UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, on its own behalf and on behalf of ADRIAN PETERSON, Plaintiff, v. NATIONAL FOOTBALL LEAGUE and NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, Defendants.	CASE NO. 14-CV-4990-DSD-JSM **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO HOLD THE NFL IN CIVIL CONTEMPT**

INTRODUCTION

In clear disregard of the Court's rules and all governing legal principles, the NFLPA purports to seek an order of contempt based on entirely lawful and proper conduct by the NFL, specifically: (1) the NFL's legal arguments to the Hearing Officer in opposition to the Union's request for relief following the Court's February 26, 2015 remand order; and (2) the NFL's suspension of another player, Greg Hardy, who is not a party to this action and whose case is not, and never has been, before this Court. The Court should reject this baseless motion.

First, this motion was filed in blatant disregard of the NFLPA's duty under Local Rule 7.1(a) to "meet and confer with the opposing party in a good-faith effort to resolve the issues raised by the motion." The NFLPA does not claim – because it cannot – that it ever notified the NFL that it intended to seek a contempt order against the League (or its

Commissioner) or otherwise attempted to resolve such a dispute. In fact, having already fully reinstated Adrian Peterson well before the Union filed the motion, the NFL had every reason to believe there was *no dispute* regarding Peterson's current status, let alone one that could warrant the filing of a contempt motion. Indeed, before its motion was filed, the only mention of "contempt" was the NFLPA's threat that the *Hearing Officer* would be in contempt if he failed to grant the Union's specific requests for relief. Given these facts, the NFLPA's certificate of compliance with Rule 7.1(a) is disingenuous, at best, and the motion should be denied for failure to follow the Local Rule.

Second, no reasonable interpretation of the well-established law governing contempt could support the Union's motion. The motion does not allege *any* conduct by the League or the Commissioner, let alone conduct that actually contravenes a specific directive in the Order, which is a prerequisite for finding contempt. In fact, upon receipt of the Order, the NFL immediately returned Peterson to the "Commissioner Exempt" roster with pay, and undertook the process leading to his reinstatement.

Rather than challenge conduct, the NFLPA challenges the *legal argument* made by the NFL to the Hearing Officer on remand in opposing the Union's request for an immediate decision vacating Peterson's discipline in its entirety. There is no support – and the NFLPA cites none – for holding a party in contempt for disagreeing with the moving party's legal positions or expressing legal positions of its own. Moreover, the NFL has presented to the Hearing Officer sound and good faith arguments that neither the Court's Order nor the CBA requires an immediate ruling on remand or that Peterson's

discipline be vacated entirely. Indeed, the Union itself has acknowledged that Peterson is subject to *some* discipline for his admitted child abuse.

Finally, there is no legal basis for the claim that the NFL or its Commissioner may be held in contempt of the Order for suspending a *different* player, Hardy, who is never mentioned in the Order, whose own case involves entirely different facts, and whose appeal to the Hearing Officer was pending when the Union filed this motion. The Hardy argument instead reveals that the Union brings this motion for an improper and legally insupportable purpose.

BACKGROUND

A. The Commissioner Imposes Discipline on Peterson.

In November 2014, Peterson pleaded *nolo contendere* to "reckless assault" and acknowledged his criminal responsibility for severely beating his four-year old son. As the NFLPA has acknowledged, Peterson's child abuse constituted conduct detrimental to the NFL in violation of the League's Personal Conduct Policy that warranted discipline pursuant to Article 46 of the CBA. Order (ECF No. 39) at 4. As a result, the Commissioner suspended Peterson without pay for at least the remainder of the season (three games), imposed an additional fine of three weeks' pay, and required him to participate in counseling with an expert trained in treating individuals who have committed child abuse. *See id.* at 7.

The NFLPA appealed Peterson's discipline, but did not dispute that he had engaged in "conduct detrimental" for which discipline was appropriately imposed. *See* Pet. Ex. 20 (ECF No. 1-2) (Notice of Appeal); Ex. 122 (ECF No. 1-9) (Hr'g Tr.) at 20:7-

14. The NFLPA asked that Peterson's suspension be "reduced to two games time served and two game checks." Pet. Ex. 122 at 131:24-132:2. The Hearing Officer denied the appeal. Pet. Ex. 126 (ECF No. 1-19) (Award).

B. The NFLPA Petitions To Vacate The Decision.

The NFLPA filed in this Court a petition to vacate the Hearing Officer's decision, and moved for a declaratory judgment that Peterson was entitled to immediate reinstatement "because he has already served far more than the maximum two-game suspension that could have been imposed under the CBA." Petition to Vacate (ECF No. 1) at 15. The only relief that the Union specifically requested was "an order declaring that Mr. Peterson is entitled immediately to be reinstated as a player in the National Football League." *Id.* at 73.

The Court declined the NFLPA's request for declaratory relief, but granted its petition to vacate. Order at 16. The Court ordered that "[t]he case is remanded for such further proceedings consistent with this order as the CBA may permit." *Id.* Critically, in keeping with its limited jurisdiction to review an arbitration award, the Court did not direct when those "further proceedings" were to occur, the nature or limits of any discipline that might be imposed on Peterson in subsequent proceedings, or whether Peterson was entitled to any form of affirmative relief from the League's discipline process (*e.g.*, immediate reinstatement). *See generally id.* Nor did the Court order the NFL to take or abstain from any action with respect to any player other than Peterson. *See generally id.*

Upon receipt of the Order, the NFL returned Peterson to the full-pay roster status on which he had been placed – and that a CBA arbitrator had approved (*see* Declaration of Joseph G. Schmitt, Ex. D (ECF No. 32-4)) – before his Article 46 appeal, which meant that he was free to participate in club activities. *See* Affidavit of Barbara Podlucky Berens ("Berens Aff.") (ECF No. 49) Ex. 4 (Mar. 4 Letter from Daniel L. Nash to Harold Henderson).

In addition, the NFL appealed the Court's judgment to the Eighth Circuit. *See* Notice of Appeal (ECF No. 40). That appeal is now fully briefed and awaiting argument. *See* Docket, *National Football League Players Ass'n v. National Football League, et al.*, No. 15-1438 (8th Cir. docketed Feb. 27, 2015).

C. The Parties Address The "Further Proceedings" Under The CBA.

Notwithstanding its own prior argument for a two-game suspension, upon remand the NFLPA argued to the Hearing Officer that he should "immediately" vacate Peterson's discipline "in its entirety" because that is "the only outcome on remand that would be consistent with [the Court's] order." Berens Aff. Ex. 3 at 2, Ex. 5 (Mar. 3 and 5 Letters from Jeffrey Kessler to Harold Henderson).

The NFL opposed this request on two grounds. *Id.* Ex. 4. First, the NFL explained that an "immediate" ruling was not required because the CBA expressly permits the Hearing Officer to extend any deadlines as he deems appropriate. *See id.* The NFL also explained that awaiting the Eighth Circuit's ruling would eliminate the potential for conflicting decisions and would not prejudice Peterson, since he already had served the suspension from regular season play and was free to participate in club

activities. *Id.* Second, the NFL argued that the NFLPA's request to vacate Peterson's discipline in its entirety should be denied because, among other reasons, it was inconsistent with the NFLPA's prior position that the discipline should be reduced to "two games time served and two game checks." *Id.*; Pet. Ex. 122 at 131:24-132:2.

D. The NFL Reinstates Peterson.

On April 17, 2015, the NFL reinstated Peterson to active status (*see* Declaration of Daniel L. Nash ("Nash Dec.") Ex. 1), thus placing him in the position that the Union had requested when it filed its original petition. As a result, the only remaining issue involves the financial consequences of the discipline imposed on Peterson during the 2014 season. *See* Nash Dec. Ex. 2 (June 2, 2015 Letter from Daniel L. Nash to Jeffrey Kessler).

E. The NFLPA Moves For Contempt Sanctions.

After remand, the NFLPA asserted to the Hearing Officer: "Should *you* fail to act promptly to hear and decide Mr. Peterson's pending Article 46 appeal, the NFLPA shall have no choice but to seek an order of contempt from the District Court, as *you* would be granting the NFL's unlawful request in defiance of the Court's Order." Berens Aff. Ex. 5 at 1 (emphasis added). However, at no point did the NFLPA suggest that such an order would be equally appropriate for the NFL, or inform the NFL that it intended to seek contempt sanctions against the League for making permissible legal arguments to the Hearing Officer. Nor did the NFLPA ever attempt to meet and confer with the NFL regarding a possible motion for civil contempt.

Nevertheless, on May 19, 2015, the NFLPA filed its motion to hold the League, the NFL Management Council, and the Commissioner in contempt for violating the

Court's order. The NFLPA claims that the NFL defied the order (1) by advancing legal arguments in opposition to the Union's request that the Hearing Officer immediately and completely vacate Peterson's discipline (Mot. at 16-20) (ECF No. 48), and (2) by disciplining another player (Hardy) in an unrelated proceeding (*id.* at 20-23).

F. The NFL Attempts To Informally Resolve This Motion.

After the Union filed its motion, the parties exchanged letters that confirmed that the only substantive dispute concerning Peterson is whether he owes a fine equal to three weeks' pay. *See* Nash Dec. Exs. 2-3. The NFL committed to make no effort to collect the fine before the Eighth Circuit resolves the pending appeal. *See* Mot. at 18, n.7. The NFL further proposed that it would join the Union in requesting that the Hearing Officer rule on this remaining issue if the Union agreed to withdraw the contempt motion. *See* Nash Dec. Ex. 2.

The Union rejected this proposal. It refused to withdraw the motion unless the NFL "reassessed" the discipline of a *different* player, Hardy, and "commit[ted] not to retroactively apply the New Policy to any additional NFL players as long as Judge Doty's Order stands." Nash Dec. Ex. 3. Notably, at the time the Union rejected the NFL's offer, Hardy's appeal of his discipline was still pending. *See id.* The Hearing Officer subsequently resolved that appeal, significantly reducing the length of the suspension originally imposed, and the NFLPA has not challenged the Hearing Officer's resolution.

ARGUMENT

I. THE MOTION MUST BE DENIED BECAUSE IT WAS FILED IN DEROGATION OF THE NFLPA'S DUTY TO MEET AND CONFER AS REQUIRED BY THIS COURT'S RULES.

This Court's Local Rule 7.1(a) mandates that, before filing most motions (including motions for contempt), a movant "must, if possible, meet and confer with the opposing party in a good-faith effort to resolve the issues raised by the motion." L.R. 7.1(a). This requirement "is not a meaningless procedural hurdle attorneys should simply check off their lists before filing a motion." *Icenhower v. Total Automotive, Inc.*, Civil No. 14-1499, 2014 WL 4055784, at *2 (D. Minn. Aug. 15, 2014). Rather, it is an important procedural safeguard designed to "make[] the Local Rules effective and efficient for practice in this District." *Id.*

Accordingly, this Court frequently denies motions of all types when the moving party fails to make a "good faith effort" to comply with Rule 7.1(a)'s meet-and-confer requirement, *id.* *See, e.g.*, *LaFountaine v. Reishus*, Civil No. 13-355 (ADM/TNL), 2014 WL 4248437, at *27 (D. Minn. Aug. 27, 2014) (denying motion in part because plaintiff "did not satisfy the meet-and-confer requirements" of Rule 7.1(a)); *United States ex rel. Ellis v. City of Minneapolis*, No. 11-cv-0416, 2013 WL 5406625 (PJS/TNL), at *1-2 (D. Minn. Sept. 25, 2013) (affirming magistrate judge's denial of motion where party failed to comply with Rule 7.1(a)'s meet-and-confer requirement); *Stephens v. Federal Nat'l Mortg. Ass'n*, No. 12-cv-2453, 2013 WL 656611 (JRT/SER), at *2 (D. Minn. Jan. 28, 2013) (denying motion for failure to comply with Rule 7.1(a)).

Here, the NFLPA claims that it attempted to resolve the NFL's "noncompliance" with this Court's order "via written correspondence to Arbitrator Harold Henderson and counsel for the NFL," and discharged its meet-and-confer obligation by "indicat[ing]" in that correspondence "that a failure to resolve the parties' dispute could result in the filing of a contempt motion." Meet and Confer Statement (ECF No. 47) at 1. That post hoc effort to create the appearance of compliance is unavailing for at least two reasons.

First, the NFLPA did not attempt to resolve this matter at all; it simply threatened to file a contempt motion against the Hearing Officer if he did not immediately enter the precise award it demanded – vacating Peterson's discipline in its entirety even after having acknowledged that his conduct merited a two-game suspension. *See*, *e.g.*, Berens Aff. Ex. 5 ("Should you fail to act promptly to hear and decide Mr. Peterson's pending Article 46 appeal, the NFLPA shall have no choice but to seek an order of contempt from the District Court"); *id.* Ex. 8 (warning Hearing Officer that imposing any discipline on Peterson "would constitute blatant contempt for the District Court's Order"). As another judge in this Court has recognized, "[t]hreatening to bring a motion is not the sort of 'good faith effort to resolve the issues' of a potential motion that is contemplated by the Rule." *Damgaard v. Avera Health*, Civil No. 13-2192 (RHK/JSM), 2015 WL 1608209, at *9 (D. Minn. Apr. 10, 2015). Rather, the NFLPA was required to discuss its concerns with the NFL and try to resolve them in good faith before asking this Court to intervene.[1]

[1] This failure to meet and confer is particularly significant because, at the time the Union filed this motion, the NFL had every reason to believe that there was no outstanding dispute in light of Peterson's full reinstatement and the NFL's commitment not to collect the outstanding fine until the Eighth Circuit resolved the appeal.

Second, even if threatening to file a motion was somehow an effort to meet and confer in good faith, the NFLPA never even directed its threat to the NFL. Rather, the Union threatened *the Hearing Officer* with contempt if he had the temerity to accept the NFL's arguments. *See, e.g.*, Berens Aff. Ex. 5 ("Should *you* fail to act promptly to hear and decide Mr. Peterson's [appeal]" . . . "the NFLPA shall have no choice but to seek an order of contempt") (emphasis added); *id.* Ex. 8 (warning Hearing Officer that accepting the NFL's arguments "would constitute blatant contempt"). At no point in its letters to the Hearing Officer did the NFLPA reveal, or even "indicate," that its threatened contempt motion would be directed at the NFL. Nor does the NFLPA's motion identify any correspondence whatsoever to the NFL, no less the Commissioner, in support of its claim that it satisfied the meet-and-confer obligation. In fact, the NFL's first notice of the NFLPA's intention to file this motion was in a telephone call moments before it issued a press release to the public about the motion. Nash Dec. Ex. 4. But Rule 7.1(a) requires the movant to meet and confer directly "with the *opposing party*."

II. THE NFLPA'S MOTION ALSO FAILS ON THE MERITS.

"The contempt power is a most potent weapon, and therefore it must be carefully and precisely employed." *Independent Fed'n of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir. 1998) (internal citation omitted). Accordingly, a party seeking civil contempt bears the heavy burden of proving, by "clear and convincing evidence," that a court order required certain, specific conduct by the contemnor and that the contemnor failed to comply. *See Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993); *accord Chicago Truck Drivers v. Brotherhood Labor Leasing*, 207 F.3d

500, 505 (8th Cir. 2000). Absent proof of a "failure to comply with a 'clear and specific' underlying order," a finding of contempt is not proper. *Chaganti & Associates, P.C. v. Nowotny*, 470 F.3d 1215, 1223 (8th Cir. 2006); *Imageware, Inc. v. U.S. West Commc'ns*, 219 F.3d 793, 797 (8th Cir. 2000) ("No one should be held in contempt for violating an ambiguous order . . . [a] contempt should be clear and certain.").

The NFLPA clearly has not satisfied its burden here.

A. The Court's Order Contains No Clear And Specific Directive Capable Of Creating Contempt Liability.

This Court's Order provided that: (1) the Hearing Officer's award was vacated, and (2) the case should be remanded "for such further proceedings consistent with this order as the CBA may permit." Order at 16. That is all. The Court at no point ordered any party to take or abstain from taking any of the actions the NFLPA now alleges – and for good reason, since it is for the Hearing Officer, not the Court, to determine what proceedings "the CBA may permit." Order at 16; *see United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36-37 (1987) (in actions reviewing arbitration awards, "the function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator") (citations omitted).

That lack of a specific judicial directive is fatal to the NFLPA's motion because one party may not seek to enlist a court to employ its contempt power to enforce an order that does not expressly compel another party to act in a specific way. *See, e.g., Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 75-76 (1967) (reversing civil contempt sanction premised on order that "did not state in

'specific . . . terms' the acts that it required or prohibited"); *Sierra Club v. City of Little Rock*, 351 F.3d 840, 846 (8th Cir. 2003) ("If the City had declined to implement the requested rate increase, the court could not have held the City in contempt . . . because the City would not have been in violation of any court order. The court order merely declared the City in violation of its permit[;] . . . [t]he court did not address what action, if any, the City was required to take…."); *Russell v. Sullivan*, 887 F.2d 170, 171 (8th Cir. 1989) ("Civil contempt is available only where a court order exists and can be enforced. No order directing the Secretary to pay Bartels' fee exists in this case, so therefore, the contempt sanction is unavailable.") (citation omitted); *Jankowski v. City of Duluth*, No. CIV. 11-3392 MJD/LIB, 2012 WL 6044414, at *4 (D. Minn. Dec. 5, 2012) (refusing to find city in contempt where the court order was "not clear and unambiguous" but instead was "subject to more than one interpretation").[2]

Every civil contempt case on which the NFLPA relies confirms that contempt sanctions are not available unless a court first enters an order specifically directing a

[2] *See also Glover v. Johnson*, 138 F.3d 229, 245 (6th Cir. 1998) ("[N]oncompliance with the terms of this order is not a proper basis for a finding of contempt and the imposition of sanctions because, as the ruling itself states, it does not 'order' the defendant to do anything."); *Santana Products, Inc. v. Compression Polymers, Inc.*, 8 F.3d 152, 155 (3d Cir. 1993) ("In fact, the order does not compel Compression Polymers to take any action nor does the order restrain it from doing anything. Thus, Compression Polymers cannot be held in contempt for failing to comply with the order because the order contains no provisions with which it must comply."); *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) ("[B]ecause the appellants were never directly ordered to promulgate new regulations, we must reverse the district court's contempt finding which was based in part on their failure to do so."); *Iowa Prot. & Advocacy Servs., Inc. v. Gerard Treatment Programs*, L.L.C., 274 F. Supp. 2d 1063, 1075 (N.D. Iowa 2003) (party could not be held in contempt for refusing to provide information where the underlying order "simply contained no operative commands and compelled no action" requiring the sought-after disclosure).

particular party's conduct. *See, e.g.*, *Shillitani v. U.S.*, 384 U.S. 364, 371 & n.9 (1966) (failure to comply with grand jury subpoenas); *Chaganti & Assocs.*, 470 F.3d at 1223 (failure to comply with order enforcing settlement agreement); *Hope Elec. Corp.*, 293 F.3d at 413, 418 (failure to comply with order to, *inter alia*, immediately implement new CBA, permit union to audit employer's payroll records, and fire two particular employees); *In re Grand Jury Subpoenas Duces Tecum*, 85 F.3d 372, 375-376 (8th Cir. 1996) (failure to comply with subpoenas duces tecum); *NLRB v. Ralph Printing & Lithographing Co.*, 433 F.2d 1058, 1060-62 (8th Cir. 1970) (failure to comply with order to engage in collective bargaining); *Ford Motor Co. v. B & H Supply, Inc.*, 646 F. Supp. 975, 1002 (D. Minn. 1986) (failure to comply with preliminary injunctions).

The NFLPA does not even suggest that the Court's remand order contains such a clear and explicit directive. After all, the Order is *silent* regarding when further proceedings should occur (except to say they should be consistent with the CBA), the nature of any discipline that might be imposed in subsequent proceedings, or how the NFL may discipline other players in different circumstances. The Union instead argues that, because the order "unequivocally requires . . . further CBA arbitral proceedings, and that such proceedings must be 'consistent with' the Order" (Mot. at 16), the Court's entire opinion is implicitly coercive. The Union thus assumes that any action by anyone that could be seen as "inconsistent" with the *NFLPA*'s interpretation of the Court's opinion is automatically subject to sanction. *See* Mot. at 23-24. But that is not how civil contempt works.

Courts do not sanction a party for failing to follow its adversary's interpretation of what a decision "implicitly" means. *See Int'l Longshoremen's Ass'n*, 389 U.S. at 76 (vacating contempt sanction premised on non-compliance with order directing party to "comply with and to abide by" arbitration award because order did not explain "what the court intends to require and what it means to forbid"); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 213 (8th Cir. 1974) (refusing to affirm contempt sanction based on district court's directives that were only "strongly implied" because the order underlying a contempt finding "must be sufficiently specific to be enforceable"); *Glover*, 138 F.3d at 245 ("The defendants cannot be held in contempt and fined for failure to heed what the district court 'strongly urg[ed]'; a party may be found in contempt for disobedience of a court's lawful order, but not for disregarding its 'urging.'").

The Union's own motion confirms the absence of any "sufficiently specific" directive. The current motion asks the Court to require that the Hearing Officer "rule on Mr. Peterson's appeal as soon as practicable," that the NFL "[c]ease and desist from advocating" certain positions in Peterson's case and from imposing certain discipline on other players, and that Peterson's discipline be vacated in its entirety. Mot. at 24. Of course, the Order itself includes no such directives; nor could it, in light of the Court's limited jurisdiction to review an arbitration award. Because the NFLPA now seeks to impose unambiguous directives that are plainly absent from the Order, the Order is not "sufficiently specific to be enforceable" through this Court's contempt power. *Hazen v. Reagen*, 16 F.3d 921, 924 (8th Cir. 1994); *see Int'l Brotherhood of Electrical Workers, Local Union No. 545 v. Hope Electrical Corp.*, 293 F.3d 409, 418 (8th Cir. 2002)

("[C]ontempt orders must be based on a party's failure to comply with a clear and specific underlying order.").[3]

B. The NFL Engaged In No Conduct That Violates The Court's Order.

Even if the remand order were sufficiently coercive to support a contempt motion, the NFLPA has not identified—let alone proved by clear and convincing evidence—any conduct by the NFL (or the Commissioner) that actually violates the order.

1. The NFL Cannot Be Held In Contempt For Asserting Legal Arguments About How The Hearing Officer Should Apply The CBA's Requirements On Remand.

The NFLPA makes the remarkable assertion that the NFL "violated" this Court's order merely by opposing the Union's demand that the Hearing Officer immediately vacate Peterson's discipline in its entirety. The Union's position cannot be reconciled with the law, the Court's order, or the CBA.

The NFLPA seeks to hold the NFL in contempt not for disregarding a directive from this Court, but for *taking a position.* That is advocacy, not disobedience. The NFL is aware of no case – and the NFLPA has cited none – in which a federal court has ever enforced contempt sanctions against a party simply for advocating a position. Quite the opposite: The Supreme Court settled this question long ago, holding that the advocacy the NFLPA calls "blatant contempt" is actually nothing of the sort, and cannot be enjoined or punished just because a court (or, as in this case, another party) happens to

[3] Any doubt as to the coercive effect of the Court's remand order must be resolved in favor of the NFL. *See Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 18 (1st Cir. 1991) ("[U]ncertainty about the scope and purport of an order should be resolved in favor of a putative contemnor.").

disagree with a litigant's position. *See, e.g.*, *In re McConnell*, 370 U.S. 230, 236 (1960) ("The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his official duty."); *Holt v. Virginia*, 381 U.S. 131, 136 (1965) (reversing contempt sanctions against attorney and client that were based on "nothing whatever except [contemnors'] allegations made in motions for change of venue and disqualification" of trial judge).[4]

Even if the Court could use its contempt power to punish a party for making legal arguments, it could not do so here because the NFL's advocacy is plainly permitted under any reasonable reading of the Order. Again, the Court remanded the case to the Hearing Officer "for such further proceedings consistent with this order as the CBA may permit," without specifying when those proceedings should occur or what issues or positions should be considered on remand. Order at 16. The NFL's opposition to the Union's request to the Hearing Officer was entirely in keeping with this Order.

First, the NFL acted "consistent with" the Court's order and the CBA in opposing the Union's request that the Hearing Officer vacate Peterson's discipline altogether. The Order did not preclude disciplining Peterson for beating his son, an act that the NFLPA conceded was "conduct detrimental" meriting discipline under the CBA. *See supra*, p. 3.

[4] The NFLPA at various points accuses the NFL of "instruct[ing]," "direct[ing]," or "telling" the Hearing Officer what to do. *See, e.g.*, Mot. at 7, 9, 17. As the NFLPA's own sources show, the NFL did no such thing. *See, e.g.* Berens Dec. Exs. 4, 7, 10. Nor could it. The Hearing Officer has no obligation to act on either party's requests.

Refusing to acquiesce in the Union's changed position was inconsistent with neither the CBA nor the Order.

Second, the NFL acted "consistent with" the Order and the CBA when it opposed the NFLPA's request for an "immediate" decision from the Hearing Officer. The CBA simply does not address post-remand proceedings, let alone dictate the timing of a Hearing Officer's decision upon remand. Indeed, the provision on which the Union relies—Article 46 (*see* Mot. at 2, 17, 19)—applies only to *initial* appeals to the Hearing Officer. *E.g.*, CBA Art. 46 § 2(d) (addressing timing of decision "following the conclusion of the hearing"). But regardless, Article 46 affords the Hearing Officer substantial discretion in scheduling, providing that "[e]ach of the time limits set forth in this Article *may be extended* . . . by the hearing officer upon appropriate motion." CBA Art. 46 § 3 (emphasis added). Therefore, even if the NFLPA's strained reading of the CBA is correct, it was wholly "consistent" with the CBA, and thus the Order, to ask the Hearing Officer to exercise his discretion to schedule proceedings in light of the Eighth Circuit appeal—particularly when doing so would not prejudice Peterson in any way.[5]

2. The NFL Cannot Be Held In Contempt For Its Disciplinary Decisions Regarding Other Players.

The NFLPA's remaining argument is that the NFL should be held in contempt of this Court's Order based on its discipline of different players in different circumstances,

[5] The Union's argument to the contrary is not only baseless, but it ignores the clear limits of this Court's jurisdiction, which, again, recognize that it is for the Hearing Officer, not the Court, to construe the CBA's procedural requirements. *See United Paperworkers Int'l Union*, 484 U.S. at 36-37. The Court's Order reflects this limitation by instructing that proceedings merely be "consistent with" the CBA, rather than, as the Union would now have it, dictating a particular schedule.

such as Hardy. Mot. at 20-24. The Union's invitation for this Court to intervene in another player's disciplinary matter is an insupportable abuse of process and well beyond the Court's jurisdiction.

Even if this Court had jurisdiction over another player's arbitration (and it does not), the limited scope of review in an action to review an arbitration decision would bar the Court from taking any action that might "usurp[] the arbitrator's role" of deciding the merits of the dispute. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 511 (2001). Thus, in reviewing an arbitration decision, a court is precluded from "interfer[ing] with an arbitration proceeding" beyond the "narrowly defined procedural powers" of "determin[ing] (1) whether arbitration should be compelled, . . . and (2) whether an arbitration award should be confirmed, vacated, or modified." *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 619 F.3d 458, 461-462 (5th Cir. 2010); *accord Lee v. Chica*, 983 F.2d 883, 885 (8th Cir. 1993).

That limitation plainly forbids an order directing the NFL to "cease and desist" from advocating its position before the Hearing Officer in another matter. Such an order would impermissibly interject this Court and its judgments into the arbitration, thereby usurping the Hearing Officer's authority and "seiz[ing] control over substantive aspects of [the] arbitration." *Positive Software*, 619 F.3d at 462. Indeed, far from simply "control[ing]" the arbitration, such an order would effectively dictate its outcome in clear violation of the well-settled rule that courts "must not foreclose further proceedings by settling the merits according to [their] own judgment of the appropriate result." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40 n.10 (1987).

To be clear, the NFL disputes the Union's characterization of the Hardy discipline as involving a "retroactive" application of a new policy. But that was for the *Hearing Officer* in the Hardy matter to resolve, as well as the impact, if any, of the decision in this case. *See Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1425 (8th Cir. 1986) ("an arbitrator generally has the power to determine whether a prior award is to be given preclusive effect"); *accord Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC*, 638 F.3d 572, 579 (8th Cir. 2011); *see also* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 11-20 (Kenneth May et al. eds., 7th ed. 2012) ("Courts and arbitrators alike agree that the weight to be given to" arbitration awards, including those "between the same parties [under] the same contract [provision]," "lies within the discretion of the arbitrator.").

Simply put, this Court has no authority to intervene in the Hardy matter (or any other player's case) to evaluate the discipline there—without the benefit of a factual record no less. *See* Order 1 (Court's order regarding Peterson is "[b]ased on a review of the file, record, and proceedings herein . . . ."). The Union's insistence to the contrary lays bare the true—and improper—reason for its contempt motion.

CONCLUSION

For the foregoing reasons, the NFLPA's motion to hold the NFL, the NFL Management Council, and Commissioner Goodell in contempt should be denied.

DATED: July 23, 2015

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