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NATIONAL FOOTBALL LEAGUE  
PLAYERS ASSOCIATION,

Claimant,

v.

NATIONAL FOOTBALL LEAGUE

Respondent

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BEFORE ACTING SYSTEM ARBITRATOR  
STEPHEN B. BURBANK

Re: New Orleans Saints “Pay-For-Performance/Bounty” Program

OPINION

APPEARANCES:

FOR THE NFL PLAYERS ASSOCIATION:

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FOR THE NFL:

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By a demand for arbitration dated May 3, 2012, the National Football League Players Association (“NFLPA”) commenced this proceeding against the National Football League (“NFL”) pursuant to the Collective Bargaining Agreement between the NFLPA and the NFL dated August 11, 2011 (“CBA”). The NFLPA challenges the authority of the Commissioner of the NFL (“Commissioner”) to impose discipline on four current and former New Orleans Saints (“Saints”) players – Scott Fujita, Anthony Hargrove, Will Smith, and Jonathan Vilma (collectively, “the Players”) -- growing out of their alleged involvement in a pool from which Saints players were allegedly paid both for legitimate football activities (e.g., interceptions) and for conduct that incapacitated opponents, either temporarily (“cart-offs”) or for the duration of a game (“knockouts”). The NFL responded on May 18; the NFLPA replied on May 25, and a hearing was held on May 30.

Claiming authority under the standard Player Contract<sup>1</sup> and Article 46 of the CBA,<sup>2</sup> the Commissioner found that the Players had engaged in “conduct detrimental to the integrity of, and public confidence in, the game of professional football,” and suspended each of them without pay for a number of games during the 2012 regular season. The Commissioner’s May 2, 2012 letters to the Players each included the following paragraph describing in general the facts revealed by the record before him:

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<sup>1</sup> The standard Player Contract provides in pertinent part:

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 ... 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 at ¶ 15. *See id.*, Art. 4, § 1 (requiring standard Player Contract to be “used for all signings”).

<sup>2</sup> Article 46 provides in pertinent part:

All disputes involving ... action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows: the Commissioner will promptly send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such written notification, the player affected thereby, or the NFLPA with the player’s approval, may appeal in writing to the Commissioner.

CBA, Art. 46, § 1(a).

The record, based on numerous witness interviews and substantial documentary evidence, clearly shows that Saints defensive players and coaches organized, administered and funded a pay-for-performance/bounty program for three seasons; that the program included improper cash rewards for legitimate plays (such as fumble recoveries, interceptions, and the like) and improper cash rewards for injuring opposing players through “cart-offs” and “knockouts”; and that on multiple occasions specific cash bounties were placed on opposing players.<sup>3</sup>

In addition, the letters contained different paragraphs describing the individuals’ alleged participation in the pool, as prelude to statements concerning the basis for the discipline imposed. The relevant portions of those letters are:

Fujita

With respect to your particular involvement, the record establishes that you pledged a significant amount of money to the pool during the 2009 Playoffs. While the evidence does not establish that you pledged money toward a specific bounty on any particular player, the “pool” to which you pledged that money paid large cash rewards for “cart-offs” and “knockouts.”

It is my determination that your actions constitute conduct detrimental...<sup>4</sup>  
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Hargrove

With respect to your particular involvement, the record establishes that you actively participated in the program while a member of the Saints. Your declaration makes clear that the program existed at the Saints, and establishes that you knew about and participated in it. In addition, although you later denied it, the circumstances strongly suggest that you told at least one player on another club about the program, and confirmed that Vikings quarterback Brett Favre was a target of a bounty.

Moreover, and perhaps most important, you admitted that you intentionally obstructed the league’s investigation into the program by being untruthful to investigators. Your declaration acknowledges that you lied, but claims that you were instructed to do so by the coaching staff. Assuming that to be the case, it in no way absolved you from your obligation to cooperate with the investigation, particularly with respect to matters involving player safety and the integrity of

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<sup>3</sup> NFLPA Initiating Letter Brief, Exh. C at 1, Exh. D at 1, Exh. E at 1, and Exh. F at 1.

<sup>4</sup> *Id.*, Exh. C at 2. The Commissioner suspended Mr. Fujita for the first three games of the 2012 regular season. *See id.*

the game.

It is my determination that your participation in the bounty program and deliberate effort to impede the league's investigation both constitute conduct detrimental...<sup>5</sup>

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Smith

With respect to your particular involvement, the record establishes that you assisted Coach Williams in establishing and funding the program during a period in which you were a captain and leader of the defensive unit. More disturbing, multiple sources confirm that you pledged significant sums during the 2009 playoffs toward the program pool for cart-offs and knockouts of Saints' opposing players.

It is my determination that your active participation in the bounty program, role in its establishment and funding, and the offer of significant sums toward the program pool, all constituted conduct detrimental...<sup>6</sup>

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Vilma

With respect to your particular involvement, the record establishes that, as a captain of the defensive unit, you assisted Coach Williams in establishing and funding the program. More disturbing, several independent sources confirm that during the 2009 NFL Playoffs you offered a \$10,000 bounty to any player who knocked quarterback Kurt Warner out of the Divisional Playoff game and later pledged that same amount to anyone who knocked Brett Favre out of the NFC Championship game.

It is my determination that your general participation in the bounty program, your role in its funding, and the specific offer of bounties against specific players, all constituted conduct detrimental...<sup>7</sup>

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The NFLPA contends that the conduct for which the Players were suspended is covered by Article 14, Section 1 of the CBA, the enforcement of which is within the exclusive jurisdiction of

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<sup>5</sup> *Id.*, Exh. D at 2. The Commissioner suspended Mr. Hargrove for the first eight games of the 2012 regular season. *See id.*

<sup>6</sup> *Id.*, Exh. E at 2. The Commissioner suspended Mr. Smith for the first four games of the 2012 regular season. *See id.*

<sup>7</sup> *Id.*, Exh. F at 2. The Commissioner suspended Mr. Vilma for the entire 2012 season, effective immediately. *See id.*

the System Arbitrator under Article 15, Section 1.<sup>8</sup> Article 14, Section 1 provides in pertinent part:

A Club (or a Club Affiliate) and a player (or a Player Affiliate or player agent) may not, at any time, enter into undisclosed agreements of any kind, express or implied, oral or written, or promises, undertakings, representations, commitments, inducements, assurances of intent, or understandings of any kind: (a) involving consideration of any kind to be paid, furnished, or made available or guaranteed to the player, or Player Affiliate, by the Club or Club Affiliate either prior to, during, or after the term of the Player Contract... .

CBA, Art. 14, § 1.

In addition, the NFLPA seeks to enforce Article 14, Section 6(c), under which suspensions are not permitted penalties “for conduct in violation of Section 1 of this Article.” The sole penalties permitted for such conduct (as to players) are set forth in Section 6(a), as follows:

In the event that the System Arbitrator finds a violation of Subsections 1(a) or 1(b) of this Article, for each such violation: (i) (1) the System Arbitrator may impose a fine of up to \$500,000 on any player or player agent found to have committed such violation, and (2) shall, unless the parties to this Agreement otherwise agree, order the player to disgorge any undisclosed compensation found to have been paid in violation of Section 1 of this Article unless the player establishes by a preponderance of the evidence that he was unaware of the violation; and (ii) the Commissioner shall be authorized to void any Player Contract(s) that was (or were) the direct cause of such violation.

CBA, Art. 14, § 6(a).

The NFLPA argues that the discipline that the Commissioner imposed on the Players was “predominantly based on the undisclosed ‘pay for performance’ feature of the alleged bounty system.” NFLPA Reply at 1. Central to that argument is the view that two documents to which the Commissioner referred in his letters to the Players informing them of their suspensions are of equal probative value in determining the gravamen of the discipline as are the explanations in the letters themselves. The two documents are the March 2, 2012 “Report of NFL Security on Violations of ‘Bounty’ Rule by New Orleans Saints” (“NFL Security Report”), NFL Initiating Letter Brief, Exh. A, and the March 21, 2012 “Memorandum of Decision: In the Matter of Bounty Violations by New Orleans Saints” (“Memorandum of Decision”). *Id.*, Exh. B. As counsel for the NFLPA acknowledged at the May 30 hearing, however, it should make no difference which feature of the

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<sup>8</sup> The NFLPA also invokes Article 4, Section 5(a) of the CBA, which provides that “[a]ny agreement between any player and any Club concerning terms and conditions of employment shall be set forth in writing in a Player Contract as soon as practicable,” but does not impute to it any significance independent of Article 14, Section 1 for these purposes.

conduct in question was paramount for the Commissioner if, as the NFLPA contends, all of that conduct is within the prohibition of Article 14, Section 1. *See* May 30, 2012 Tr. at 76 (“Article 14 does not say that it matters for what purpose [i.e., legitimate plays or “cart-offs”] the payments are being made.”).

Simply as a matter of contract language, the alleged activities that gave rise to the Commissioner’s disciplinary action do not fit comfortably within the ambit of Article 14, Section 1, whether one focuses on the “pay for performance” (legitimate football activities) or the “bounty” (“cart-offs” or “knockouts”) feature of the pool. Section 1 evidently contemplates and prohibits an undisclosed agreement or understanding between a player and a Club concerning the player’s compensation. Undisclosed compensation terms could be used to avoid the Salary Cap or the rules governing Rookie Compensation and the Rookie Compensation Pool, thereby disturbing the competitive conditions to which they are thought to contribute. The concern about the integrity of the Salary Cap and the Rookie Compensation Pool is inferable from the placement of Article 14 in the CBA – immediately following the articles that prescribe the Salary Cap and the accounting rules for the Salary Cap – linkage that is confirmed by Article 14, Section 3 (authorizing System Arbitrator proceedings for alleged violations of the Salary Cap and Rookie Compensation Pool provisions, as well as for alleged violation of the ban on circumvention) and by Article 18 (prescribing certifications, including certification that Player Contract “sets forth all components of the player’s remuneration”). That the animating concern is undisclosed compensation is also confirmed by the fact that disgorgement of “any undisclosed compensation found to have been paid in violation of Section 1” is a mandatory penalty for a violation found by the System Arbitrator, unless the parties to the CBA otherwise agree or “the player establishes by a preponderance of the evidence that he was unaware of the violation.”

Article 14, section 1 clearly does not reach an agreement among players to reward on-field conduct (of any sort) out of a pool funded and maintained by players without involvement of Club personnel. Yet, as the NFLPA points out in reply to arguments made by the NFL, the allegation that coaches were involved in the activities that prompted the Commissioner’s discipline of the Players – indeed that one of them established and managed the pool – and that their superiors were aware of and did little if anything to stop them, suggests that “the Club” was involved for purposes of Article 14, Section 1, if not in paying, then in “ma[king] available” amounts from the pool.<sup>9</sup> Moreover, the involvement of multiple players does not insulate the scheme at issue here from Article 14’s prohibition, if it is otherwise applicable, since the prospect of and criteria for receiving distributions from the pool could be deemed an “undisclosed ... inducement[] ... or understanding[]” for all players regarding payments that would be made available by the Club, acting through coaches.

Although it is thus possible to bring some the conduct alleged in the NFL Security Report

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<sup>9</sup> The NFL Security Report found that, although players primarily funded the pool, two assistant coaches occasionally contributed to it (as on one occasion did “one individual from outside the club”). NFLPA Initiating Letter Brief, Exh. A at 1.

within the reach of Article 14, Section 1, I need not decide that question, since I have concluded that, with one possible exception, the conduct for which the Commissioner imposed discipline on the Players is not covered by Article 14, Section 1 and thus that the System Arbitrator lacks jurisdiction.

For this purpose, the important distinction is not between “pay-for-performance” distributions and “bounties.” It is rather the distinction, as to players, between funding the pool or making offers or pledges to contribute sums to it, on the one hand, and accepting (or agreeing to accept) distributions from it, on the other. Even if Article 14, Section 1 is properly interpreted to prohibit players from accepting (or agreeing to accept) undisclosed payments from a pool, primarily funded by players, for on-field performance (of whatever sort), to extend its terms to player contributions (or pledges) to the pool is not linguistically compelled and would wholly unmoor the language from its animating purposes. *See Reape v. New York News, Inc.* 504 N.Y.S.2d 469, 470 (App. Div. 1986) (“Since the intent of the parties in entering an agreement is a paramount consideration when construing a contract, even the actual words provided therein may be transplanted, supplied or entirely rejected to clarify the meaning of the contract.”).

It is important that the System Arbitrator insist upon exclusive jurisdiction when the CBA confers it. It is also important, however, that the System Arbitrator not usurp jurisdiction that is conferred on other decision makers. *See CBA*, Article 15, Section 2(e) (limiting System Arbitrator’s jurisdiction to terms of enumerated articles). Counsel for the NFLPA acknowledged that the same nucleus of operative facts may give rise to conduct that violates both Article 14, Section 1 and the prohibition against conduct detrimental, and that the appropriate disciplinary process depends upon which aspect is sought to be punished.<sup>10</sup> So here.

Unlike the NFLPA, I do not regard the NFL Security Report, the Memorandum of Decision, and the Commissioner’s May 2, 2012 letters as equally probative of the gravamen of the discipline imposed on the Players. In his letters to the Players, the Commissioner indicated that the NFL Security Report and the Memorandum of Decision “set forth the key facts regarding the bounty program.”<sup>11</sup> As counsel for the NFL observed at the hearing, only two of the Players are mentioned by name in the NFL Security Report, one of them only in connection with his denial that a bounty program existed, and no player is mentioned by name in the Memorandum of

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<sup>10</sup> “[I]f a player threw a game, that aspect of the conduct would be punishable by the Commissioner, not noncontract payments. If he was given a noncontract payment, that would still be for [the System Arbitrator], but the fact that a game was thrown? That’s conduct detrimental.” May 30, 2012 Tr. at 27. *See also id.* at 27-28 (“Same thing if someone had a firearm. It doesn’t matter that there was a noncontract payment. There would be an aspect that could be punished, but they’re very limited in [ ] terms of [the] type of behavior that is not given to others.”).

<sup>11</sup> NFLPA Initiating Letter Brief, Exh. C at 1, Exh. D at 1, Exh. E at 1, and Exh. F at 1. The Commissioner did not rely on, and is not bound by, any legal analysis or legal conclusions in the NFL Security Report.

Decision. *See* May 30, 2012 Tr. at 48. Moreover, in the concluding section of the former, the author(s) determined that “the evidence appears to establish ‘conduct detrimental’ in violation of the Constitution and Bylaws” and specifically that “[t]he players who contributed funds and targeted players on opposing teams are guilty of conduct detrimental.” NFLPA Initiating Letter Brief, Exh. A at 4. Finally, the Memorandum of Decision concerned, and concerned only, the appropriate discipline for the Club and Club personnel, reserving the question of discipline, if any, for players. *See id.*, Exh. B at 4, 6.

It makes little if any difference, however, once one has the relevant distinction in mind. With the possible exception of Mr. Hargrove, there is no reason to believe that the Commissioner proceeded because of undisclosed payments to the Players (or their undisclosed agreement to accept payments). The Commissioner’s letter to Mr. Hargrove leaves open the possibility that the “participation” for which (in part) discipline was imposed involved receipt of (or agreement to accept) payments from the pool.<sup>12</sup> His letters to the other three individuals state clearly that he imposed discipline because of the various roles that they allegedly played in establishing and/or funding a pool that rewarded on-field conduct calculated to injure opponents, and that also included bounties on specific opponents.

In that regard, it is not the case, as suggested by counsel for the NFLPA, that the Commissioner’s only interest with respect to “the bounty part” is to “punish for unsportsmanlike conduct on the playing field.” *See* May 30, 2012 Tr. at 25. Under the NFLPA’s view of the CBA’s jurisdictional architecture, punishment of players who, with minimal involvement by Club personnel, provided financial incentives for -- as opposed to themselves engaging in -- on-field conduct that was designed to cause injury would be possible, if at all, only under a provision (Article 14, Section 1) that is animated by concern about undisclosed payments *to* players and that does not distinguish between payments for legitimate plays and those intended to incapacitate opponents. If the language of the CBA required that result, I would be bound to implement it. But, as discussed above, with the possible exception of Mr. Hargrove, I do not believe that Article 14, Section 1 reaches the behavior of the Players that the Commissioner has sought to punish. In addition, if there were doubt on that score, I would regard this as a situation appropriate for giving a “practical and reasonable interpretation to the language employed and the parties’ reasonable expectations with respect thereto,” by reconciling Article 14, Section 1 and the Commissioner’s power to impose discipline for conduct detrimental under Article 46. *Malleolo v. Malleolo*, 731 N.Y.S.2d 752, 753 (App. Div. 2001). *See also* *National Conversion Corp. v. Cedar Bldg. Corp.*, 23 N.Y.2d 621, 625 (N.Y. 1969) (“All parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency.”).

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<sup>12</sup> *See supra* text accompanying note 5. *But see* May 30, 2012 Tr. at 69 (counsel for the NFLPA observing, “[a]ll that [the Commissioner] has on Mr. Hargrove is that he gave money into the program. He doesn’t link him to giving any hits, he doesn’t link him to saying I’m going to particularly do something for cart-offs.”). The Commissioner also (and, apparently, primarily) imposed discipline on Mr. Hargrove for intentional obstruction of the league’s investigation. *See supra* text accompanying note 5.



The NFLPA is understandably concerned that the Commissioner's claims of power to discipline for conduct detrimental not be permitted to subvert protections for players won in the collective bargaining process. Alert to that risk, I have nonetheless concluded that Article 14 cannot reasonably be interpreted to address the phenomenon of players providing or offering to provide financial incentives to injure opponents and thus that, when alleged to have done so, they are not entitled to the bargained-for protections (as to process and permissible penalties) that Article 14 provides.<sup>13</sup>

In sum, with respect to Mr. Fujita, Mr. Smith and Mr. Vilma, I conclude that the System Arbitrator lacks jurisdiction. I will retain jurisdiction as to Mr. Hargrove pending further action by the Commissioner either in a revised letter or in connection with Mr. Hargrove's appeal. The action called for -- if the Commissioner continues to believe that discipline is appropriate and again chooses to rely on Mr. Hargrove's alleged participation in the pool in addition to his obstruction of the league's investigation -- is to specify the nature of that alleged participation. If receipt of (or agreement to accept) payments from the pool plays any part in the revised decision (or decision on appeal), the NFLPA may return to seek relief from the System Arbitrator.

In light of the pendency of appeals from the Commissioner's decisions, it is appropriate to emphasize -- with respect to all of the Players -- that nothing in this opinion is intended to convey a view about the underlying facts or the appropriateness of the discipline imposed.

s/Stephen B. Burbank  
Stephen B. Burbank  
June 4, 2012

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<sup>13</sup> Even though counsel for the NFL was careful not to suggest that he was speaking for the Commissioner in this respect, his answers to questions probing the limits of the Commissioner's power were measured. *See* May 30 Hearing Tr. at 56 ("[M]y own view is that ... the Commissioner could not discipline a player for exercising free agency rights to which the league had agreed in the [CBA]); *see also id.* at 54-55.