hearing when he testified because I
18 informed him and he heard Mr. Vincent's testimony that the
19 first time anyone told him from the NFL: By the way, that
20 policy doesn't apply to players. So there could really be a
21 disconnect between what Mr. Wells thought he was looking at
22 versus what actually ends up being the discipline that
23 Mr. Vincent is applying. That's the leap, that's the chasm
24 they can't jump over.

25 Let me move, your Honor, now, if I can, to the second

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1 important point, which is the failure to have standards and
2 what this means, because we didn't get to discuss this yet, and
3 I think this is critical. Your Honor, I don't have the time to
4 read the testimony, but Mr. Vincent, Mr. Wells, Mr. Caligiuri,
5 their expert from Exponent, and all the other experts from
6 Exponent, said over and over again under oath that there were
7 no standards, there were no protocols for measuring pressure in
8 footballs either before the game started or after the game
9 started.

10 The consequence was, according to Exponent, their own
11 expert, and Mr. Wells said this, too, they didn't collect the
12 right information. What the problem was, no one at the NFL
13 knew about the ideal gas law, which is surprising because I
14 think I studied that in ninth grade chemistry. I could be
15 wrong, but I think I did. And the basic principle was when you
16 go from a cold locker room to a warm environment, you always
17 lose pressure. If you go from a dry ball to a wet ball, you
18 always lose pressure. So therefore, thousands of footballs in
19 the NFL over the years have been below the 12.5 standard. I
20 could state that as a matter of certainty. How do I know?
21 Because there are thousands of footballs that were put out
22 there which naturally lost pressure. And no one tested them.
23 There had never been, to my knowledge, any ball tested at
24 halftime in the history of the NFL.

25 So what do the experts do? They said we have to make

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1 assumptions. That's what experts do. But assumptions doesn't
2 mean it's a fair and consistent basis for discipline. And let
3 me show your Honor, I made one demonstrative I would like to
4 ask Mr. Greenspan to please hand out, which I think brings this
5 point home in a way, frankly, that sometimes when you're
6 preparing for argument things click in a way that they don't
7 when you're writing your briefs.

8 And I call this chart Angels Dancing on the Head of a
9 Pin. And what this does is it says let's look at what the
10 NFL's experts said. So none of this is me. What the NFL
11 experts said in Table 11 is here is the actual measurements
12 that they believe of the Patriots' balls at halftime. That's
13 what table 11 is. And your Honor could see, depending on which
14 gauge you think it was, we'll take the worst case for Tom
15 Brady, the worst case for Tom Brady is 11.09 on average, that's
16 their average. So giving every benefit of their assumptions
17 it's 11.9.

18 Then look at what they say many pages later in their
19 report, and I'm quoting their report again, they say they do
20 all of their assumptions for time, for temperature, for
21 wetness, and they say these are the assumptions we're adopting,
22 and they go these equations -- this is their expert -- predict
23 the Patriot balls should have measured between 11.52 and 11.32
24 at the end of the first half. So let's start with that. Not
25 at 12.5. Their assumptions are it was going to go down from

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1 12.5 to 11.52 and 11.32.

2 Then it occurred to me as I'm preparing this argument,
3 how much of a difference is that? And what it turns out, it's
4 one or two-tenths of a difference of PSI. What does that mean?
5 It means how much do you think we have to alter the assumption
6 to overcome one or two-tenths of PSI. It means their
7 conclusion is Mr. McNally, the attendant, went into the
8 bathroom to lower the PSI one or two-tenths of a PSI. I would
9 say, your Honor, even the NFL would not contend that a
10 quarterback could even feel the difference of one or two-tenths
11 of PSI, let alone in making a difference in play.

12 So what you have here, it would be as if you were a
13 traffic cop and they stopped you and said you have been going
14 one mile over the speed limit, you are getting a ticket. How
15 do you know that, Officer? Did you have a radar gun? No. Did
16 you have some other measure to test? No. How do you know?
17 Well, I watched your car go, and I called one Mississippi, two
18 Mississippi, three Mississippi, and I can tell that means you
19 were one mile over. That would be thrown out of court because
20 you would say there's no fair and consistent basis to determine
21 discipline.

22 And so here we have a situation where, again, it's the
23 NFL's decisions. They could have had standards, they could
24 have measured temperature, they could have required all balls
25 to be measured at halftime.

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1 THE COURT: Because we are running short, so this
2 obviously goes to the tampering issue, this is another basis
3 why he can't -- you're saying he can't be --

4 MR. KESSLER: But I can't question the facts, so what
5 I am questioning is something else. They're going to say I'm
6 arguing the facts here. I'm not. What I'm saying is that
7 because there were no procedures they couldn't meet the
8 admitted CBA tests of fair and consistent discipline because
9 there are going to be hundreds of other players who may have
10 balls that are lower or higher, nobody knows. We don't know
11 what the Colts' balls would be if you tested them this way.
12 They never tested all the Colts' balls, they tested four of
13 them. We know a Colts ball official took one of the balls, the
14 so-called twelfth ball, and by the way, violated the rule by
15 tampering with the ball during the game. He wasn't
16 disciplined.

17 The point here is this has never been a serious issue
18 for this league. And they could decide today, they could
19 decide -- Commissioner Goodell could say I'm publishing a new
20 competitive integrity policy, we're going to test balls, we're
21 going to measure temperature, we're going to do it at halftime,
22 but he can't do it after the fact. That's my second point.

23 THE COURT: So you're saying this is a legal issue.

24 MR. KESSLER: Correct, because the league concedes --
25 it's in his opinion, Commissioner Goodell says I concede that I

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1 have to be fair and consistent in my imposition of discipline.
2 He concedes that's under the CBA. I'm saying as a matter of
3 law where it is undisputed that there were no standards and
4 tests put into place -- because I argued before it would be
5 like in a drug program if you just sent me into the locker room
6 and said to player I don't know, piss in a cup. What am I
7 going to do with it? We have procedures. We have pee samples.
8 We have testing. And if you don't follow those procedures,
9 guess what, there's no discipline, because there has to be a
10 fair and consistent method.

11 The third ground, I want to talk briefly about evident
12 partiality. And this ground, your Honor, their basic argument
13 is that well, we agreed to the Commissioner, and he is
14 inherently biased, so stop crying about it.

15 THE COURT: That's not what he said. Aren't you going
16 to talk about the notes and Mr. Nash or not?

17 MR. KESSLER: Yes, you're right. I will come back to
18 fundamental fairness. I want to argue first about evident
19 partiality.

20 On evident partiality, our argument is as follows:
21 Even when you agree to an arbitrator who has an inherent bias,
22 as we did here in the CBA, there's no dispute about that, what
23 the case law says, and I refer you to the Bettman case that was
24 decided in this Court, as well as the Virginia Squires case
25 that was decided in this Court, and the New York State Court

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1 Morris Shuler case that you don't agree to unexpected things
2 happening where the arbitrator's own conduct becomes part of
3 what he has to decide.

4 So this happened here because there was a very
5 significant issue as to whether or not Mr. Goodell improperly
6 delegated his first-level disciplinary authority to
7 Mr. Vincent. And we wanted witnesses on that point. We wanted
8 Commissioner Goodell to testify on that point. We wanted
9 Mr. Vincent to testify on that point. We wanted to develop a
10 fact record.

11 And what Commissioner Goodell did, before we even got
12 to the hearing, was he said: I know what happened. Of course
13 he knows what happened. Here's what happened. That's not
14 delegation. I did not violate the CBA. An arbitrator can't
15 rule on that. And here's how I know this is correct: In the
16 Rice case, Commissioner Goodell himself said I will step aside
17 because my conduct is at issue, and he had Judge Jones do this
18 himself.

19 THE COURT: Judge Jones served as the arbitrator.

20 MR. KESSLER: Correct. And he said I'm recusing
21 myself. And the reason that's significant is he recognizes
22 there are cases where we haven't consented to his bias that he
23 must recuse.

24 And to me, this is the clearest possible case. This
25 wasn't a frivolous argument we made up, your Honor. We have

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1 pending an arbitration agreement before a neutral arbitrator as
2 to the limits of the delegation of the Commissioner's
3 authority. This is a very serious in the CBA. He didn't let
4 us make a record and summarily dismissed it.

5 And the second thing he did is he again confuses his
6 roles. Once he became the arbitrator he wasn't supposed to
7 come out and publicly proclaim his views on this. I'm sorry,
8 when you become an arbitrator you have to step back. He didn't
9 step back. Instead, he went out and issued a press release
10 after the Wells Report saying how comprehensive and thorough it
11 was. And so the question is having done that, he now -- how is
12 he going to issue a decision saying, "Guess what, I think the
13 Wells Report was wrong," which was the issue before him as the
14 arbitrator.

15 So he just -- and the reason this is so perplexing is
16 this was the reason he stepped aside in Bounty. He knew this.
17 So he knew the history because in Bounty he actually went on
18 ESPN, I believe, or some TV show and gave interviews, and even
19 he recognized I better step aside, and he let Paul Tagliabue
20 decide this.

21 And the question is we have to have -- his power is
22 not limitless, it is limited by the Federal Arbitration Act,
23 the Labor Management Relations Act and the CBA. And that's
24 what he has to understand in terms of this. That's evident
25 partiality.

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1 My last argument is fundamental fairness.

2 THE COURT: In leaving this for last, do you think
3 it's of less significance?

4 MR. KESSLER: No, it's just that I have to order them
5 somehow, and I debated all night which order to use. So you
6 could put this one first because we win on any one of them.

7 So on fundamental fairness, even they concede, because
8 the Second Circuit authority says you have to have access to
9 relevant evidence to be able to be present your case, there's
10 no dispute, they don't deny that. Again what they deny is that
11 didn't happen.

12 And so what did they deny us here? First and most
13 importantly, the whole factual issue at the hearing was whether
14 the Wells Report's findings were correct. Why? Because that
15 was the basis for the discipline, according to Mr. Vincent.

16 How could we attack the Wells Report? We didn't have
17 access to any of their underlying materials. We couldn't get
18 them. And the NFL did. Why do I say the NFL did? Because lo
19 and behold, Mr. Wells' partner shows up as the person who
20 cross-examines Tom Brady, the only person who cross-examined
21 Tom Brady, the only person who cross-examined our experts, and
22 those were our witnesses.

23 It's true Mr. Nash cross-examined Mr. Wells and
24 Mr. Birch, who he called as adverse witnesses, but Paul Weiss
25 was the lawyers, and Mr. Wells said yes, I'm being paid for

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1 this, or his words were I hope I'm being paid for this, and he
2 said yes, I understood they're our client in doing this. So
3 they had all these materials and we didn't.

4 THE COURT: You're talking about, to be clear,
5 Mr. Reisner now, Lorin Reisner.

6 MR. KESSLER: Correct, Mr. Wells' partner, who was the
7 co-author of the Wells Report.

8 THE COURT: Got it. And he cross-examined some of the
9 key witnesses and did some direct as well and he, you're
10 saying, because he's a partner of Paul Weiss, had access to
11 these investigation notes.

12 MR. KESSLER: In fact they were his notes.

13 THE COURT: You didn't.

14 MR. KESSLER: That's correct. All the underlying fact
15 information.

16 So what Mr. Nash says is he -- in fact, it's peculiar,
17 because he cites Judge Jones for this, he says well, in Rice
18 Judge Jones somehow said you don't get that type of discovery
19 under this CBA, and here's why that's wrong. So this issue
20 first came up in Bounty, and in Bounty we asked for the
21 investigator notes, and the NFL said no, the CBA doesn't
22 provide for them. And Commissioner Tagliabue said yes, it's
23 required for fundamental fairness, and so the notes were all
24 turned over in Bounty.

25 In Rice the NFL, when we asked for the notes in Rice,

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1 just gave them to us because they knew they lost in Bounty. So
2 we never presented to Judge Jones the issue of whether we were
3 entitled to the investigator notes because the NFL voluntarily
4 turned them over.

5 So what Judge Jones was called to decide was two
6 issues. One is should she compel testimony of witnesses to
7 give us a chance, and she did, she compelled in particular the
8 testimony of Commissioner Goodell in Rice, who they refused and
9 resisted, and she said no, Commissioner Goodell must testify,
10 he's an essential witness. Number two, we did lose on one
11 point, we asked for documents from the Ravens, not from the
12 NFL, a team. And Judge Jones ruled well, that she thought was
13 beyond what was contemplated in the discovery. That had
14 nothing to do with this fundamental right to get the basis of
15 the discipline. In other words, the Ravens facts had nothing
16 to do with the discipline being imposed, so I understand that's
17 a decision of the judge. So we think we were absolutely
18 entitled to that.

19 Number two, Mr. Pash's testimony, Mr. Goodell's
20 testimony, and Mr. Birch's testimony. We were entitled to
21 Goodell and Birch on the issue of delegation. We were
22 precluded from making any fact record on the delegation issue.
23 In fact, the reason, your Honor, you could say why am I not
24 arguing delegation to you? I was never able to present it
25 below. I have no record. I have no facts. All I have is

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1 Commissioner Goodell's testimony and his pronouncement that as
2 the arbitrator I find I am credible and I'm telling the truth
3 and I did nothing wrong. That's Commissioner Goodell's finding
4 about himself.

5 So I didn't get Goodell's testimony, which I asked
6 for, he refused. I didn't get Mr. Birch -- sorry, Mr. Vincent
7 to testify about the delegation. He let me cross-examine
8 Mr. Vincent about the lack of procedures, what happened on the
9 game day on the AFC championship, but he never let me examine
10 him at all on delegation.

11 And finally, with respect to Mr. Pash, so Mr. Pash --
12 again, the NFL makes their own bed and they don't want to lie
13 in it. They announce to the world Mr. Pash is the co-lead
14 investigator in the Wells Report. That was their press
15 release. It's written in the Wells Report. That was their
16 decision. I then said okay, you're giving me Ted Wells'
17 testimony. First they said no, by the way, your Honor, and I
18 found out the day of the hearing, yes, which is nice for a
19 litigator, but I go in terms of that, and they said okay,
20 you'll get Mr. Wells today.

21 But Mr. Pash, they said well, we don't have to provide
22 him because he didn't really do anything. Well, in all due
23 respect, I'm entitled to probe that factually in a
24 fundamentally fair hearing. So I asked Mr. Wells about this,
25 he said he knows Mr. Pash made comments. Mr. Wells didn't know

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1 what those comments were. Why? Because he probably gave them
2 to Mr. Reisner or one of the other associates or people at Paul
3 Weiss. So Mr. Wells sort of isolated himself. He didn't even
4 know how much those comments affected what was in there or not,
5 nobody knows because there was no record, or what other
6 involvement he had. Mr. Wells said he was a facilitator. What
7 did he facilitate?

8 THE COURT: Well, Mr. Pash, as I understand, he's a
9 very senior executive in the NFL, also a Harvard-trained
10 lawyer, former partner at Covington & Burling, et cetera, and
11 if I'm not mistaken, instrumental in negotiating the collective
12 bargaining agreement in 2011.

13 MR. KESSLER: Yes.

14 THE COURT: So he would be someone who would be
15 expected to have the kind of information that would have helped
16 you in this.

17 MR. KESSLER: No question. And exactly for the same
18 reason Judge Jones said fairness required that we get
19 Commissioner Goodell's testimony in the Rice case, we should
20 have gotten Mr. Pash's testimony in this case. It could have
21 been very informative on many of the issues that came up here,
22 and it was denied.

23 So your Honor, to sum up, and I know I exceeded my
24 time, and I apologize for that. I will sum up by saying your
25 Honor asked at the last hearing where was the gate in

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1 deflategate. It's a good question. I don't know where the
2 gate is, but I'll tell you what I hope the gate is. I hope the
3 gate leads through this courtroom to a fair result under the
4 legal requirements of the Federal Arbitration Act, the LMRA,
5 and the CBA. That's all that we could ask for is that the NFL
6 comply with the rules. This happened in Bounty. It happened
7 in Rice. It happened in Peterson. It happened in Hardy. The
8 last thing I want to do, your Honor, is to keep fighting these
9 things. But until it becomes clear to the NFL that the gate
10 has to be to comply with the law and the requirements, I'm
11 afraid, again by their own decisions, they force us to take up
12 the valuable resources of the Court because we have to
13 vindicate the CBA rights.

14 Your Honor, again I apologize for taking all this
15 time.

16 THE COURT: No, we'll give the other side the same
17 amount of time.

18 One final question, the final question is this,
19 throughout the Wells proceeding, throughout the hearing and
20 throughout these proceedings, Mr. Brady has been steadfast in
21 his position that he did not -- was not involved in this
22 January 18 deflate situation. But last week you said that when
23 it came to the non-cooperation something to the effect that he
24 wished -- I think you said, and I think right now Mr. Brady has
25 concluded that it should have been done in a different way

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1 because in this proceeding he did everything that Mr. Wells
2 asked for. There was some acknowledgment, I thought, by you
3 then, last week, that he could have done better in turning over
4 his emails.

5 MR. KESSLER: Your Honor, what I was acknowledging was
6 not that he violated any CBA obligation, because I don't think
7 he did, but that had others been involved in counseling him, or
8 if Mr. Wells had said there is going to be consequences --
9 which he deliberately did not say -- for not turning this over,
10 then I know, in talking to Mr. Brady -- and he testified to
11 this, this is not attorney-client privilege -- he said if I
12 knew there were going to be consequences this way, if it would
13 become this issue, I would have turned it all over despite my
14 privacy concerns because, one, I didn't want the consequences,
15 and number two, there was nothing there.

16 That's why I said last time when you draw this whole
17 circle, there's nothing there, because we know they had those
18 texts. And we know, as you pointed out, most of the texts that
19 we looked at have nothing to do with the championship game. So
20 yes, if Mr. Brady was in a different spot, what he knows today,
21 I think he would have said let's turn this over and not make it
22 an issue. Because if it wasn't an issue, I don't know what the
23 NFL would have said in their brief.

24 THE COURT: And that covers the phone, too?

25 MR. KESSLER: Yes, no question about that. And

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1 remember, there was no arbitration pending yet, there was no
2 legal proceeding pending yet, he didn't receive anyone's advice
3 that oh, there's a pending case, as you would, as your Honor
4 knows in other situations, you have to preserve this.
5 Mr. Wells didn't say: Would you please preserve evidence. He
6 had no notice or understanding of that either, he just did what
7 he's always done, given the celebrity life that he leads.

8 THE COURT: Thanks.

9 MR. KESSLER: Thank you, your Honor.

10 THE COURT: You may have longer than you might have
11 anticipated. Take as much time as you need.

12 MR. NASH: Thank you, your Honor. Subject to your
13 Honor's questions, I don't think I will have as long, because I
14 think the answer to most of what Mr. Kessler had to say is
15 found in the legal standard that he can't disagree with, and
16 that is a disappointed grievant in a CBA arbitration, which is
17 what we have here, this was a disciplinary decision that was
18 issued in accordance with the collective bargaining agreement,
19 Mr. Brady was given, as I said last week and as we said in the
20 papers, all of the rights available to him under the CBA, we
21 had a hearing and the Commissioner issued a decision that is
22 final and binding.

23 Now Mr. Kessler says well, there are exceptions to the
24 general rule where the arbitrator imposes his own views on
25 industrial justice. The answer to that argument, your Honor,

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1 though, and I think the answer to virtually all of the
2 arguments that you just heard can be found in Commissioner
3 Goodell's award itself.

4 I'm not going to be able today to respond to all of
5 what I believe are misstatements of the record or disagreements
6 about how the various policies should be interpreted or
7 disagreements about the underlying facts, I am going to rely on
8 the findings that the Commissioner reached and which are
9 entitled to deference.

10 I will say this, though, I think Mr. Kessler's
11 presentation this morning proved the basic point that what we
12 are now doing is we are rearguing Mr. Brady's appeal. He is
13 asking you to stand in the shoes of the arbitrator. And for
14 example, he's even given you a new exhibit about the
15 measurements of the footballs and asking you to look at that
16 and make judgments about well, if there were different
17 procedures in place, maybe there would have been natural causes
18 for the conclusion of the deflation.

19 But what he's ignoring is we had a ten-hour hearing on
20 this, that he presented an expert witness on this and other
21 expert witnesses relied on and documented in the Wells Report
22 who also testified and Mr. Kessler also had the opportunity to
23 cross-examine. And following that hearing the Commissioner
24 made a conclusion based on that evidence, based on the entire
25 record, that the argument that he just asked you to accept and

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1 the exhibit that he just asked you to consider does not provide
2 any basis to alter the underlying conclusion that the balls
3 were tampered with.

4 And he did so in a reasoned decision, and based on,
5 simply put, the head of the physics department at Princeton
6 University who convinced him, based on his testimony and based
7 on all of the scientific analysis that was presented in the
8 hearing, that these explanations or these criticisms -- because
9 what really what you're hearing today are criticisms about how
10 things could have been done or should have been done. But what
11 happened at the hearing, the Commissioner reviewed the evidence
12 and made a judgment and made a judgment in agreement with the
13 evidence that was presented. Under the law, there's no basis
14 for the Players Association to come in here, whether they give
15 you a new exhibit or ask you to parse through the records or
16 look at this line in the testimony or this document, under the
17 law, they don't get to reargue that point.

18 Under the law, all that is required is that the award
19 that was issued by the Commissioner, the award that is under
20 review in this Court, is grounded in the collective bargaining
21 agreement. The Commissioner was reviewing the evidence and
22 making factual findings. The Commissioner was interpreting the
23 CBA and applying the CBA. The Commissioner considered
24 arguments that they made and, frankly, rejected them. He
25 considered their arguments about precedent in Bounty and others

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1 and did not agree. Those were judgments for the Commissioner,
2 and as long as he under the law is arguably, even arguably
3 applying those, those are final and binding.

4 THE COURT: It's also true he was relying on the
5 conclusions in the Wells Report, is that right?

6 MR. NASH: Yes, he relied on the conclusions in the
7 Wells Report, and he says this very explicitly in the award, he
8 relied on the entire record.

9 And to that point, your Honor, the question about I
10 think you said the leap from the Wells Report to the
11 Commissioner's judgment, let's be clear here, again this is
12 parsing that is going on. Mr. Kessler comes in and says look
13 at the original disciplinary letter and says it's based on the
14 Wells Report and it's just generally aware, and now somehow the
15 Commissioner exceeded his authority based on the evidence
16 presented at the hearing.

17 First of all, he's misstating the record. The Wells
18 Report also concludes, and I think it does so on page 9, not
19 only that Mr. Brady was generally aware, but that the actions
20 of the Patriots' employees would not likely have the occurred
21 without his knowledge and approval. That's in the Wells Report
22 as well.

23 But most importantly, under the CBA, the judgment
24 about Mr. Brady's culpability, his involvement in the ball
25 tampering, his knowledge and awareness and beyond was one for

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1 the Commissioner to make. And that was the entire purpose of
2 the appeal hearing. Mr. Brady was given the initial
3 disciplinary letter, his union representative filed an appeal,
4 he had his hearing, and following that hearing, as the
5 Commissioner says in his award, he made judgments based on the
6 facts and the discipline and based on the entire record. It
7 includes the Wells Report, but he is in no way limited to the
8 Wells Report. I find it astonishing that I think he's being
9 criticized here because he considered Mr. Brady's testimony.
10 Well, that was the point of the hearing. That was Mr. Brady's
11 opportunity under the collective bargaining agreement.

12 And this part is quite critical, this idea that the
13 only thing that happened here was that Mr. Brady was generally
14 aware is simply not correct as a matter of the findings in the
15 award. It's not correct -- it's not a correct description of
16 the Wells Report, I would suggest, but the responsibility of
17 Ted Wells and the Wells Report were to document the facts, and
18 the appeal hearing was Mr. Brady's opportunity to put in
19 whatever facts he wanted, and from there the Commissioner was
20 entitled to make a judgment based on the entire factual record.
21 To say that he somehow exceeded his authority by relying on
22 Mr. Brady's testimony in confirming his conclusion -- and let's
23 be clear about their arguments about Peterson and the exceeding
24 authority, the question on appeal here, they have no legal
25 support for that. The only legal support they offer is the

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1 Peterson case and, your Honor, I would submit that their
2 description of the Peterson case is not applicable here even if
3 you accept it.

4 But under the law, an arbitrator's authority is --
5 he's right it's a creature of contract, and here the
6 Commissioner's authority is not only to impose the discipline
7 in the first place, but also to consider the appeal and issue a
8 final and binding award. And he did exactly this. He
9 exercised his authority. He gave Mr. Brady his opportunity for
10 appeal. He listened to the testimony, he considered all of the
11 evidence, and then he made a judgment to affirm the discipline.
12 There is no question that affirming the underlying discipline
13 was well within his authority as an arbitrator under the Labor
14 Management Relations Act, and they have no support to the
15 contrary.

16 But as to this notice issue that they keep saying that
17 is the critical issue, I think one of the critical issues, I
18 think there are a lot of issues that were described as critical
19 by Mr. Kessler, the problem with their entire argument is it is
20 a question of fact and it is a question of interpretation of
21 the collective bargaining agreement.

22 And I noticed a number of times in his argument that
23 Mr. Kessler rarely described the award itself. He would say
24 things like well, the NFL argues he had notice, or the NFL
25 argues you should look at it this way. Well, yes, that's what

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1 we argued in the appeal. But what matters here is not what I'm
2 arguing or not even what Mr. Kessler is arguing, because we're
3 not here to retry the arbitration, what matters here is what
4 the Commissioner found.

5 And on the issue of notice, he issued a clear,
6 reasoned, thorough opinion based on his assessment of all of
7 the record evidence, including Mr. Brady's testimony, and he
8 concluded Mr. Brady was well on notice. He concluded that
9 Mr. Brady was involved. He did not believe Mr. Brady. That is
10 what arbitrators do, they assess credibility.

11 I was somewhat surprised in the papers that the
12 Players Association filed on Friday that one -- a number of
13 their arguments were well, Mr. Brady denied it under oath, or
14 it's just generally aware that's not enough evidence. Well,
15 no, if you read the award, the award carefully goes through the
16 fact that the Commissioner considered that and did not believe
17 Mr. Brady. He did not believe the explanations for the text
18 messages that showed, despite Mr. Brady's denial that he didn't
19 know Mr. McNally or didn't know who he was and never told
20 anybody about his -- never cared about the ball pressure.

21 In fact I think one of the most interesting aspects on
22 credibility at the hearing was Mr. Brady said he never really
23 thought about ball deflation. It wasn't really an issue for
24 me. And yet there was substantial evidence to the contrary.
25 There were the texts. Probably the most direct piece of

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1 evidence on this point was the text from Mr. Jastremski to
2 Mr. McNally saying that Mr. Brady brought him up and said: You
3 must be under a lot of stress getting them done. Mr. Wells and
4 the Commissioner here as well concluded that he was talking
5 about the fact that Mr. Brady was aware that Mr. McNally was
6 the deflating the footballs.

7 Now we can argue about how to interpret that text. I
8 suggest it's pretty clear evidence. In considering that,
9 consider one other thing: Mr. McNally had no responsibility
10 for preparation of the game balls. This is all in the Wells
11 Report, it's explained in the Commissioner's award. He had no
12 responsibility. His responsibility was to carry the footballs
13 next to referee and bring them out.

14 If that's so, why would Mr. Brady be telling
15 Mr. McNally, boy -- Mr. Jastremski, boy, McNally must be having
16 a lot of stress getting them done. Certainly, your Honor, it
17 is a reasonable inference for both Mr. Wells in the first
18 instance, but most importantly for the Commissioner in his
19 award to reach the conclusion that Mr. Brady was not just
20 generally aware, he was involved.

21 THE COURT: He was involved on January 18, 2015?

22 MR. NASH: Absolutely, your Honor.

23 THE COURT: So I asked the same question of
24 Mr. Kessler. When Mr. Wells says that he was generally aware,
25 et cetera, et cetera, he does not say in that sentence of what

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1 happened on January 18, 2015. Mr. Goodell clearly does.

2 Right?

3 MR. NASH: I don't think that's a fair reading of the
4 Wells Report.

5 THE COURT: That's going to be my question. You think
6 that sentence does mean January 18, 2015 by Mr. Wells?

7 MR. NASH: Absolutely.

8 THE COURT: Why doesn't it say that? He's a pretty
9 smart guy, Mr. Wells, I think we all agree, and he says --
10 let's get it exactly right. He says more probable than not
11 that Tom Brady was at least generally aware of the
12 inappropriate activities of McNally and Jastremski involving
13 the release of air from Patriot's game balls.

14 To me what is conspicuously absent from that sentence
15 is his finding or a finding without any specific reference to
16 January 18, 2015 game. You think I'm misreading the sentence?

17 MR. NASH: I think you can't read that one sentence.

18 THE COURT: So where else does Mr. Wells say that
19 Mr. Brady was generally aware of what they did on January 18,
20 2015? Anywhere?

21 MR. NASH: I would suggest that that is the only
22 logical interpretation or understanding of the sentence that
23 you just read. The entire investigation at the very beginning
24 of the report says that the whole purpose of the investigation
25 was to determine whether the footballs used in the AFC

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1 championship game, a very significant game, were purposefully
2 deflated, and who was responsible.

3 He then goes on to make a number of findings about the
4 activities of Mr. McNally and Mr. Jastremski relevant to that
5 game. Mr. McNally going to bathroom. Now I understand, and
6 you asked this question last week, well, he also noted the
7 evidence about the texts that were before the AFC championship
8 game. But that is certainly evidence that supports the idea
9 that when Mr. McNally, for example, went into the bathroom
10 completely out of protocol, that he was carrying out the
11 activities probably that had been done before, but in any
12 event --

13 THE COURT: That's a bit of a problem, too, "probably
14 been done before," some guy from the Colts say they do it all
15 the time, all that stuff, that's not what's found here. What's
16 found here is that an infraction occurred on January 18, 2015.
17 And I may be misreading, but all I'm trying to point out, to
18 me, and maybe this is a misread, but I think that it's
19 conspicuously absent from Mr. Wells' finding that there's no
20 reference in that key finding, the January 18, 2015 game.
21 Mr. Wells knows better than anybody that that's the game under
22 consideration. And I'm just saying, at least that's the way it
23 struck me, why wouldn't you say -- he's a smart lawyer -- on
24 January 18, 2015.

25 And the reason you can, I'm sure, and everybody is

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1 entitled to interpret it differently, and maybe mine is the
2 minority interpretation, that the report is all about that game
3 and that's what is implied there, but the Wells Report goes
4 back to a Jets game in October 2014 and it goes back to a lot
5 of incidents, so does that finding of generally aware
6 specifically embrace the January 18, 2015 game? You say it
7 does. I say I have some pause because I think the kicker --
8 not the kicker in football sense, but the real point here, or
9 at least the question that I have in my mind is why didn't he
10 say on January 18, 2015?

11 MR. NASH: I would suggest if you read the
12 introduction of the Wells Report he explains what he was tasked
13 to do.

14 THE COURT: I know it.

15 MR. NASH: And when he makes the conclusion that you
16 just cited and he's talking about the inappropriate activities
17 of Jastremski and McNally, he's talking about the factual
18 findings that he just reviewed in his report about the day of
19 the AFC championship game.

20 It's true that he relies on other evidence, but that's
21 evidence including months earlier of Mr. McNally calling
22 himself a deflator, saying I haven't gone to ESPN yet. He's
23 not making a finding that it happened six months earlier, but
24 what he's saying is, and I think it's certainly reasonable, and
25 this is I think well documented in the report, that kind of

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1 text evidence certainly supports the view that on the day of
2 the AFC championship game when Mr. McNally went into the
3 bathroom he was carrying out that plan.

4 THE COURT: You have to infer that.

5 MR. NASH: Sure, but I think the evidence is pretty
6 direct on that. And I think what really matters is, again,
7 it's not what Mr. Wells found, what really matters is what
8 Commissioner Goodell found in his award.

9 THE COURT: I get that.

10 MR. NASH: And he was clearly convinced that on the
11 day of the AFC game that Mr. Brady was aware of and had
12 knowledge of that activity and should be held responsible.

13 THE COURT: So what did he know that Mr. Wells didn't
14 know that makes -- if he wrote that sentence, and he did,
15 Mr. Goodell, he said on January 2, 2015, what was the
16 difference between what he knew, Mr. Goodell, and what
17 Mr. Wells knew?

18 MR. NASH: I'm not sure I would describe it as a
19 difference, he had the opportunity to make the judgment based
20 on the entire record and to consider Mr. Brady's explanations.
21 Again, as I just said, in a number of places in the award
22 Commissioner Goodell finds Mr. Brady's explanations not to be
23 credible. And he did so, your Honor, based on his assessment
24 of Mr. Brady's credibility based on his experience as the
25 Commissioner of the NFL, which is what arbitrators do all the

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1 time.

2 THE COURT: I get that. Is there a particular
3 question that was asked of Mr. Brady at the hearing about
4 January 18, 2015 that Mr. Goodell disbelieved?

5 MR. NASH: Yes, that he denied any involvement, that
6 he denied ever really caring about the inflation level of the
7 football, that he basically had a complete denial that this
8 ever even occurred to him.

9 THE COURT: But he denied that he didn't do anything
10 wrong on January 18, 2015, right?

11 MR. NASH: Right.

12 THE COURT: Is there any particular basis to
13 disbelieve that?

14 MR. NASH: I think it's very well documented in the
15 award itself. The Commissioner makes the judgment based on
16 that is just not believable for a 14-year quarterback in the
17 NFL to come in and say: I only really care about the texture
18 of the football, I don't care about the inflation, I never told
19 anybody. Yet there's evidence from Mr. McNally -- who
20 Mr. Brady said he didn't know who he was -- that Mr. Brady told
21 me what he preferred for ball inflation. There was evidence in
22 the record in the Wells Report that the game official, Walt
23 Anderson, an experienced game official, when he arrived at the
24 AFC championship game that morning he already knew Tom Brady's
25 inflation preference at the low end at 12.5.

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1 THE COURT: But that's entirely legal, right? If a
2 quarterback has a preference for a 12.5 inflation, there's
3 nothing wrong with that, is there?

4 MR. NASH: No, no, no. It's interesting that you were
5 just talking about inferences, and I agree that -- and we
6 talked about this a little bit last week, we don't have a text
7 from Mr. Brady saying do this.

8 THE COURT: I'm not drawing inference.

9 MR. NASH: But you can draw reasonable inferences
10 based on this evidence.

11 THE COURT: If the quarterback said I have a
12 preference for 12.5 inflation, you think you can draw an
13 inference from that that he engaged in misconduct? That's
14 perfectly legal. That's the reason for the league rules of
15 12.5 to 13.5.

16 MR. NASH: No, my point, your Honor, is that he didn't
17 have a preference. He didn't know where he picked 12.5. He
18 didn't really think about it. And he considered all that and
19 said you know what, that's -- your story is not matching up
20 with all the evidence.

21 And there's one last very important point that
22 happened at the hearing that Mr. Wells did not have. Now
23 Mr. Wells did say -- he testified to it and he documents this
24 in his report -- that Mr. Brady's failure to cooperate was very
25 troubling to him. It was very troubling to the Commissioner.

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1 And what he learned at the hearing is that the evidence
2 actually had been destroyed.

3 Your Honor, an arbitrator -- it certainly does not
4 exceed his authority, and it certainly can't be his own brand
5 of industrial justice to draw an inference that when somebody
6 destroys evidence that they knew was being requested, that an
7 inference can be drawn, and it confirms the failure to
8 cooperate. So these are things that arbitrators, your Honor,
9 do all the time.

10 And again, I would suggest that the discussion that
11 we're having now is the kind of discussion that we might have
12 in an arbitration hearing and we did have at this appeal. And
13 this is why I started with what I said when I started, it's
14 very difficult for me to come and stand up here today and
15 respond to each and every what I believe are factual
16 misstatements. The record is clear. The record -- the answers
17 are in the award is what I would say about that.

18 THE COURT: Fair enough.

19 MR. NASH: And your Honor, on the idea that the
20 discipline that was imposed here and Commissioner Goodell's
21 affirmance of it was not fair and consistent, both on the
22 question of notice and on the question of fair and consistent,
23 Commissioner Goodell certainly applies those principles. He
24 certainly goes through the arguments that you heard. He makes
25 judgments. He doesn't agree that this is a mere equipment

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1 violation. You had a discussion about the policy, how do you
2 read this policy about equipment violations.

3 I have responses to that. I think it was Exhibit 114.
4 One of my responses is that Mr. Kessler is just reading part of
5 it. I think you noticed it says -- on the very first page of
6 Exhibit 114 it acknowledges the Commissioner's authority to
7 impose discipline for conduct detrimental, including
8 suspensions.

9 On page 20, the page of Exhibit 114 that they rely on,
10 which is a fine schedule, in the very first paragraph it says
11 these are minimums, and depending on the facts, they could
12 be -- the discipline could be much more serious. So the idea
13 that that document can now -- we could argue about how to
14 interpret that document.

15 THE COURT: What does the sentence that says that for
16 a first offense it's limited to a fine, what does that mean?

17 MR. NASH: It says the first offenses will be fines,
18 but also before it says that -- it makes clear that these are
19 minimums. First of all, on page 1 of the document it
20 reinforces the notice that the Commissioner relied on that is
21 in Mr. Brady's player contract, it's in the CBA, that players
22 are all on notice, that they're subject to discipline,
23 including suspension, including banishment from the league for
24 engaging in conduct detrimental, conduct that affects the
25 integrity of the game, and says up to and including suspension

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1 and banishment from the league.

2 And then on page 20 --

3 THE COURT: Is this in the award?

4 MR. NASH: No, I'm sorry, I'm reading from their
5 Exhibit 114, the document that Mr. Kessler was talking about.

6 THE COURT: Which is entitled what?

7 MR. NASH: Entitled "Player Policies." I think you
8 were referring to them earlier. But even the page that they
9 rely on in the very beginning says: Fines listed below are
10 minimums. Other forms of discipline, including higher fines
11 and suspension, may be imposed.

12 So the point isn't that you need to resolve how to
13 interpret this document. Even if you accepted Mr. Kessler's
14 arguments about it, there's clearly an interpretive dispute,
15 and under the law, that dispute is for the Commissioner. We
16 don't -- they don't get to come in and start doing that here in
17 federal court.

18 The same is true when they argue about how -- by the
19 way, on the player policies, I should add your Honor observed
20 and asked Mr. Kessler about the notice about the failure to
21 cooperate. I thought the response was interesting. The
22 response was: Well, I got to distinguish this, that's personal
23 conduct policy, that's not really noticed here. Yet the case
24 that he relies on entirely is the Peterson case, which was
25 under the personal conduct policy. So I found that to be quite

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1 inconsistent.

2 But in any event, the point is we don't need -- you
3 certainly, we would submit, your Honor, the Court need not
4 resolve the best way to interpret these documents or to apply
5 them to conduct here. That is, under the law, a decision for
6 the arbitrator, in this case, the Commissioner. The same is
7 true about arguments concerning how the Bounty case should be
8 interpreted, how the Rice case should be interpreted and
9 applied. We have this in our briefs, the law is clear, that is
10 for the arbitrator to do.

11 They say it's undisputed, but clearly there are
12 different views here about how it should be interpreted and
13 applied, and what matters is how the Commissioner resolved
14 those disputes. And that's true in terms of whether it was
15 fair to discipline Mr. Brady based on both the involvement in
16 the ball tampering as well as the failure to cooperate. This
17 argument that he didn't have specific notice or didn't have
18 enough notice was resolved against them. And that really,
19 under the law, is and should be the end of the matter, your
20 Honor.

21 THE COURT: Just so I understand, so the four-game
22 suspension covers ball tampering, non-cooperation, and the
23 non-cooperation is included the phone -- the destruction of the
24 phone, those are all tied together?

25 MR. NASH: The destruction of the phone was cited as

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1 evidence that confirmed the underlying failure to cooperate.
2 It also was evidence interpreted by the Commissioner to
3 reasonably draw an inference that supported the underlying
4 finding about ball tampering.

5 Again, we get back into: Is there a text on the day
6 of the AFC championship game? Maybe there is, but we don't
7 know because it's undisputed that the phone that Mr. Brady used
8 during that entire period was not the texts that were
9 relevant -- and by the way, I think your Honor knows this, but
10 last week Mr. Kessler said all Mr. Wells requested were the
11 texts between Mr. Brady and three individuals. That's not
12 correct. It's in the award. Mr. Wells requested texts about
13 ball tampering with anybody. But we don't know, and your Honor
14 certainly, as an arbitrator, as a judge, I'm sure you would be
15 comfortable with this, you can certainly draw an inference from
16 that action, and you can certainly draw the inference that it
17 supports, and for purposes of this exceed authority, your
18 Honor, it certainly is evidence that the Commissioner can rely
19 on to affirm the underlying conclusion about the
20 appropriateness -- about the factual findings and the
21 appropriateness of the discipline.

22 He says this in his award, and I think it's important,
23 the Commissioner does, that this is not mere ball tampering.
24 This was a serious issue. This was the AFC championship game.
25 There's a reason why there is so much attention. And I

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1 understand sports fans have different views about how this
2 should be handled, but from the Commissioner's perspective this
3 was a very serious issue. And I would submit from the
4 perspective of others within the NFL and fans outside of the
5 NFL, the question of whether during the AFC championship game
6 there was this kind of effort to evade the rules after the
7 officials certified a football is a serious matter. But also,
8 as the Commissioner explains in his award, the integrity of the
9 league in these kinds of matters depends upon cooperation and
10 certainly not obstruction of investigation into these matters,
11 and the Commissioner weighed all of that.

12 THE COURT: I got it. Are you saying that the penalty
13 is or should be or could be greater in the AFC championship
14 game than the first game of the season?

15 MR. NASH: I'm not saying that at all, and I'm not the
16 Commissioner, so I don't know that I would say that. But what
17 I would say is this idea that this should be minimized, I think
18 the fact that it occurred in a game of this importance shows
19 clearly that this was a significant issue. I think it would be
20 significant in any game. I assume that the Commissioner would
21 think that is true as well. But I'm just pointing that out in
22 response to the efforts that you hear that this was not -- this
23 should be deemed the same thing as a player's uniform not being
24 appropriate or violating the rules. This was -- I don't
25 think -- certainly let me put it this way, for the purposes of

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1 the legal standard, it can't be said that it would be
2 unreasonable for the Commissioner, or that it is his own brand
3 of industrial justice to say this is a serious matter. This
4 called into question whether our rules are being followed and
5 whether the games were being played on a fair and even playing
6 field.

7 THE COURT: So the four-game suspension then, I think
8 it's obvious, but just to confirm, covers ball tampering on
9 January 18, 2015, plus failure to cooperate in the
10 investigation, including destruction of the phone, right?

11 MR. NASH: No, I think the destruction of the phone
12 was evidence that confirmed the underlying failure to
13 cooperate.

14 THE COURT: So all of that is folded into the
15 four-game suspension?

16 MR. NASH: Yes.

17 THE COURT: So which of the four games is attributable
18 to ball tampering, and which is attributable to failure to
19 cooperate?

20 MR. NASH: Well, the award doesn't specify, and I
21 don't believe there's any requirement in the CBA to break it
22 down that way. I think the Commissioner makes a judgment, and
23 he says this in the award, he says taking the record as a
24 whole, considering all of these factors, he determined that a
25 four-game suspension was the appropriate sanction.

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1 There is another view, and there are people within the
2 NFL who would express this view, that it should be more, it
3 should be four games just for the ball tampering. But again,
4 your Honor, we could argue about whether it should be one game.
5 Let's be clear, they say it should be a fine. The Commissioner
6 concluded a four-game suspension -- affirming the four-game
7 suspension was appropriate based on this record. Someone has
8 got to make the call, and under the CBA there's no dispute that
9 that call is made by the NFL Commissioner. It's his judgment.

10 THE COURT: So the four games is based on the
11 aggregation of the ball tampering and the non-cooperation?

12 MR. NASH: Yes.

13 THE COURT: I guess presumably on the January 18, 2015
14 game, right?

15 MR. NASH: Right.

16 THE COURT: So the next time somebody tampers with a
17 ball, for example, if that were to happen, but cooperates, what
18 kind of sentence or discipline would he get?

19 MR. NASH: It would be up to the Commissioner to
20 decide based on the facts that are presented. And here again,
21 both the CBA and the long-standing precedent, including the
22 Bounty case that they rely on, that these kinds of judgments,
23 the parties have agreed clearly, unlike other parts of the
24 collective bargaining agreement, that -- and the Commissioner
25 says this in his award, there's no requirement that there be a

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1 specific fine schedule or suspension schedule, if you do this
2 it will be this plus this. There's no maximum. It commits the
3 judgment to the sound discretion of the Commissioner.

4 Commissioner Tagliabue in the Bounty decision explains
5 why that is so. He says especially in integrity of the game
6 matters that the parties have agreed to defer to the
7 Commissioner's judgment on this point. They have also agreed
8 not to operate in some sort of static -- I think he uses the
9 word static, or it's in one of the arbitration decisions below,
10 a rigid framework where it has to be X games.

11 That's not true for other things under the collective
12 bargaining agreement. So for example, clubs are different.
13 Clubs may impose discipline. Under the CBA, though, there are
14 some greater limitations on that ability. They have fine
15 schedules, proposed disciplinary schedules, and there are
16 maximums. So clubs can discipline players for conduct
17 detrimental, but there's a maximum of four games plus I believe
18 a one-week fine. That doesn't exist for the Commissioner. And
19 there's a reason. This was a purposeful bargain. And so
20 ultimately the answer to your question, your Honor, is the
21 amount of discipline would be within the sound judgment of the
22 Commissioner, and that's the agreement.

23 THE COURT: I have a little trouble with that. In the
24 award itself Mr. Goodell says, "In terms of the appropriate
25 level of discipline" -- so he obviously also felt that he had

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1 to explain the level. He said, "the closest parallel of which
2 I am aware is a first violation of the policy governing
3 performance-enhancing drugs" -- he means steroid use, et cetera
4 -- "and that the four-game suspension imposed on Mr. Brady is
5 fully consistent with, if not more lenient than, the discipline
6 ordinarily imposed for the most comparable effort by a player
7 to secure an improper competitive advantage and by using a
8 masking agent" -- masking presumably for the drugs -- "to cover
9 up the underlying violation."

10 So he's trying to rationalize or explain or justify,
11 as appropriate, what he did. So I have this question, though,
12 and that is how are deflating footballs, assuming that's what
13 Mr. Brady -- certainly is what Mr. Brady is found to have done
14 by Mr. Goodell, and not fully cooperating with the
15 Commissioner's investigation, legally comparable to steroid use
16 and use of masking agents?

17 Relatedly, I'm going to ask you if there's any
18 empirical or scientific comparability. How did he pick steroid
19 use to explain why he fined Mr. Brady for -- why he suspended
20 him for four games for deflating the balls and then not
21 cooperating? How is that equal to steroid use?

22 MR. NASH: It starts with the premise of the findings
23 regarding deflation of the football. He found not only were
24 the balls deflated, but they were deflated purposely to gain a
25 competitive advantage. The same is true when a player uses a

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1 performance-enhancing drug or steroids. It is used in order to
2 gain a competitive advantage. I don't think he's saying this
3 is exactly factually the same as steroid use, but I think the
4 point is that both violations involve an effort to gain a
5 competitive advantage.

6 Now there's also a distinction. As you read, he said
7 that in fact he believed Mr. Brady's punishment was arguably
8 more lenient. That's because, first of all, there's also this
9 non-cooperation aspect of this matter. But also he concluded,
10 and I hope you understand that they disagree, Mr. Brady denies
11 it, but he concluded Mr. Brady was involved. Under the steroid
12 policy, a player can take a supplement and then he can test
13 positive, and if he said I didn't know it had a banned
14 substance, he's still suspended for four games.

15 THE COURT: So I ask you the same question about that,
16 how is that like deflating a football and not cooperating?
17 Clearly the question is a fair question to pose because clearly
18 Mr. Goodell felt that he had to explain the four-game
19 suspension. And his explanation about steroid use, in my mind,
20 only raised more questions than it answered, because I don't
21 see -- I still don't see how the four games is comparable to a
22 player using steroids and a masking agent.

23 MR. NASH: I think in the Commissioner's judgment it
24 goes to integrity of the game.

25 THE COURT: Everything goes to integrity of the game.

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1 MR. NASH: I don't think that's fair. Trying to get a
2 competitive edge by using a prohibited substance affects the
3 integrity of the game. I think, in the Commissioner's
4 judgment, attempting to alter the footballs after the game
5 officials have certified them is an effort to gain a
6 competitive advantage that affects the outcome of the game. I
7 think the fact that he explains that only shows that this
8 certainly was his analysis of the underlying CBA. He also
9 compares it to the Cleveland Browns incident.

10 So there's no question that he was applying this law
11 of the shop principle that the Players Association is urging
12 about fair and consistent discipline, but there's equally no
13 question that he made that judgment based on his assessment of
14 the facts, which are binding, and his interpretation of the
15 CBA. The steroid policy is part of the CBA.

16 Your Honor, the only other points I would address, on
17 the bias case I would submit respectfully that is -- they try
18 to equate this with Rice. The difference with Rice obviously
19 is the underlying issue in the Rice case was what did Ray Rice
20 say to the Commissioner. As the Commissioner said here, he was
21 not a factual witness to Mr. Brady's conduct. This would just
22 rewrite the agreement. If they could create some sort of issue
23 saying we want you as a witness, the agreement that the
24 Commissioner would serve as a hearing officer would be
25 nullified.

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1 I think the answer -- and I don't need to spend a lot
2 of time on this -- is in the decision that the Commissioner
3 issued before the hearing on recusal. He issued a careful
4 decision explaining the reasons why, under his interpretation
5 of the CBA, there was no basis for that claim.

6 I would note, by the way, they filed the same motion
7 for recusal of the Commissioner in the Bounty case that they
8 cite so often.

9 THE COURT: How about Mr. Pash? Why didn't you
10 produce Mr. Pash for testimony? You're saying they're trying
11 to knock out the Commissioner as arbitrator, but the Mr. Pash
12 thing is totally different. He's a senior executive, co-author
13 of the Wells Report. What's the problem with having him
14 testify?

15 MR. NASH: Well, the answer to that question is found
16 in the other ruling that the Commissioner issued before the
17 hearing. It's the decision --

18 THE COURT: On the motion in which he denied Mr. Pash,
19 the application.

20 MR. NASH: He granted -- for example, he compelled
21 Mr. Wells to testify, but he made a judgment, like arbitrators
22 and judges make all the time, that Mr. Pash was not a relevant
23 witness.

24 But he did one other thing with respect to Mr. Pash.
25 He said depending on what happens at the hearing, you can renew

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1 your motion. You can ask Mr. Wells. But what they did with
2 Mr. Pash is they created this issue, frankly, because there was
3 a press release that announced originally that Mr. Pash and
4 Mr. Wells would be -- Mr. Pash would be a co-investigator,
5 something like that, and they said that made Mr. Pash a
6 relevant witness.

7 What the Commissioner did in the prehearing decision
8 was to say I don't think that he was involved, but you can ask
9 Mr. Wells.

10 THE COURT: I don't think what?

11 MR. NASH: Mr. Pash is a relevant witness.

12 THE COURT: He edited the Wells Report. Nobody else
13 was given the authority to edit the Wells Report. So that's a
14 big deal. He is a lawyer, right? He's a very senior
15 executive. So he's the co-lead on the investigation. You
16 allow one person, Mr. Wells, to be cross-examined, I don't
17 understand what the thinking was behind not allowing Mr. Pash.

18 MR. NASH: Not allowing?

19 THE COURT: To be a witness.

20 MR. NASH: Because he was not a witness. The judgment
21 was made that he was not a witness to any relevant facts
22 underlying the decision.

23 Now again, though, and I think this is important, the
24 Players Association was given the opportunity to renew that
25 request at the hearing. What the Commissioner said in his

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1 prehearing ruling was I don't think Mr. Pash is a relevant
2 witness, I think you're misdescribing the facts, but I am going
3 to compel Mr. Wells to testify, and you can ask Mr. Wells about
4 Mr. Pash's role. And they did. And after you ask Mr. Wells,
5 you can renew your request for Mr. Pash, and they never did.

6 THE COURT: And the Commissioner also said Mr. Pash's
7 testimony would be cumulative.

8 MR. NASH: Yes.

9 THE COURT: How do you know? Cumulative of what?
10 Unless you know what he's going to testify to, how would you
11 know it's cumulative?

12 MR. NASH: Because we argued to the Commissioner in
13 response to that that Mr. Pash was not substantially involved.
14 He was not a witness to any of the events at the AFC
15 championship game. It was plainly sufficient, in the
16 Commissioner's judgment, if Mr. Wells, who is the lead
17 investigator, is going to be compelled to testify --

18 THE COURT: He's the co-lead. Mr. Pash's name is a
19 co-lead.

20 MR. NASH: Your Honor, that's true only if you accept
21 their argument about how to interpret a press release in
22 February.

23 THE COURT: It's not my press release, so I didn't
24 write it, so you all wrote it.

25 MR. NASH: But Mr. Wells explained.

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1 THE COURT: Was it not true?

2 MR. NASH: I can point you to Mr. Wells' testimony.
3 He was asked about it.

4 THE COURT: I read it.

5 MR. NASH: He said no, that's a statement they put out
6 because at the time they weren't sure how they were going to do
7 it, but when I came on, it was made clear I am the lead
8 investigator, Mr. Pash is not the co-lead investigator, and
9 it's my charge alone.

10 In that respect, your Honor, this also goes to this
11 independence argument that --

12 THE COURT: Well, we'll get to that in a minute, but
13 who else but Mr. Pash had the opportunity to edit the Wells
14 Report before it became public? Anybody?

15 MR. NASH: I'm assuming any number of lawyers at
16 Mr. Wells' firm, but I don't think they -- I don't think
17 there's any -- again, judges and arbitrators make judgments
18 about this all the time. We can disagree. They can argue
19 about it. But ultimately under the law, the decision as to --
20 and I think the cases are quite clear about this, the decisions
21 are clear that the arbitrator has the discretion to make
22 judgments about whether something is cumulative or not
23 cumulative. And again here, though --

24 THE COURT: You know, it's interesting, because under
25 the law arbitrators don't have the authority to make decisions

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1 that testimony is going to be cumulative unless they specify in
2 what respect they would be cumulative. They cannot just
3 conclude oh, well, we can't have him because his testimony is
4 cumulative. That's my understanding of what the cases say.

5 Some cases have been -- some arbitration awards have
6 been, I believe, vacated precisely because an arbitrator made a
7 finding that testimony would be cumulative and didn't specify
8 in what respects it would be cumulative. I ask you who else
9 but Mr. Pash could have given testimony about whether or not
10 his edits or what his edits were about or how extensive they
11 really were or if he was trying to support Mr. Goodell or any
12 other things that an edit could cover, who else could have
13 possibly given that testimony except Mr. Pash?

14 MR. NASH: Your Honor, Mr. Wells was asked about this.

15 THE COURT: I know he gave his answer, you know,
16 Harvard trained, you always have some comments. Frankly, I
17 didn't find that answer very enlightening. I think he said
18 it's a thick report, and a Harvard trained lawyer, as Mr. Pash
19 is, would always have something to say, but I don't know what
20 that means.

21 MR. NASH: This goes back to our fundamental point
22 about the CBA. There's nothing that prevents someone from the
23 league office from being involved in the underlying
24 investigation.

25 THE COURT: I didn't say he couldn't be involved, I'm

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1 talking now about the cases which say that even though this is
2 not Federal District Court and governed by the Federal Rules of
3 Civil Procedure, there are some basic procedures of fairness
4 that have to be followed, and one of them often is that you
5 have to allow someone to make their case by calling witnesses,
6 and I'm just trying to figure out what the big objection was in
7 calling Mr. Pash. I submit to you that it's not sufficient to
8 say or conclude without specifying that his testimony would
9 have been cumulative.

10 MR. NASH: And not relevant to the core facts. We
11 understand that one of the strategies in the appeal was to put
12 Mr. Wells on trial or put the investigation on trial. But
13 Mr. Pash had no firsthand knowledge of the underlying facts
14 affecting Mr. Brady's involvement. He had no firsthand
15 knowledge. He was not a relevant witness to any of these key
16 issues.

17 Now your Honor, your description or the fact that
18 there may be cases that get vacated, I would submit that what
19 most all of the cases say, that these kinds of judgments are
20 not a ground for vacatur, that's clearly the general rule, and
21 that to the extent there is a case out there where an award has
22 been vacated -- and let's keep in mind what happened here.
23 Those cases are you didn't get an opportunity to put on
24 witnesses. If Commissioner Goodell said I'm not letting you
25 call testimony, those are all very extreme cases.

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1 What we have here is we had a dispute over -- a
2 prehearing dispute over who should have to testify, who
3 shouldn't. Briefs were submitted. The Commissioner issued a
4 ruling. He granted their request for testimony and documents
5 in some respects, he denied requests for the documents they
6 sought. The cases all say, I think pretty clearly, that in
7 that context, that's not denying somebody a fundamentally fair
8 hearing. Moreover they have to show prejudice on top of that.
9 And there's no way -- this was really -- the Mr. Pash issue was
10 really a red herring and an argument that really didn't have,
11 as the Commissioner found, a whole lot of weight. But again,
12 as I said, he didn't slam the door, he said let's have the
13 hearing, you can ask Mr. Wells, you can raise it again, and
14 they didn't. So even if there were an argument here, your
15 Honor, I submit it's been waived.

16 The statement about the notes, first of all, was --
17 the argument about the notes was based on an inaccurate or at
18 least incomplete statement of the record.

19 THE COURT: You're talking about the interview notes?

20 MR. NASH: Yes, the interview notes.

21 What I heard, I think, is that basically all they got
22 was the Wells Report. But that's not true, and I think in the
23 Commissioner's prehearing ruling on witnesses and documents
24 they got not only the Wells Report, but they got the underlying
25 documents considered by the investigators, including the

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1 interview notes conducted by NFL security. Those, by the way,
2 are the interview notes that were produced to them in the Rice
3 case. So this argument about Rice we got the notes but here we
4 didn't. No, they got the same notes. They didn't get the
5 lawyer notes in Rice either.

6 And Judge Jones is -- their effort to distinguish
7 Judge Jones' decision just doesn't work. She's quite clear,
8 and it goes back to the very first case that Mr. Kessler opened
9 his argument with, that arbitration is a creature of contract.
10 We agree, it is, and the contract is to be respected. And in
11 this case the contract has very clear rules about discovery.
12 There's nothing wrong with that. There are Supreme Court
13 cases, I think Justice Scalia talked about this, that one of
14 the reasons that arbitration is favored, one of the reasons
15 there is so much deference to arbitration is the process is not
16 federal court litigation. You don't get the kind of discovery
17 that you get in the court. That's one of the reasons that
18 parties use it. As Judge Jones found, under this CBA, the
19 agreement is you're not entitled to make these kinds of broad
20 requests. In fact, as we pointed out in our papers, they got
21 substantially more discovery than what the contract even
22 provides. So I think that that argument, your Honor, obviously
23 has no merit whatsoever.

24 As for the -- one other thing about the notes, the
25 other thing I was kind of curious about, they make a great deal

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1 about the fact that Mr. Reisner cross-examined Mr. Brady, and
2 it was unfair because he had I guess notes of Mr. Brady's
3 interview, so that was somehow unfair, attorney notes. Your
4 Honor, that happens in court all the time. We didn't have
5 Mr. Brady's attorney's notes. But they know what happened at
6 the hearing, they didn't need Mr. Reisner's notes of his
7 interview with Mr. Brady for the purpose of cross-examination.

8 THE COURT: Maybe he had interview notes of other
9 people, Mr. Reisner did, that he was using to cross-examine
10 Mr. Brady.

11 MR. NASH: But lawyers, your Honor --

12 THE COURT: Not of Mr. Brady's interview.

13 MR. NASH: But that's the only witness that they
14 complained about that somehow didn't have the interview notes.

15 THE COURT: I don't think that's what they're saying.
16 Maybe I'm wrong.

17 MR. NASH: I'm not saying that -- let me --

18 THE COURT: I thought they didn't get the interview --

19 MR. NASH: They did not get any of the privileged
20 interview notes, that is correct. My point is, though, even if
21 they had some sort of right to it, they would have to show some
22 sort of prejudice, and what they're complaining about is well,
23 he got to cross-examine Mr. Brady.

24 THE COURT: So the prejudice is that one side had the
25 notes and he was able to examine with them and the other side

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1 didn't. Isn't that prejudice?

2 MR. NASH: No, your Honor.

3 THE COURT: It depends what's in the notes.

4 MR. NASH: Attorney notes are -- I don't see how
5 that -- they know full well what Mr. Brady testified or said to
6 Mr. Wells in this interview.

7 THE COURT: I think there are cases that talk about
8 interview notes.

9 MR. NASH: But again, your Honor, the real answer here
10 is -- the real answer here, and it's in the Supreme Court
11 cases, it's in the Second Circuit cases, it's in cases in this
12 Court, arbitration is not civil or criminal.

13 THE COURT: I get that. We know that. But still
14 there are certain due process requirements, and I think there
15 are interview note cases, actually.

16 MR. NASH: That may be so, your Honor, I would agree
17 with that. I think many of them find attorney notes are
18 privileged, but that's a whole other issue.

19 But again, in the context of arbitration -- in the
20 context of arbitration it is what the contract provides for.
21 And when you talk about a fundamentally fair hearing, there's
22 no question that Mr. Brady got everything and more that is
23 required in the CBA.

24 The only -- the last point I cover is this bias issue,
25 your Honor. Your Honor, that's an effort to rewrite the

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1 agreement. Mr. Goodell was not a witness. The fact that he
2 imposed the initial discipline based on the Wells Report and
3 therefore he's somehow bound to the Wells Report and that makes
4 him not a neutral fact finder, that's what the CBA provides.
5 And this is clear in the case law, it's clear in the Bettman
6 case that they cited that they can't seek to rewrite the
7 collective bargaining agreement by making this kind of bias
8 challenge.

9 In fact, they made it before. We litigated it in the
10 Williams case, and after the Williams case rejected this
11 argument, and it's been rejected in other cases that we cite,
12 we entered the same agreement in 2011. We understand they may
13 want to change that, they don't want the Commissioner to be the
14 hearing officer, but that is the agreement, and under the law,
15 it's entitled to be respected.

16 THE COURT: Thank you very much.

17 MR. NASH: Thank you, your Honor.

18 MR. KESSLER: Your Honor, I will be brief and go in
19 reverse order. I will start first with fundamental fairness.
20 I direct the Court's attention --

21 THE COURT: I will anticipate that you get the order
22 right, I'm not so sure that you will do it briefly.

23 MR. KESSLER: I will direct your Honor's attention to
24 the case of Home Indemnity Company v. Affiliated Food
25 Distributors. You may be familiar with this case. Very, very

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1 clear, Southern District of New York, 1997, and it stated as
2 follows: There is an affirmative duty of arbitrators to ensure
3 that relevant documentary evidence in the hands of one party is
4 fully and timely made available to the other party before the
5 hearing is closed, and the failure to do so is a violation of
6 Section 1083 of the Federal Arbitration Act. And that is a
7 decision for the Court, it's not Mr. Goodell's decision.

8 THE COURT: I'm familiar with that case.

9 MR. KESSLER: Number two, with respect to Mr. Pash,
10 just to be clear, it wasn't just a press release that said he
11 was the co-author, the Wells Report said he was the co-author.
12 It repeated the NFL's announcement. And this is when the
13 report was issued, after he's edited it, and Mr. Nash says I
14 should show prejudice by what Mr. Pash would say? I don't know
15 what he would say. That's why it was fundamentally unfair, and
16 we were entitled to it. That's all I will say about
17 fundamental fairness. I think it's clear we have that issue.

18 Evident partiality. There is no response to the fact,
19 and no Court in my view has ever sustained an arbitrator's
20 ability to determine his own conduct. It is exactly the same
21 as in Rice. In Rice there was a different issue, it's what the
22 player told him and whether it was double discipline. Here,
23 it's whether he unlawfully delegated his authority.

24 And again, I agree if there was a frivolous argument,
25 we couldn't come in and say we want the arbitrator to be the

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1 witness, we had a basis here because why, and we cited this in
2 our brief, the Commissioner announced to the world, again, his
3 decision, I am asking Mr. Vincent to make this determination,
4 and I will review it as the arbitrator. He made that
5 announcement. We cite that originally in our petition. Having
6 done that, he called into question what was the delegation.
7 And then in his opinion he writes: Well, I spoke to
8 Mr. Vincent, here's what I did, here are the facts. He can't
9 decide that as an arbitrator. No court, I would submit, would
10 hold that past the evident partiality test.

11 Going back to fair and consistent treatment, Mr. Nash
12 complains and says well, I handed up a new exhibit to your
13 Honor, as if that's new evidence. What that exhibit is is it
14 takes the Wells Report information, nothing else, because
15 that's the basis for the discipline, and simply, your Honor,
16 does the math. It simply says here's what they said was the
17 expected level with the environmental factors, and here's the
18 actual measurements according to the Wells Report, and it's one
19 or two-tenths PSI. The only thing that the Wells Report didn't
20 do, for obvious reasons, is say gee, it's only one or
21 two-tenths of PSI.

22 Our argument is not that your Honor should find some
23 new facts, what we are saying is because of no procedures --
24 and, you know, he doesn't deny there were no procedures, he
25 can't -- because there were no procedures you couldn't be fair

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1 and consistent in disciplining Mr. Brady versus any other
2 players in the NFL. So they need a system. And your Honor, if
3 you do nothing more than say NFL, if you really think this is
4 important to competitive integrity of the game, put in the
5 system, that would probably help fairness and consistency. It
6 would make them comply with the CBA.

7 That gets me, your Honor, to the notice point which I
8 will end with. The first thing I want to say is so Mr. Nash
9 said there's no support for the Peterson ruling that
10 Mr. Goodell as the arbitrator or Mr. Henderson as the
11 arbitrator is limited to what he can decide. Well, the
12 support, your Honor, is in Peterson itself, and Peterson cites
13 a number of the cases which make it clear as follows: When two
14 parties submit an issue to arbitration, it confers authority
15 upon the arbitrator to decide, underscore, that issue, not some
16 other issue.

17 Here the NFL did not appeal, so it submitted no issue.
18 The union appealed for Mr. Brady. We submitted one issue. The
19 one issue we submitted was is this discipline imposed by
20 Mr. Vincent proper or not proper under the CBA? End of issue.
21 That is why Judge Doty said Mr. Henderson could not go back and
22 find another basis for the discipline.

23 And by the way, there is Supreme Court authority for
24 this as well that we cited in our brief which makes it very
25 clear that you have to look at what is the issue. The only

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1 issue here was our appeal. It's not like they cross appealed
2 and said oh, we have some new -- because, by the way, the CBA
3 doesn't provide cross appeal, it just says the player and the
4 union may appeal the discipline. That's their problem.

5 So that brings us back to generally aware. And your
6 Honor said: Well, what is there new that will do this? Number
7 one, I want to say your Honor is spot on. It's got to be about
8 the AFC championship game. In fact, it is not at all clear
9 that Mr. Wells' finding is even about that game. I think your
10 Honor is correct. How do I know that? Because in the very
11 paragraph of Wells where he says generally aware, he cites back
12 to the Jets game, which had nothing to do with this at all.

13 And again, Mr. Nash said: What is new? Well, the
14 only thing he could cite new was Mr. Brady's repeated denials,
15 which Mr. Wells heard. So what he is saying is the
16 Commissioner disbelieved Mr. Brady even more than Mr. Wells
17 disbelieved Mr. Brady. That can't be a basis for jumping from
18 generally aware across the room to some other scheme or
19 participation. Just doesn't fit.

20 And with respect to the cooperation piece of this,
21 remember, Mr. Wells testified he already drew an adverse
22 inference against Mr. Brady that because of not turning over
23 that there was some adverse materials there, and even with that
24 inference he only could get to generally aware and not even
25 necessarily the AFC championship game. So there was nothing

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1 new there. The Commissioner also drew an adverse inference.
2 He's saying the Commissioner drew an even stronger adverse
3 inference. That doesn't get you past generally aware with
4 regard to this.

5 And I want to say your Honor's memory was correct. If
6 you look at the transcript on pages 114 to 115, I won't read it
7 now, Mr. Brady was very clear that after the Jet game he said
8 let's go with 12.5, that's in the rule, and his direction was
9 show the rule to referee. How could that be evidence of
10 illegally? But in the NFL world, if you do that, it means you
11 broke the law. It just doesn't make sense.

12 THE COURT: Do you have that there? Is that the
13 transcript?

14 MR. KESSLER: Yes, I have the transcript. I will read
15 it. Here said the following, page 114, line 7. By the way,
16 this is Mr. Reisner from Paul Weiss asking the questions, it's
17 not my questions.

18 "Q. Now you have said publicly that you like footballs to be
19 inflated to at least 12.5 PSI, correct?

20 "A. I said that after the championship game.

21 "Q. And so how long have you known that 12.5 is your preferred
22 level of inflation?

23 "A. After the Jets game.

24 "Q. And how did you come to learn that 12.5 is your preferred
25 level of inflation?

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1 "A. We basically just picked a number at that point. I guess
2 historically we have always set the pressure at -- before
3 George Jastremski took over, it had been historically set at
4 like 12.7 or 12.8. That's what I learned after the fact. And
5 I think, based on that Jets game, I said why don't we just set
6 them at 12.5, bring this letter to the ref, and I didn't think
7 about it after that.

8 "Q. You said you just picked a number. Did you pick the
9 number 12.5 for any particular reason?

10 "A. Ball pressure has been so inconsequential, I haven't even
11 thought about that. I think at the end of the day the only
12 time I thought about it was after the Jets game and then after
13 this was brought up after the championship game. It was never
14 something that has been on my radar, registered. I never said
15 PSI. I don't think I even knew what that meant until after the
16 championship game. It was never something that even crossed my
17 mind.

18 "How did you come to pick 12.5 as the number?

19 "Well, we looked in the rule book."

20 And later there's testimony when he says show it to
21 the referee. So this is the opposite of the basis of an
22 inference.

23 Finally, your Honor, two last things. I will ask my
24 colleague, if you don't mind, to give you the 18 cases where
25 the courts decide that an award should be set aside in this

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1 district either for violation of the essence of the CBA,
2 fundamental unfairness, evident partiality, because they're not
3 all in our briefs. And this will illustrate it's the Court's
4 decision. It doesn't matter that Mr. Goodell said: Well, I
5 considered that and I rejected it. Under the FFA and LMRA it
6 comes back to the Court.

7 If you could hand those up.

8 And finally I urge your Honor to look at the league
9 policies, because Mr. Nash said well, it's up to the NFL to
10 decide if it's a fine or not. These are NFL policies. These
11 are not Jeff Kessler's policies. These are not Tom Brady's
12 policies. And when you look at this, the only notice you can
13 get is that it says first time offenses, fine.

14 And he said -- your Honor asked questions: Why is
15 this like steroids? I agree with you, that analogy doesn't
16 make sense, at least to me, but here's one that the NFL made.
17 They put equipment violations next to uniform violations and
18 receivers putting Stickum on their gloves during a game for
19 purposes, they wrote, of effecting getting a competitive
20 advantage and affecting the integrity of the game. That's the
21 most analogous conduct. And what does it say? First time
22 offenses is a fine.

23 Your Honor, unless you have any other questions, I
24 think I'm finished.

25 THE COURT: I don't. I do have one -- if somebody

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1 could furnish me, unless there's an objection, I have reports
2 of but not the actual letter that Vincent sent I guess to
3 Mr. Kraft, because he also sent him a disciplinary notice. I
4 want to make sure I have the entire contents of that letter.
5 Could somebody make that available for me?

6 MR. KESSLER: Yes.

7 THE COURT: Maybe today. So this is very helpful, and
8 so it's now almost 12:20. Why don't the lawyers and I
9 reconvene in say 15 or 20 minutes, is that fair? Let's say 20
10 minutes.

11 MR. KESSLER: Which date?

12 THE COURT: I am saying we'll adjourn, if you could
13 come back in 20 minutes and I will briefly talk to each lawyer.

14 MR. KESSLER: So in 20 minutes from now, your Honor?

15 THE COURT: If that's okay.

16 Okay, this is very helpful. Thank you very much.

17 I just note that I have the letter already.

18 MR. KESSLER: I just handed it up.

19 THE COURT: It's dated May 11, 2015, to Robert Kraft,
20 and I also have Mr. Kessler's list of authorities. I guess
21 we'll make these Court exhibits to today's oral argument.

22 Thanks.

23 oOo

24

25

