IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

JONATHAN VILMA, Plaintiff,	:	CIVIL ACTION
	:	No. 12-1283 c/w 12-1718 & 12-1744
VERSUS	:	**PERTAINS TO 12-1744**
	:	SECTION "C" (3)
ROGER GOODELL, ET AL,	:	
	:	JUDGE HELEN G. BERRIGAN
Defendants.	:	
	:	MAGISTRATE JUDGE DANIEL E. KNOWLES, III

NFLPA REPLY MEMORANDUM IN SUPPORT OF MOTION TO VACATE[1]

Every point in the NFL's Response (Doc. 143, the "Opposition") boils down to the erroneous proposition that, when serving as an arbitrator, the Commissioner is immune from the rules that apply to all arbitrators under federal law. This is the NFL's defense to the Commissioner's evident partiality (i.e., that because the NFLPA agreed the Commissioner could arbitrate certain subjects, he can conduct himself however he pleases when doing so), to the Commissioner's failure to conduct a fair hearing (i.e., that when serving as an arbitrator, the Commissioner decides the process and may provide as little as he likes), and to the Commissioner's new trumped up claim against Mr. Fujita (i.e., that, as arbitrator, the Commissioner can interpret the NFL Constitution & Bylaws however he wants). However, a sports league commissioner who has bargained to serve as a labor arbitrator has also committed to follow the LMRA and FAA prohibitions against evident partiality. "[W]here the arbitrator" – or the arbitral process or award – "exceeds the express limitations of [the] contractual mandate,

[1] Defined terms have the same meaning herein as in the Memorandum of Law in Support of the NFLPA's Motion to Vacate Commissioner Goodell's Arbitration Award (Doc. 137-1) (the "Motion"). In quotations herein, unless otherwise indicated, emphasis is added, and internal quotations, citations, brackets, and ellipses are omitted.

judicial deference is at an end."[2]

I. THE COMMISSIONER'S EVIDENT PARTIALITY REQUIRES VACATUR

A. It Is Neither "Improper" Nor "Inappropriate" For The Court To Assess The Commissioner's Evident Partiality Now

First, the NFL's lead argument (Opp'n at 2) rests on the false premise that this Court will act on the Commissioner's evident partiality before he issues a new arbitration award. The Court, however, has already made clear that it will promptly rule on the NFLPA's Motion after the award issues.[3]

Second, the NFL's claim that the Court could never act before the Commissioner issues an award is not only irrelevant, it is legally incorrect. Courts may disqualify arbitrators for evident partiality even before arbitration commences.[4] Pre-award disqualification is justified when "the unmistakable partiality of the arbitrator will render the arbitration a mere prelude to subsequent litigation." Aviall, Inc. v. Ryder Sys., Inc., 913 F. Supp. 826, 836 (S.D.N.Y. 1996), aff'd, 110 F.3d 892 (2d Cir. 1997). In fact, sports league commissioners – including the NFL Commissioner – have at least twice been disqualified for evident partiality pre-arbitration. See Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067-68 & n.2 (2d Cir. 1972); Morris v. New York Football Giants, Inc., 575 N.Y.S.2d 1013, 1017 (Sup. Ct. 1991).[5]

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[2] Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n, 889 F.2d 599, 602 (5th Cir. 1989).

[3] Daigle v. Gulf State Utils. Co., 794 F.2d 974 (5th Cir. 1986) is an "exhaustion of remedies" case that is irrelevant here because the Commissioner arbitration will, in fact, be "exhausted" when the Court rules. Further, Daigle did not involve an evident partiality claim, which the Fifth Circuit recognizes may justify pre-arbitration relief (infra).

[4] E.g., Third Nat'l Bank v. WEDGE Group Inc., 749 F. Supp. 851 (M.D. Tenn. 1990) (pre-arbitration removal of arbitrator named in parties' agreement); Cristina Blouse Corp. v. Int'l Ladies Garment Workers' Union, 492 F. Supp. 508 (S.D.N.Y. 1980) (same).

[5] Although cited by the NFL for the opposite proposition, Gulf Guaranty Life Insurance Co. v. Connecticut General Life Insurance Co. expressly acknowledges that there are circumstances in which pre-award removal of an arbitrator is appropriate. See 304 F.3d 476, 492 (5th Cir. 2002) (recognizing the grounds set forth in Aviall, but concluding they did not apply in that particular case). Aviall – endorsed by the Fifth Circuit in Gulf Guaranty Life Insurance Co. – expressly recognizes the propriety of disqualifying an arbitrator before the arbitration for conduct he engaged in after the parties appointed him. See Aviall, 110 F.3d at 834-35 (discussing Erving).

Third, the NFL fails to identify any aspect of the Court's evident partiality analysis that would be any different after the award issues. The record of the Commissioner's conduct has been before the Court for months and there is no practical, equitable, or legal reason why the Court cannot assess evident partiality now.

Last, it is the NFL that has created the need for a schedule that enables the Court to rule immediately after the Commissioner issue his arbitration award. The NFL could simply have agreed to stay the Players' suspensions until the Court rules on the Motion to Vacate, but the League's refusal to do so has necessitated a briefing schedule that allows for expeditious Court review and action. Otherwise, the Players would suffer severe and irreparable harm from unlawful suspensions before the Court ever had a chance to act.

B. The Commissioner Is Not Above Arbitration Law

The NFL again argues that the NFLPA agreed in the CBA to the evident partiality that the Commissioner demonstrated here. (See Opp'n at 3-4.) This is absurd. While the NFLPA did agree that the Commissioner may arbitrate a limited sphere of "conduct detrimental," the NFLPA never agreed that the Commissioner may – even before the arbitration takes place – publicly condemn the player conduct at issue, publicly commit himself to unprecedented discipline, and prioritize the NFL's agenda over any semblance of impartiality. Rather, the NFLPA agreed the Commissioner could act as an arbitrator entitled to judicial deference "on the merits" because he, like all sports league commissioners acting in this capacity, would be subject to FAA and LMRA standards for arbitrator conduct, including evident partiality.[6]

It apparently needs reiterating that the NFLPA does not object to the Commissioner

[6] See NHLPA v. Bettman, 1994 WL 738835, at *13 (S.D.N.Y. Nov. 9, 1994) ("Obviously, even the agreed-upon appointment of an arbitrator with known links to one side of the controversy does not immunize the status or conduct of the decisionmaker from all judicial scrutiny."); Morris, 575 N.Y.S.2d at 1017; Erving, 468 F.2d at 1068 n.2.

serving as arbitrator because of any "inherent bias"; rather, it is his statements and conduct in this specific case that have rendered the Commissioner evidently partial. The authorities the NFL cites on page 5 of the Opposition thus respond to an argument the NFLPA is not making.

Nor is there any dispute between the parties about the governing, objective evident partiality test applied by the Fifth Circuit. See Householder Group v. Caughran, 354 F. App'x 848, 852 (5th Cir. 2009).[7] Instead, the actual debate is whether this Court, as fact-finder, should conclude that the evidence demonstrates that Commissioner Goodell's actions violate this objective standard. E.g., Lifecare Int'l, Inc. v. CD Med., Inc., 68 F.3d 429, 435 (11th Cir. 1995) ("the 'evident partiality' question necessarily entails a fact intensive inquiry"). The overwhelming and undisputed record of the Commissioner's evident partiality – i.e., his public statements and public conduct (the latter of which is wholly ignored by the NFL's Opposition) – speaks for itself, and the NFLPA will not repeat it here.[8] We will, however, respond to the NFL's main Opposition points concerning the "facts." (Opp'n at 5-8.)

First, the NFL cites the Commissioner's charge to protect "public confidence in the game of professional football" as though it is a get-out-of-jail free card, granting carte blanche to ignore the law of evident partiality in the name of public relations. (Opp'n at 5-6.) But the CBA nowhere reflects any agreement by the NFLPA that the Commissioner may launch a pre-arbitration, public relations campaign to "expl[ain] to the public as to why he had decided to discipline the . . . players," or "why their respective conduct was detrimental to professional

[7] The NFL cites an Eighth Circuit case for the proposition that a showing of actual "prejudice" is required, but that is not the law here. (Opp'n at 4 (citing Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 552 (8th Cir. 2007) (discussing prejudice requirement as a "burden under our case law")).) Nevertheless, there is ample evidence of the Players being prejudiced by the Commissioner's bias in this proceeding, e.g., the Commissioner's re-imposition of essentially the same discipline under a new label to evade the ruling of the Appeals Panel without affording the Players the most basic procedural rights provided by the CBA.

[8] (See, e.g., Mot. at 5-13, 15-17; Appl. to Vacate (No. 12-cv-01744, Rec. Doc. 1) ¶¶ 47-50, 57-59, 67-80; Mem. in Opp'n to Defs.' Mot. to Dismiss at 10-11 (Rec. Doc. 104); Consent Mot. to Take Judicial Notice (Rec. Doc. 94); see also Order Granting NFLPA Mot. for Judicial Notice (Rec. Doc. 102).)

football." (Id.) Instead, by agreeing to serve as an arbitrator in certain cases, the Commissioner assumed the responsibility in such cases to refrain from conduct that "a reasonable person would have to conclude [] was partial." Householder Group, 354 F. App'x. at 852.

Second, the NFL's emphasis on the fact that the Commissioner statements cited by the NFLPA were made "after NFL Security reported on its findings," and "almost all were made after Commissioner Goodell issued his notices of discipline," (Opp'n at 6), ignores the dispositive timing issue. The relevant fact is that 100% of the statements and conduct relied upon by the NFLPA as evidence of the Commissioner's evident partiality occurred before he completed his duties as an arbitrator in this matter.[9]

Third, by arguing that the NFLPA had a "public relations campaign" of its "own" (Opp'n at 6 n.1), the NFL punctuates the degree to which it is missing the point. The NFLPA was not, and is not, acting as a labor arbitrator bound by the evident partiality standards of the LMRA and FAA. The union therefore does not reap the benefits, nor bear the responsibilities, that the Commissioner assumed by agreeing to serve as an arbitrator.

Last, the NFL never denies that by virtue of the Commissioner's actions, he has publicly locked himself into positions on the underlying merits from which he cannot retreat when issuing his arbitration decision. This indisputable conclusion requires vacatur of any award he issues. See Morris, 575 N.Y.S.2d at 1016-17 (disqualifying NFL Commissioner from arbitrating dispute, pre-arbitration, because "[t]o find for [the players], the Commissioner would have to reverse certain positions he previously strongly advocated").

[9]Judge Zainey's decision in Adams v. Sec. Am., Inc., 2006 WL 2631863 (E.D. La. Sept. 12, 2006), is inapposite. In Adams, plaintiffs' evident partiality claim was based on comments made by the arbitrator about the accuracy of a witness's testimony on day 60 of the proceedings. Id. at *8-9. The court held that comments made to the parties during the arbitration proceedings and after considerable testimony were insufficient to show evident partiality because, by then, it was appropriate for the arbitrator to have developed views regarding the merits and to comment on them during the proceeding. Id. By contrast, the Commissioner's statements here were made to the public and before the arbitration even commenced.

II. THE AWARD SHOULD BE VACATED FOR THE ADDITIONAL REASON THAT IT VIOLATES THE CBA AND INDUSTRIAL DUE PROCESS

The NFL responds to the NFLPA's objections concerning the atrocious procedural defects in the Commissioner's arbitration with misdirection – specifically, by taking on red herring positions the NFLPA never advanced – and by arguing that the requisite process is a creature of the Commissioner's whim. At the threshold, we note that the NFLPA does not seek "the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure" or all of the "rights and procedures common to civil trials." (Opp'n at 9, 10.) Rather, the NFLPA merely seeks (i) the express protections afforded to the Players under the CBA (and guaranteed by "essence of the agreement" case law), and (ii) the implicit requirements of fundamental fairness that, as a matter of law, must be provided in all arbitrations (as guaranteed by industrial due process case law).

A. The Process Expressly Required By The CBA

In Article 46 hearings, the CBA expressly requires disclosure of all exhibits the Commissioner relies upon. (See Mot. at 22-23; Appl. to Vacate ¶¶ 85-96; Memo. in Opp'n to Defs.' Mot. to Dismiss at 15-17.) Despite this clear CBA directive, the Commissioner defiantly refuses to disclose the vast majority of the 18,000 documents and numerous witness statements that he relies upon and that formed the basis of the NFL Security Report underlying his factual conclusions. (See id.) While the Commissioner might have the authority to decide procedural issues at the arbitration (Opp'n at 9), he does not have unconstrained authority to ignore the express procedural requirements of the CBA under the "essence of the agreement" doctrine, which must be enforced by the Court.[10]

[10] Delta Queen, 889 F.2d at 602 ("[W]here the arbitrator exceeds the express limitations of [the] contractual mandate, judicial deference is at an end."); Cont'l Airlines, Inc. v. Int'l Bhd. of Teamsters, 391 F.3d 613, 619-20 (5th Cir. 2004) (arbitral board "read out" specific requirements of the parties' agreement and thus award did not

B. Processes Implicitly Required By Industrial Due Process

It is revealing that the NFL disputes the Players' arbitration right to fundamental fairness. (See Opp'n at 10 n.3 (critiquing the NFLPA's "only federal case" supporting existence of this requirement).) No matter what the NFL thinks, the inherent right of workers to a fundamentally fair hearing is a settled proposition.[11]

Industrial due process has been defined to include an accused worker's right to access exculpatory evidence and to confront his accusers. (See Mot. at 19-21; Appl. to Vacate ¶¶ 97-114; Mem. in Opp'n to Defs.' Mot. to Dismiss at 17-20.) With respect to exculpatory evidence, the NFL has finally stopped denying that there is no such undisclosed information that would aid the Players' defenses. Indeed, the NFLPA learns of more undisclosed, exculpatory information with each passing day.[12] As for the Players' right to confront their accusers – Coaches Williams and Cerullo – the NFL will again deny the Players that right, even while the NFL itself relies upon newly revealed declarations from these witnesses. (Opp'n at 11.) Nor is the NFLPA's "opportunity to question the NFL Security personnel who conducted the investigation" (id.) a substitute for the Players' right to confront their accusers; NFL Security personnel are League employees who can at best provide second- and third-hand accounts of contested facts.[13]

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draw its essence from the agreement); Int'l Union of Operating Eng'rs v. Cooper Natural Res., Inc., 163 F.3d 916, 920 (5th Cir. 1999) (affirming vacatur because arbitrator disregarded his clear obligations under the contract).

[11] See, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 299 (5th Cir. 2004) (requiring fundamentally fair hearing that "meets the minimal requirements of fairness – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. The parties must have an opportunity to be heard at a meaningful time and in a meaningful manner."); Murphy Oil USA, Inc. v. United Steel Workers AFL-CIO Local 8363, 2009 WL 537222, at *3 (E.D. La. Mar. 4, 2009) (similar); see also Gulf Coast Indus. Workers Union v. Exxon Co., USA, 70 F.3d 847, 850 (5th Cir. 1995) (proceedings lack fundamental fairness when arbitrator refuses to hear evidence "pertinent and material to the controversy").

[12] (Compare concurrently filed Declaration of Jimmy Wayne Kennedy ¶¶ 4-5, Oct. 14, 2012 (attesting that he told NFL Security he had "no information" about the alleged bounty on Brett Favre) with Mem. from Commissioner Goodell to Chief Executives and Club Presidents at 4 (Oct. 9, 2012) (Mot., Greenspan Decl., Ex. P) (Rec. Doc. 137-2) (identifying Kennedy as a source of the NFL's information about the alleged bounty on Favre).

[13] Workers also have an industrial due process right to have mitigating factors considered in any punishments. (See, e.g., Appl. to Vacate ¶¶ 115-125; Mem. in Opp'n to Defs.' Mot. to Dismiss at 20-21.) The Commissioner's newfound lip service to this principle is just that.

III. ANY SUSPENSION OF MR. FUJITA WILL INDEPENDENTLY VIOLATE THE ESSENCE OF THE AGREEMENT

Forced to acknowledge that Mr. Fujita did not participate at all in Coach Williams's "pay-for-performance/bounty" program, but unwilling to retreat from his public promise to make examples of each of the Players, the Commissioner has contrived a brand new charge against Mr. Fujita: purportedly violating two provisions of the NFL Constitution & Bylaws. (See Mot. at 23-24.) Tellingly, the NFL does not quote the language of these provisions in its Opposition or even attempt to explain how they could possibly apply to NFL players. (See Opp'n at 12.) As set forth in the NFLPA's Motion, the Constitution & Bylaws provisions cited by the Commissioner apply only to League and Club employees (not players). (See Mot. at 23-24.) There is no other conceivable interpretation of the plain language of the provisions. Accordingly, if the Commissioner suspends Mr. Fujita on this ground, his arbitration award will violate the essence of the agreement for this reason as well.[14]

Underscoring this conclusion, the NFLPA has just become aware of an ESPN segment that aired around January 1996, entitled "Smash for Cash," detailing former NFL player-funded "incentive" pools for legitimate plays.[15] The segment shows players discussing player-to-player incentives for "big plays" (e.g., interceptions), and one player, Reggie White, describes paying $500 for "big hits" (Mr. Fujita, by contrast, is not alleged to have offered incentives for any hits). The NFL did not punish any of those players for violating the Constitution & Bylaws provisions invoked against Mr. Fujita, or for anything else. To the contrary, towards the conclusion of the segment, an NFL spokesperson is quoted as saying "the 'Smash for Cash' program is within the

[14] The NFL cites MLBPA v. Garvey, 532 U.S. 504, 509 (2001) to argue that an arbitrator's "serious error does not suffice to overturn his decision." (Opp'n at 12.) But the Commissioner did not merely commit a "serious error"; he was not "even arguably construing or applying the contract" – which MLBPA holds requires vacatur. Id.

[15] See DVD: Smash for Cash (ESPN NFL Countdown 1996), Ex. A to the Declaration of David L. Greenspan, filed concurrently herewith.

rules as long as players use their own monies, the amounts are not exorbitant, and the payments are not for illegal hits."[16] The fact that the NFL has a different agenda today than it did in 1996 cannot change the unequivocal language of the NFL Constitution & Bylaws, which has never prohibited this type of behavior. The Commissioner's attempt to nonetheless suspend and scapegoat Mr. Fujita for conduct – incentivizing undisputed, legitimate plays – never before punished or prohibited by the NFL not only violates the "essence of the agreement" but further demonstrates the Commissioner's evident partiality.

IV. THE COURT HAS THE POWER TO APPOINT A NEUTRAL

According to the NFL, even if the Court were to find that the arbitration award must be vacated because of the Commissioner's evident partiality, the Court would be impotent to order anything other than arbitration right back before the same evidently partial arbitrator. (Opp'n at 13.) This nonsensical result – arbitration purgatory – is not the law. To the contrary, the precedents cited by the NFLPA run the gamut: sports league commissioners designated as arbitrators being disqualified in favor of neutrals, other labor and commercial arbitrators being disqualified (or having their awards vacated) in favor of neutrals under the LMRA and FAA, and replacement of appointed arbitrators occurring both pre- and post-arbitration. (See Mot. at 17-19.) Furthermore, the Supreme Court and the Fifth Circuit have specifically empowered district courts to exercise "judicial inventiveness" to protect the labor arbitration process. (See id.)[17] In light of all of these authorities, there can be no serious question about the Court's ability to

[16] The Constitution & Bylaws provisions invoked against Mr. Fujita are the same provisions in effect when the "Smash for Cash" segment aired. (Compare Greenspan Decl., Ex. B (then-in effect Constitution & Bylaws) at Art. IX, §§ 9.1(C)(8), 9.3(G) with Mot. to Vacate at 24 (quoting the provisions cited against Mr. Fujita); see also Tim Panaccio, Packers' Big Hits Earned Cash, Courtesy of All-pro Reggie White, PHILLY.COM, Jan. 13, 1996, http://articles.philly.com/1996-01-13/sports/25654435_1_bill-cowher-big-hits-greg-aiello (quoting current NFL spokesman Greg Aiello: "there was nothing wrong with what White did").)

[17] E.g., United Ass'n of Journeymen v. Bechtel Constr. Co., 128 F.3d 1318, 1323 (9th Cir. 1997) ("We agree with the Third Circuit and the Fifth Circuit. Preservation of labor peace requires that district courts have some flexibility in fashioning decrees to enforce agreements to arbitrate labor disputes.").

implement the only remedy that will be effective here – the appointment of a neutral.

Finally, it is the height of hubris for the NFL to contend that neither Magistrate Knowles nor "the ablest Judge" can rival the "experience and competence" of the Commissioner to decide this matter. (Opp'n at 14.) Having disabled himself as evidently partial, Commissioner Goodell can no longer claim the right to arbitrate this dispute. In fact, it is only a neutral of unquestioned integrity who can restore public confidence in this process and mitigate the damage which the NFL's handling of "bounty-gate" has inflicted upon the game.

Respectfully submitted, October 18, 2012.

Jeffrey L. Kessler (*Pro Hac Vice*)
David G. Feher (*Pro Hac Vice*)
David L. Greenspan (*Pro Hac Vice*)
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
Telephone: (212) 294-6700
Facsimile: (212) 294-4700

/s/ Joseph N. Mole
Joseph N. Mole (Bar No. 9538)
Meredith Simoneaux (Bar No. 34090)
FRILOT L.L.C.
1100 Poydras Street, Suite 3700
New Orleans, Louisiana 70163
Telephone: (504) 599-8000
Facsimile: (504) 599-8100

and

Richard C. Smith (*Pro Hac Vice*)
FULBRIGHT & JAWORSKI, LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2623
Telephone: (202) 662-4795
Facsimile: (202) 662-4643

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2012, a copy of the above and foregoing was served via the Court's CM/ECF system upon all counsel of record in these consolidated cases.

/s/ Joseph N. Mole