IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, on its own behalf and on behalf of ADRIAN PETERSON, Petitioner, -v.- NATIONAL FOOTBALL LEAGUE, NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, and ROGER GOODELL, Respondents.	:	Case No. 14-cv-4990 (DSD/JSM) **THE NFLPA'S REPLY IN SUPPORT OF ITS MOTION TO HOLD THE NFL IN CIVIL CONTEMPT**

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PRELIMINARY STATEMENT

The NFL's Opposition underscores the League's contempt for the Court's Order. The League has virtually nothing to say in defense of its behavior, *e.g.*, successfully imploring Henderson to conduct no further proceedings and retroactively applying the New Policy to yet another NFL player, all in blatant defiance of the Order.

Instead, the NFL offers a kitchen sink of arguments about its purported *carte blanche* to make "mere" legal arguments contrary to the Court's Order, the inapplicability of the Order to anything or any person other than Peterson, the Order being too non-specific to require the NFL's adherence, and the NFLPA's failure to meet and confer over an issue for which the NFL was on full notice and had no intention of complying. The League also resorts to misdirection by making gross misstatements about the NFLPA's Motion and the three very specific and narrow grounds underlying it. Each one of the League's arguments is meritless and lays bare the NFL's contumacious belief that the Court is powerless to enforce the Order because the NFL has appealed it. But, again, the League has no response to—and therefore ignores—the authorities conclusively holding that a notice of appeal does not excuse non-compliance or immunize a party from contempt. Mot. at 18-19.

Over five months have passed since this Court vacated Henderson's award, holding that lack of notice and retroactive application of the New Policy violated the essence of the CBA, that Henderson exceeded his authority by considering Peterson's punishment under the previous Policy, and ordering "further proceedings" consistent with the CBA. Since then, the NFL has succeeded in having Henderson conduct *no* "further proceedings"—resulting in what the NFLPA believes to be the longest, unresolved conduct detrimental

appeal in League history. The NFL has also urged Henderson to *again* exceed his CBA authority by reviewing Peterson's discipline under the previous Policy—a position that the League does not address in its Opposition and did not retract even after the NFLPA filed this Motion. And, even after the Court's Order, the NFL continued to apply the New Policy retroactively to punish players, believing there is nothing the Court can do to stop it. Respectfully, the Court should show the League it is not above the law. A civil contempt finding is severe, but so is the League's willful disregard of the Court's Order.[1]

ARGUMENT

I. THE NFL'S CONTUMACIOUS CONDUCT

In its Opposition, the NFL chooses to address its conduct last. The NFLPA will address it first.

A. "Taking a Position" That Defies a Court Order is Contumacious

The League claims, without citation, that "[t]he 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." Opp'n at 15. The League then cites two cases for the purported proposition that legal advocacy can never be contumacious. *Id.* at 16. The first argument is a gross misstatement of the NFLPA's Motion and the second is wrong as a matter of law.

The NFLPA does *not* attack as contumacious the NFL's opposition to Henderson "vacat[ing] Peterson's discipline in its entirety" or even the NFL's opposition to Henderson

[1] Unless otherwise indicated, emphasis is added throughout this Memorandum.

taking action "immediately." Opp'n at 15. To be sure, the Union disagrees with the NFL's advocacy on those fronts, but the Union nowhere asserts that *those* arguments warrant a finding of contempt. Rather, the NFLPA's Motion challenges two different—and very specific—positions that the NFL has advocated before Henderson, each of which directly violates the Order. Mot. at 2-3.

The first concerns the NFL asking Henderson—rather than this Court—for a stay, *i.e.*, to conduct ***no further proceedings***, until the Eighth Circuit rules on the NFL's appeal**.**[2] Motion, § I. This squarely contradicts the Court's direct Order for "further proceedings before the arbitrator as permitted by the CBA" and "further proceedings consistent with this order as the CBA may permit." Order at 16. And finding the NFL in contempt on this ground does not require the Court either to interpret the CBA or to "dictat[e] a particular schedule." Opp'n at 17 n.5. Rather, the issue is plain and simple, and requires no analysis of the CBA at all: the NFL successfully advocated that Mr. Henderson conduct ***no proceedings,*** the opposite of the Court's directive for ***further proceedings*** consistent with [the Court's] order."[3]

[2] The Eighth Circuit has not even set a date for oral argument.

[3] The NFL's argument that the CBA does not address "post-remand proceedings" is absurd. Opp'n at 17. The Court's Order vacating Henderson's Award restored the *status quo ante*, *i.e.*, Peterson waiting for Henderson to (re-)decide his disciplinary appeal. The CBA requires that such appeals be heard expeditiously and a decision rendered "as soon as practicable." CBA, Art. 46, § 2(d), 2(f)(i). Thanks to the NFL's advocacy, even five months after the Court's Order, ***no*** "further proceedings" have been held and ***no*** decision has been issued. In any event, as set forth above, the Court need not consider the CBA—only the fact that the NFL advocated for an arbitral stay despite the Court ordering "further proceedings" and the NFL choosing not to seek a judicial stay.

The second position that the NFLPA has challenged as contumacious is the NFL's repeated arguments to Henderson that, if he declined the NFL's directives to conduct no further proceedings, "the discipline imposed by the Commissioner should be upheld in its entirety under the [previous Policy]." Mot. at 9. These arguments blatantly defy the Court's Order because the Court had already ruled that Henderson "adjudicating the hypothetical question of whether Peterson's discipline could be sustained under the previous Policy" exceeded his CBA authority and constituted a second ground for vacating the Award. Order at 15-16; Mot. at 19-20. In other words, the NFL urged Henderson to do exactly what the Court had already ruled the CBA prohibited Henderson from doing. The NFL's Opposition offers ***no defense***—nothing—for this indefensible conduct. The silence speaks volumes.

Instead, the NFL argues that advocating a legal position is somehow categorically immune from a finding of contempt. Opp'n 15-16. The NFL's two cases say no such thing. For starters, they both concern ***criminal*** contempt under federal and Virginia statutes, respectively. *In re McConnell*, 370 U.S. 230 (1962); *Holt v. Commonwealth of Virginia*, 381 U.S. 131 (1965). Nonetheless, the cases make clear that "disobey[ing] any valid court order" or "attempt[ing] to prevent the judge or any other officer of the court from carrying on his court duties" is contumacious (*Holt*, 381 U.S. at 136), and legal advocacy *is* susceptible to contempt. *McConnell*, 370 U.S. at 234 ("the question in this case comes down to whether it can 'clearly be shown' on the record that the [lawyer's] statements while attempting to make his offers of proof actually obstructed the district judge in 'the performance of judicial duty'") (citations omitted); *Holt*, 381 U.S. at 136

(concluding that the "words used in the motion" were not contumacious because they were "in no way offensive").[4]

Finally, we note that the NFL's persistent retroactive *discipline* of players—what the Court held to violate the essence of the CBA—is not legal advocacy, it is *conduct* by the NFL and Goodell in violation of the Court's ruling. Thus, putting aside that the NFL's arguments about "mere" legal advocacy are wrong, they have no bearing on the NFL's contempt by virtue of its retroactive punishment of Hardy.

B. The NFL Committed Further Contempt of the Order By Retroactively Disciplining Hardy in Violation of the Order

With respect to its retroactive punishment of Hardy, the NFL argues that "[e]ven 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." Opp'n at 18 (emphases added and citations omitted). In fact, the NFL refers to "arbitration" or "arbitrators" fourteen times in this two-page section of its brief. *Id.* at § II.B. But this is another exercise in misdirection—the NFLPA's Motion has ***nothing to do with*** Hardy's (or any other player's) arbitration proceedings or arbitration award.

[4] *See also Commonwealth of Pennsylvania v. Local Union 542*, 552 F.2d 498, 504-505 (3rd Cir. 1977) ("Freedman suggests that *McConnell* permits a lawyer to disregard an adverse ruling by the trial judge if the lawyer believes that such action is necessary to protect the record for appeal purposes. We cannot agree. *McConnell* stands only for the narrow proposition that an attorney's unfulfilled threat to violate a trial judge's order does not constitute an obstruction of justice summarily punishable as criminal contempt.").

Rather, the NFLPA moved for contempt because Goodell and the NFL *disciplined* Hardy retroactively. That conduct is entirely different from—and separate from—the arbitration proceedings which ensued from Hardy's appeal of the discipline. To date, the NFLPA has not brought any judicial challenge to the Hardy arbitration process or decision, and is not asking the Court to intervene in the Hardy arbitration through this Motion. Accordingly, the NFL's pages of argument about courts' limited role in arbitration proceedings are just a waste of paper.

Moreover, the NFL's claim that the Court's Order in *Peterson* does not apply to "different players" fundamentally misstates the Order. The Court did not decide anything particular to Peterson or his conduct. Rather, the Court held based on the law of the shop that ***the CBA*** precludes retroactive application of the New Policy and its enhanced disciplinary penalties to any player. Order at 12-14. Hardy may not be the same person as Peterson, but the same CBA applies to both of them, and as such, so does the same law of the shop requiring notice and application of the "well-recognized bar against retroactivity." *Id*. at 13. It is the height of hubris—and contumacious—for the NFL to argue that this binding Court Order does not prevent it from continuing to punish players retroactively.

Although the NFL has much to say about the Court's purported powerlessness, it has little to say in defense of its contumacious disciplinary conduct. The NFL does make a half-hearted statement that the League "disputes the Union's characterization of the Hardy discipline as involving a 'retroactive' application of a new policy." Opp'n at 19. But even Arbitrator Henderson has now ruled that the NFL could not retroactively punish

Hardy by using the new baseline of a six-game suspension set forth in the New Policy because of the absence of any notice that such a policy would apply.[5]

As the NFLPA established in its Motion, if the NFL had any intention of complying with the Court's Order, it would have stated in no uncertain terms that Hardy's discipline was imposed pursuant to the previous Policy. Mot. at 20-23. Now, even Henderson has stated his "agree[ment] that the league seems purposefully vague about which policy is being applied here, and that the statements of Commissioner Goodell and Senior Vice President Adolpho Birch in their testimony in the Rice appeal suggest they may have believed they were acting under a new policy." Lisle Aff., Ex. 1, July 10, 2015 Letter from Harold Henderson to David Greenspan and Daniel Nash, at 7. Henderson continued that "[t]he material difference between the August 2014 memorandum is the new baseline for discipline at a six-week suspension; ***that is a change which cannot fairly be applied to conduct which occurred prior to the announcement.***" *Id.* at 10. He then held that Goodell's retroactive punishment of Hardy could not stand:

> [A ten-game suspension] is simply too much, in my view, of an increase over prior cases ***without notice such as was done last year, when the "baseline" for discipline in domestic violence or sexual assault cases was announced as a six-game suspension***. Therefore, the discipline of Mr. Hardy hereby is modified to a suspension of four games . . . .

[5] Goodell designated Henderson to serve as the Article 46 Hearing Officer in Hardy's appeal over the Union's objection and even after the Court had held that Henderson failed his CBA duties in *Peterson*. Order at 14 ("Henderson . . . failed to meet his duty under the CBA."). The NFLPA has not moved for contempt on this ground, but it is yet another sign of the NFL's disregard for the Court's Order and for fair and consistent treatment of NFL players.

Id. at 12. The NFL thus cannot be heard to argue that it did not retroactively punish Hardy in contempt of the Court's Order; even the evidently partial Henderson could not reach any other conclusion.[6]

II. THE COURT'S ORDER CLEARLY DIRECTED THE NFL NOT TO ENGAGE IN THE CHALLENGED BEHAVIOR

The NFL makes the incredible argument that—no matter what it does—it cannot be found guilty of civil contempt because the Court's Order purportedly contains "no clear and specific directive." Opp'n at 11. It is hard to fathom what could be more clear or more direct than the Order requiring "further proceedings before the arbitrator as permitted by the CBA" and "further proceedings consistent with this order as the CBA may permit." Order at 16. Each one of the three grounds for the NFLPA's Motion concerns the NFL's undisputed non-compliance with these specific directives.

First, urging the arbitrator to conduct *no proceedings* constitutes contempt for the Court's specific directive to conduct "further proceedings before the arbitrator." *Compare id. with, e.g.*, Berens Aff., Ex. 11 (NFL informing Henderson "there is no immediate need for [him] to conduct further proceedings [in Peterson's appeal] prior to the Eighth Circuit's decision . . ."); *id.* (NFL contending that "it would be nonsensical and serve no purpose for [Henderson] now to consider Peterson's arguments about how [Henderson] should apply Judge Doty's order given that the ruling is subject to change by the Eighth Circuit"). This

[6] On a different point, one need look no further than the timing of Henderson's decision in *Hardy* to see the efficacy of the NFL urging Henderson not to rule in *Peterson*. Hardy was disciplined on April 22—two months *after* the Court's February 26 Order—yet Henderson has managed to rule on Hardy's appeal while he continues to sit idly on Peterson's appeal at the NFL's behest.

contumacious advocacy continued even ***after*** the NFLPA filed this Motion. On June 9, the NFL again urged Henderson "***to defer ruling on the merits of the NFLPA's requested order until the Eighth Circuit appeal is resolved***." *See* Lisle Aff., Ex. 2, June 9, 2015 Letter from Daniel Nash to Harold Henderson.

Second, the NFL urged Henderson to consider Peterson's punishment under the previous Policy—even though Goodell never imposed discipline under that Policy—in direct contravention of the Court's ruling that Henderson "exceeded his [CBA] authority" by doing so in his original Award. Mot. at 19-20; Order at 14-16. The NFL does not even bother to defend its advocacy but instead argues that the Court did not "expressly compel [the NFL] to act in a specific way." Opp'n at 11. Even the NFL, however, concedes that the Court specifically directed that the "further proceedings" be "*consistent with the CBA*." *Id.* at 13. This is the beginning and end of the issue because the Court ruled that it was ***not*** **"**consistent with the CBA" for Henderson to exceed his CBA authority and consider Peterson's punishment under the previous Policy. But that is exactly what the NFL urged Henderson to do.

Third, the NFL punished Hardy retroactively in defiance of the Order's holding that retroactive punishment violates the essence of the CBA. The League argues that "the Order is silent regarding . . . the nature of any discipline that might be imposed in subsequent proceedings, or how the NFL may discipline other players in different circumstances." Opp'n at 13. This is false. To be sure, the Order is very narrow when it comes to the issue of player discipline, but it holds that the essence of the CBA requires notice and therefore prohibits retroactive application of the New Policy in a disciplinary situation. Order at 11-

14. On this narrow issue of notice, the Court *did* specifically rule on the CBA's law of the shop, and thus the NFL's contention that the Order was "silent" on whether retroactive punishment of another player would be "consistent with the CBA" should be rejected out of hand.

Because the Order does in fact contain a "clear and specific directive," the cases the League relies upon only serve to underscore the NFLPA's position.[7]

Finally, the NFL's (familiar) position that this Court is powerless—this time, powerless to enforce its own Order—defies common sense. If the NFL were correct that this Court could not hold the NFL and Goodell in contempt for defying the Order, the NFL could render the Order a nullity by continuing to urge Henderson not to take any action, and the NFL could force a Groundhog's Day scenario in which it continues to punish players retroactively[8] and the NFLPA must ask this Court to then vacate each and every

[7] *E.g., Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 74 (1967) ("operative command capable of 'enforcement'" supports finding of contempt); *Jankowski v. Duluth*, No. 11-3392, 2012 WL 6044414, at *5 (D. Minn. Dec. 5, 2012) ("clear and unambiguous" order required for contempt); *Russell v. Sullivan*, 887 F.2d 170 (8th Cir. 1989) (no finding of contempt because there was no court order); *Sierra Club v. Little Rock*, 35 F.3d 840 (8th Cir. 2003) (rejecting action for attorneys' fees and noting that contempt finding requires violation of court order); *see also Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998) (no contempt where party violated remedial plans not incorporated in court order); *Armstrong v. Exec. Office of the President*, 1 F.3d 1274 (D. Col. 1993) (no contempt where order did not actually direct the appellants to promulgate new regulations); *Iowa Protection & Advocacy Servs., Inc. v. Gerard Treatment Programs*, 274 F. Supp. 2d 1063 (N.D. Iowa 2003) (no contempt in the absence of clear language in the court's order); *Santana Prods., Inc. v. Compression Polymers, Inc.*, 8 F.3d 152 (3d Cir. 1993) (no contempt where order does not compel a party to take any action).

[8] This is not an academic issue. The NFL has hired a team of former prosecutors who are investigating years-old conduct by NFL players, constantly looking for new players to punish, regardless of how long ago their alleged conduct took place. Accordingly, unless

arbitration award that does not overturn such retroactive discipline. No matter how strenuously the NFL disagrees with the Order, it is not at liberty to defy the Order, nor is this Court powerless to enforce its specific directive for further proceedings consistent with the CBA.

III. THE NFL'S CLAIM THAT A PURPORTED FAILURE TO MEET AND CONFER EXCUSES ITS CONTEMPT IS ABSURD

After months of continuously defying this Court's Order, the NFL asks this Court to excuse its contempt on account of the *NFLPA's* alleged "blatant disregard" for this Court's meet and confer requirement under the Local Rules. Opp'n at 1. This is nonsense.

To begin with, nothing in Local Rule 7.1(a)—which requires pre-filing meet-and confers "if possible"—imposes an obligation to meet and confer where the opposing party has full notice that a finding of contempt may be sought against it and yet the party continues to disregard the court order at issue. As established in the NFLPA's Motion and herein, the NFL continued to brazenly defy this Court's Order for months following the NFLPA's repeated warnings that such conduct was contumacious. Mot. at 7-11; *see also* Berens Aff., Exs. 4-10. Having been ignored by the NFL throughout, there was nothing more the NFLPA could do, or was required to do, to put the NFL on notice. Local Rule 7.1(a) does not require exercises in futility, nor does it provide a get-out-of-jail-free card to litigants who are on notice of the subject of a motion but have made known their refusal to acquiesce. *See, e.g.*, *Ecolab USA Inc. v. Diversey, Inc.*, No. 12-CV-1984, 2015 WL

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this Court acts, the potential for retroactive application of the New Policy to player conduct prior to August 28, 2014, is very real.

2345264, at *1 n.1 (D. Minn. May 14, 2015) (declining to dismiss motions where moving party did not file meet and confer statement as the opposing party "assert[ed] no prejudice that it has suffered as a result of this failure").[9]

The NFL complains that the Union's certificate of compliance with Rule 7.1(a) is "disingenuous" (Opp'n at 2) because "the NFLPA never even directed its threat to the NFL" but only towards Henderson. *Id.* at 10. As purported support, the NFL quotes the following from the NFLPA's March 5 letter to Henderson: "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**.**" *Id.* at 6 (emphasis supplied by NFL). But the League's selective use of italics is just more NFL misdirection designed to obfuscate what is right there on the written page: the NFLPA's unambiguous statement about "***the NFL's unlawful request in defiance of the Court's Order***." *Id.* And the NFL

[9] For this reason, the NFL's cases are inapposite. None of them concern a contempt motion, and none of them denied a motion solely because of a purported failure to meet and confer. *E.g., Icenhower v. Total Auto.*, No. 14-14992014, 2014 WL 4055784 (D. Minn. Aug. 15, 2014) (granting motion for attorney fees despite party's failure to comply with L. R. 7.1(a)); *Ellis v. City of Minn.*, No. 11-CV-0416, 2013 WL 5406625 (D. Minn. Sept. 25, 2013) (affirming motion to sever on merits despite party's failure to comply with L. R. 7.1(a)); *LaFountaine v. Reishus*, No. 13-355, 2014 WL 4248437 (D. Minn. Aug. 27, 2014) (denying motion concerning altered documents on merits); *Stephens v. Fed. Nat'l Mortgage Ass'n*, No. 12-cv-2453, 2013 WL 656611 (D. Minn. Jan. 28, 2013) (denying motion to amend where plaintiffs failed to comply with L. R. 7.1(a), failed to file the required supporting documents, and failed to file a proposed amended pleading); *Damgaard v. Avera Health*, No. 13-2192, 2015 WL 1608209 (D. Minn. Apr. 10, 2015) (denying motion to preclude expert opinions based on the merits and party's failure to comply with L. R. 7.1(a)).

wholesale ignores the Union's further statement in the same letter that "***[t]he NFL*** strives to inflict delay, for a period of months, on what the CBA and the District Court's Order require to be an expedited appeal proceeding. ***We trust that you will not be a party to this improper request to deny Mr. Peterson's CBA rights and to defy the District Court's decision*** and that you will, instead, comply with the CBA and the Vacatur Order." Berens Aff., Ex. 5 at 2.

Other correspondence ignored by the League also shows that it was on notice that the Union considered *its*—not Henderson's—continued disregard of the Order to be a basis for contempt: "*[T]he NFL's alternative request*—that you uphold the Commissioner's discipline under the Prior Policy—is also in *blatant defiance of the Vacatur Order*" and "*The NFL* now asks you to make the same *unlawful ruling* a second time." Berens Aff., Ex. 8 at 2.

The NFL gave the NFLPA's repeated warnings the back-of-the-hand treatment and stayed the course with its contumacious behavior. Against this backdrop, the NFL's complaints that it should have been granted *another* opportunity to try to resolve a Motion that it continues to oppose lacks merit.

Moreover, the NFL's contention that it has somehow been prejudiced by the absence of any further meet and confer prior to the Union filing this Motion is belied by the fact that the NFL *continued* to implore Henderson to defy this Court's Order even *after* this Motion was filed. As stated above, as recently as June 9, the NFL again urged Henderson "to defer ruling on the merits of the NFLPA's requested order until the Eighth Circuit appeal is resolved," *i.e.*, to grant the NFL a self-help non-judicial stay and conduct no

further proceedings. Lisle Aff., Ex 2. This refusal to change course even after the Motion was filed belies any contention that a meet and confer would have made any difference.

The Court has now ordered the parties to mediate a potential resolution to this Motion. The NFLPA appreciates the opportunity to do so and will fully engage in that process, which should eliminate any of the NFL's stated concerns about the purported lack of a sufficient meet and confer process.

CONCLUSION

For all the reasons set forth in the NFLPA's Motion and herein, the NFLPA respectfully requests that the Court find the NFL in civil contempt, and issue the specific relief requested in the Motion, including reasonable attorneys' fees and costs.

Dated: July 30, 2015

Respectfully submitted,

By: s/ Barbara Podlucky Berens

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