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Petitioners: Genos "D.J." Williams and Ryan McBean, v. Respondent: National Football League.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case No. Division: Courtroom:
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PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF PETITION TO VACATE ARBITRATION AWARDS AND MOTION FOR PRELIMINARY INJUNCTION	

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Petitioners Genos “D.J.” Williams and Ryan McBean (collectively, “Players”), by their undersigned counsel, submit this Memorandum of Law in Support of their Petition to Vacate Arbitration Awards issued by Respondent National Football League (“NFL”) and to preliminarily enjoin the NFL from effectuating threatened suspensions against the Players pending resolution of this matter.

PRELIMINARY STATEMENT

This action seeks to vacate arbitration awards issued by the NFL on February 6, 2012, against Mr. Williams and Mr. McBean respectively (“Arbitration Awards”). The Players are professional football players for the Denver Broncos Football Club (“Broncos”). The Arbitration Awards, issued by Harold Henderson, the NFL’s Executive Vice President for Player Development and Senior Advisor to NFL Commissioner Roger Goodell, threaten to suspend the Players for six games each, without pay, in the 2012 season.

The Players respectfully request the Court to vacate the Arbitration Awards pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16, in light of: (1) Mr. Henderson’s having exceeded his powers; (2) Mr. Henderson’s misconduct; (3) public policy; (4) Mr. Henderson’s manifest disregard of the law; and (5) Mr. Henderson’s partiality.

The Players also respectfully request the Court to preliminarily enjoin the NFL from effectuating the threatened suspensions pending resolution of the instant action.

STATEMENT OF FACTS

The NFL Steroid Policy

The NFL Policy on Anabolic Steroids and Related Substances (“Steroid Policy”) was ostensibly designed to protect the integrity of the game of football and to protect the health and safety of its players. The NFL holds players to a strict liability standard and regularly suspends

players even though they have not tested positive for anabolic steroids or knowingly ingested a substance banned by the Steroid Policy.

The Steroid Policy requires certain actions by the player and administrators of the Steroid Policy alike during the collection and testing of specimens.

At the time a urine specimen is collected, the NFL Specimen Collection Procedures require the player to: (a) “completely remove his shirt and other garments above the waistline”; (b) “rinse his hands”; (c) lower his pants and underwear below his knees”; and, (d) “not have any clothing above his knees.” Ex. A at p. 141 ¶ 4(d)(f) and (g).¹

The specimen collector is required to “monitor the furnishing of the specimen by direct frontal observation[.]” *Id.* at ¶ 4(h). The NFL Specimen Collection Procedures also require the specimen collector, “[u]nder observation of the player,” to “close and lock the lids on the vials and ensure they are properly sealed.” Ex. A at p. 142 ¶ 5(f). The collector is then required to “seal both vials with the specimen ID seals.” *Id.* at ¶ 5(g). The NFL Specimen Collection Procedures also require “[b]oth the collector and the player” to “initial and date the vial specimen seals on the side of the vial.” *Id.* at ¶ 5(h).

The Steroid Policy also mandates the specimen collector and the testing laboratory to follow a strict chain of custody regimen to protect against tampering or alteration of the collected specimen. Specifically, the NFL Specimen Collection Procedures require: (1) the player to sign a Custody and Control Form certifying that the specimen was collected and sealed in accordance with the NFL Specimen Collection Procedures; (2) the specimen to “remain in a secure location” in the “custody and control” of the specimen collector “the entire time after the collection until it is handed over to a FedEx employee”; (3) the specimen collector to “**never** leave specimens

¹ References to “Ex. ___” refer to the Exhibits submitted herewith.

unattended any time prior to shipping” (emphasis in original); (4) the specimen to be kept “in a cool environment prior to shipping”; and (5) the specimen to “be shipped via FedEx Standard Overnight to the appropriate lab.” Ex. A at p. 143 ¶ 9.

Administration of the Steroid Policy

The NFL contracts with the National Center for Drug Free Sport, Inc. (“Drug Free Sport”) to administer the Steroid Policy. The NFL and Drug Free Sport are responsible for hiring competent and capable organizations and persons to collect specimens according to and in compliance with the NFL Specimen Collection Procedures.

The NFL and Drug Free Sport hired Stadium Medical, Inc. (“Stadium Medical”) to collect and analyze urine specimens for Broncos players pursuant to the Steroid Policy and the NFL’s Policy and Program for Substances of Abuse (“Drug Policy”).

Mr. Williams’ August 9, 2011 Urine Specimen

On August 9, 2011, Mr. Williams provided a urine specimen (“Williams Urine Specimen”) to an NFL-certified specimen collector (“Specimen Collector”) employed by Stadium Medical at the Broncos’ facility in Denver, Colorado. The Specimen Collector attested to the NFL Specimen Collection Procedures having been followed, including his frontal view of Mr. Williams providing the urine specimen. *See* Ex. N.

By letter dated October 6, 2011, Dr. John A. Lombardo, the Independent Administrator of the Steroid Policy, notified Mr. Williams that the Williams Urine Specimen was determined not to be a human specimen. Ex. A at p. 4. Dr. Lombardo also advised Mr. Williams that such a finding constituted a violation of the Steroid Policy. *Id.*

Mr. Williams had never previously failed a test under either the Steroid Policy or Drug Policy in his eight-year NFL career.

By letter dated November 11, 2011, Adolpho Birch, the NFL's Vice President of Law and Labor Policy, advised Mr. Williams that he was to be: (a) suspended for six regular-season games; (b) advanced to the next stage of the Steroid Policy; and (c) required to forfeit 6/17 of any applicable signing bonus. Ex. A at pp. 8-9.

The Specimen Collector, the NFL's contracted collection company and the NFL's testing facility committed several material violations of the Specimen Collection Procedures, failed to abide by the specimen safeguarding procedures, and allowed gaps in the chain of custody, all of which make it impossible to determine who was in possession of Mr. Williams' urine specimen, where Mr. Williams' urine specimen was stored at material times, whose sample was determined not to be a human specimen, and whether and by whom the specimen was tampered with or otherwise altered.

12:18 to 3:08 p.m. on August 9, 2011

The NFL documents do not show the time Mr. Williams provided a urine specimen. The NFL records simply reflect that Mr. Williams provided a urine specimen at some time between 12:18 p.m. and 3:08 p.m. on August 9, 2011. Ex. A at p. 51. The NFL offered no evidence at the arbitration hearing as to what time the Specimen Collector collected a urine specimen from Mr. Williams. The process takes a matter of minutes.

The Steroid Policy and NFL Specimen Collection Procedures require all urine specimens to be sealed in the player's presence. Ex. A at p. 143. Mr. Williams did not see anyone seal his urine specimen. The NFL offered no evidence at the arbitration hearing to contradict Mr. Williams' testimony that Mr. Williams' urine specimen was not sealed in his presence.

The Steroid Policy and NFL Specimen Collection Procedures require all players to initial and date a collected urine specimen seal on the side of the specimen vial. Ex. A at p. 142 ¶ 5(h).

Mr. Williams did not initial and date his urine specimen seals on the side of the vials. The NFL offered no evidence at the arbitration hearing to contradict Mr. Williams' testimony regarding this fact.

The Steroid Policy mandates a strict procedure by which the location of the collected specimen and the person in possession of the collected specimen are memorialized in official records. For example, the NFL Specimen Collection Procedures requires the Specimen Collector to keep a player's urine specimen "in his custody and control the entire time after the collection until it is handed to a FedEx employee." Moreover, a "collector must **never** leave specimens unattended at any time prior to shipping." Ex. A at p. 143 ¶ 9(b). (Emphasis in original.)

In violation of the Steroid Policy and NFL Specimen Collection Procedures, there is no evidence of where the Williams Urine Specimen was kept from the time of its collection until 3:08 p.m., and the NFL offered no such evidence at the arbitration hearing. A gap possibly as long as two hours and 50 minutes thus exists for which the Williams Urine Specimen is unaccounted.

In violation of the Steroid Policy and NFL Specimen Collection Procedures, there is no evidence, and the NFL at the arbitration hearing offered no evidence, that the specimen was sealed, who handled it or the manner in which it was safeguarded, if any, during this period.

3:08 p.m. on August 9, 2011 to 11:00 a.m. on August 10, 2011

Following the Specimen Collector's apparent removal of the Williams Urine Specimen from the testing area at 3:08 p.m. on August 9, 2011, Ex. A at p. 51, no one has been identified as having had custody and control of the Williams Urine Specimen until 11:00 a.m. on August 10, 2011, if not later.

In violation of the NFL Specimen Collection Procedures, the NFL offered no evidence at

the arbitration hearing that the Williams Urine Specimen remained in the custody and control of any authorized person until it was handed over to a FedEx employee. The FedEx shipping label does not indicate the time FedEx received the package for delivery on August 9, 2011. *See* Ex. A at p. 56. NFL documents only show that the Specimen Collector shipped the Williams Urine Specimen by FedEx standard overnight on August 9, 2011, at some unknown time, to Sports Medicine Research & Testing Laboratory (“Sports Medicine”) in Utah for analysis. *See id.*

11:00 a.m. to 11:23 a.m. on August 10, 2011

The FedEx shipping label the NFL relied on at the arbitration hearing includes an unidentified signature indicating that the Williams Urine Specimen arrived at Sports Medicine at 11:00 a.m. on August 10, 2011. *Id.* However, the FedEx Proof-of-Delivery sheet, also relied on by the NFL, states that the package did not arrive until 11:12 a.m. and was signed for by “C. Campbell.” Ex. A at p. 132. The signature for the person who allegedly signed for the FedEx package at 11:00 a.m. and the signature for “C. Campbell,” who allegedly signed for the FedEx package at 11:12 a.m., are not the same. *Compare* Ex. A at p. 56 with Ex. A at p. 132. In addition, the Confidential Laboratory Document Package the NFL offered at the arbitration hearing reflects that someone named “Stolk” received the Williams Urine Specimen and thereafter placed the urine specimen in the “refrigerator” at 11:23 a.m. Ex. A at p. 53.

11:23 a.m. to 3:23 p.m. on August 10, 2011

NFL documents offered at the arbitration hearing only indicate that the Williams Urine Specimen was placed in a “refrigerator” at Sports Medicine’s laboratory at 11:23 a.m., Ex. A at p. 53, and “received” by an unidentified person at Sports Medicine at “15:23” on August 10, 2011, Ex. A at p. 57. In violation of the Steroid Policy, the NFL offered no evidence at the arbitration hearing evidencing from where or from whom the Williams Urine Specimen was

“received” or who did the receiving at 15:23.

Mr. McBean’s August 16, 2011 Urine Specimen

On August 16, 2011, Mr. McBean provided a urine specimen (“McBean Urine Specimen”) to the same Specimen Collector who collected Mr. Williams’ urine specimen at the Broncos’ facility in Denver, Colorado.

By letter dated October 6, 2011, Dr. John A. Lombardo, the Independent Administrator of the Steroid Policy, advised Mr. McBean that his urine specimen did not contain a human specimen. Ex. B at p. 3. Dr. Lombardo also advised Mr. McBean that such a finding constituted a violation of the Steroid Policy. *Id.*

Mr. McBean had never previously failed a test under either the Steroid Policy or Drug Policy in his five-year NFL career.

By letter dated November 11, 2011, Mr. Birch advised Mr. McBean that he was to be: (a) suspended for six regular-season games; (b) advanced to the next stage of the Steroid Policy; and (c) required to forfeit 6/17 of any applicable signing bonus. Ex. B at p. 5.

There are several departures from the Steroid Policy and NFL Specimen Collection Procedures which make it impossible to rely on the validity of the McBean Urine Specimen.

Mr. McBean did not sign a Custody and Control Form for the Steroid Policy test and did not witness the Specimen Collector seal two of four vials used to collect Mr. McBean’s urine specimen. Instead, Mr. McBean relied on the Specimen Collector’s representations and assurances that he would complete the process on Mr. McBean’s behalf.

Moreover, documents relied on by the NFL at Mr. McBean’s arbitration hearing are duplicative and facially contradictory. Mr. McBean’s laboratory package contains a document allegedly prepared on November 4, 2011, which claims that Mr. McBean’s urine specimen was

received by Sports Medicine on August 10, 2011, with the FedEx # 8742 0570 9832. Ex. B at p. 15. However, Mr. McBean's laboratory package also contains a document allegedly prepared on November 7, 2011, which claims that Mr. McBean's urine specimen was received by Sports Medicine on August 17, 2011, with the FedEx # 8747 7459 5260. Ex. B at p. 14. Mr. Henderson admitted that there is "[n]o clear explanation for the discrepancy..." concerning Mr. McBean's urine specimen.

The NFL and Drug Free Sport's Termination of the Specimen Collector

Drug Free Sport and Stadium Medical conducted an investigation of the Specimen Collector's actions relating, *inter alia*, to the collection procedures and safeguarding of Mr. Williams' and Mr. McBean's urine specimens. Ex. A at pp. 134-39. On October 11, 2011, based upon that investigation, the NFL, Drug Free Sport and Stadium Medical terminated the Specimen Collector. *Id.* at p. 138.

The NFL, Drug Free Sport and Stadium Medical terminated the Specimen Collector because the Specimen Collector failed to fulfill his obligations as a specimen collector in material ways, including with regard to the collection, handling and safeguarding of Mr. Williams' urine specimen and Mr. McBean's urine specimen. *Id.* at pp. 134-39.

The Appeals Process

Mr. McBean appealed the NFL's suspension by letter dated November 14, 2011. Ex. B. at p. 9. Mr. Williams appealed the NFL's suspension by letter dated November 15, 2011. Ex. A at p. 12.

On November 29 and December 7, 2011, a hearing was held on Mr. McBean's appeal before Mr. Henderson pursuant to the Steroid Policy. *See* Exs. D, E, K. The record on Mr. McBean's appeal was closed on December 9, 2011. *Id.*

On December 13, 2011, a hearing was held on Mr. Williams' appeal before Mr. Henderson pursuant to the Steroid Policy. *See* Exs. C, J. The record on Mr. Williams' appeal was closed December 13, 2011.

Mr. Henderson's Improper Post-Hearing Conduct

On or about December 16, 2011, Jeff Pash, the NFL's General Counsel and Executive Vice President, engaged in *ex parte* communications with Mr. Henderson about the Players' cases and, during that conversation, Mr. Pash instructed Mr. Henderson to delay rendering the Arbitration Awards.

By letter dated January 16, 2012, Mr. Williams requested Mr. Henderson to dismiss the NFL's case against him for failure to render a decision within five days as required by the Steroid Policy. Ex. F. Mr. Henderson denied Mr. Williams' request by e-mail dated January 19, 2012. Ex. H.

By motion dated January 16, 2012, Mr. McBean requested Mr. Henderson to dismiss the NFL's case against him for failure to render a decision within five days as required by the Steroid Policy. Ex. G. Mr. Henderson denied Mr. McBean's request by e-mail dated January 19, 2012. Ex. I.

The Arbitration Awards

By letter dated February 6, 2012, Mr. Henderson affirmed the NFL's suspension of Mr. Williams, despite acknowledging "troubling" gaps in the chain of custody and "an environment of haste, rushing, confusion and short cuts around the [urine specimen] collection process." Ex. J.

By separate letter dated February 6, 2012, Mr. Henderson affirmed the NFL's suspension of Mr. McBean, despite testimony at the arbitration hearing that was "troubling and arguably

calls into question the integrity of the validation process.” Ex. K.

ARGUMENT IN FAVOR OF PETITION TO VACATE

I. STANDARD OF REVIEW ON A PETITION TO VACATE

The Court is empowered to vacate an arbitration decision pursuant to specific grounds enumerated in the FAA. Specifically, the Court is empowered to vacate an arbitration decision where: (1) “the award was procured by corruption, fraud, or undue means”; (2) “there was evident partiality or corruption in the arbitrator[]”; (3) the arbitrator[] w[as] guilty of misconduct... by which the rights of any party have been prejudiced”; or (4) “the arbitrator[] exceeded [his] powers.” 9 U.S.C. § 10(a)(1-4). The Court also is empowered to vacate an arbitration decision for “judicially created reasons,” including violations of public policy and the arbitrator’s manifest disregard of the law. *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001).

“Although courts have a limited function when called upon to confirm or vacate an arbitration award, such a review is necessary to ensure arbitrators comply with statutory requirements.” *Bowles Financial Group, Inc. v. Stifel, Nicolaus & Company, Inc.*, 22 F.3d 1010, 1012 (10th Cir. 1994) (citation omitted).

The Arbitration Awards should be vacated on several of these grounds.

II. MR. HENDERSON EXCEEDED HIS POWERS

Mr. Henderson exceeded his powers by conducting a hearing and granting arbitration awards in direct conflict with the procedures and evidentiary standards mandated by the Steroid Policy. An arbitrator exceeds his or her authority by “refusing to apply or ignoring the legal standard agreed upon by the parties for resolution of the dispute.” *Giraldi v. Morrell*, 892 P.2d 422, 424 (Colo.App. 1994).

The Steroid Policy clearly lays out the burdens of proof that govern disciplinary proceedings. The Steroid Policy provides that the NFL:

will be presumed to have collected and analyzed the player's specimen in accordance with the [Steroid] Policy. The player may, however, rebut that presumption by establishing that a departure from the Policy's stated protocols occurred during the processing of his specimen. In such case, the League shall have the burden of establishing that the departure did not materially affect the validity of the positive test or other violation.

Ex. A at p. 110.

Both Players' hearings were fundamentally flawed from the outset by Mr. Henderson's failure to abide by the burdens of proof set forth in the Steroid Policy. The documents submitted to Mr. Henderson by the NFL make clear that there had been departures from the Policy's required protocols, including material errors in the specimen collection process and material gaps in the chain of custody. These documents, on their face, made it impossible for the NFL to satisfy its initial burden.

The NFL documents concerning the Williams Urine Specimen evidence clear violations of the Steroid Policy and NFL Specimen Collection Procedures. The NFL introduced documents which, on their face, establish that the NFL had not "collected and analyzed the player's specimen in accordance with the [Steroid] Policy." In addition, no valid chain of custody exists as mandated by the Steroid Policy.

First, the NFL documents do not show the time Mr. Williams provided his urine specimen. The Athlete Custody and Control Form produced by the NFL only reflects that Mr. Williams "check[ed] in" to provide a urine specimen at 12:18 p.m. and then "check[ed] out" at 3:08 p.m. on August 9, 2011. Ex. A at p. 51. A gap or discrepancy of perhaps two hours and 50 minutes therefore exists for which the Williams Urine Specimen is unaccounted. That alone

establishes a departure from the Steroid Policy's stated protocols for the procedures used to collect Mr. Williams' specimen. The process takes a matter of minutes.

Second, there is no chain of custody for the time period running both from 12:18 p.m. (if that is when the urine specimen was collected) until 3:08, and from 3:08 p.m. on August 9, 2011, when the Specimen Collector allegedly removed the Urine Specimen from the testing area, until it arrived at Sports Medicine at 11:00 a.m. on August 10, 2011, if not later. *See* Ex. A at p. 56. NFL documents only show that the Williams Urine Specimen was shipped by FedEx standard overnight on August 9, 2011, at some unknown time, to Sports Medicine for analysis. *See id.* The FedEx shipping label does not indicate what time FedEx received the package for delivery on August 9, 2011, or from whom. *See id.* The NFL offered no evidence at the arbitration hearing that the Williams Urine Specimen remained in the custody and control of any authorized person up to the time it was handed over to a FedEx employee at some unknown time on August 9, 2010, in violation of the NFL Specimen Collection Procedures.

Third, there is a contradictory and confusing chain of custody following the Williams Urine Specimen's arrival at Sports Medicine. The FedEx shipping label the NFL relied on at the arbitration hearing includes an illegible, unidentified signature and notation indicating that the Williams Urine Specimen arrived at Sports Medicine at 11:00 a.m. on August 10, 2011. *Id.* However, the FedEx Proof-of-Delivery sheet, also relied on by the NFL, states that the package did not arrive until 11:12 a.m. and was signed for by "C. Campbell." Ex. A at p. 132. The signature of the person who allegedly signed for the FedEx package at 11:00 a.m. and the signature for "C. Campbell," who allegedly signed for the FedEx package at 11:12 a.m., are not the same. *Compare* Ex. A at p. 56 with Ex. A at p. 132. In addition, the Confidential Laboratory Document Package the NFL provided reflects that someone named "Stolk" received the

Williams Urine Specimen and thereafter placed the urine specimen in a “refrigerator” at 11:23 a.m. Ex. A at p. 53. In sum, there is no reliable chain of custody, in violation of the Steroid Policy, to prove who received the package, who signed for the package, what time the package was received and where the package was safeguarded, if at all, until it was allegedly placed in a “refrigerator” at 11:23 a.m.

Fourth, as Dr. Bryan Finkle, the NFL’s Consulting Forensic Toxicologist and Chairman and Founder of Sports Medicine, admitted at Mr. William’s hearing, there is no chain of custody from the time the Williams Urine Specimen was allegedly placed in Sport’s Medicine’s temporary storage at 11:23 a.m. and when it was “received” by an unidentified person at Sports Medicine at “15:23” on August 10, 2011, for testing.² Ex. A at p. 57. In violation of the Steroid Policy, the NFL offered no evidence at the arbitration hearing evidencing from where or from whom the Williams Urine Specimen was “received” for testing or who did the receiving. There is thus a four-hour period for which the Williams Urine Specimen is not properly accounted.

The NFL documents concerning the McBean Urine Specimen similarly evidence errors and omissions that should have precluded the NFL from satisfying its initial evidentiary burden.

Mr. McBean’s laboratory package contains a document allegedly prepared on November 4, 2011, which claims that Mr. McBean’s urine specimen was received by Sports Medicine on August 10, 2011, with the FedEx # 8742 0570 9832. Ex. B at p. 15. However, Mr. McBean’s laboratory package also contains a document allegedly prepared on November 7, 2011, which claims that Mr. McBean’s urine specimen was received by Sports Medicine on August 17, 2011,

² GINSBERG: There is no document that evidences what happened to this – to the specimen from either 11:00 from when Campbell got it or Stolk or whoever got it, whether it was 11:00 or 11:23 or whatever time it was until 15:23, right?

FINKLE: There are two parts to that answer. The first one, you are correct, that is right....
(The second part to Dr. Finkle’s answer is irrelevant to the 11:23 to 15:23 gap in the chain of custody).
Ex. C at 58:16-22.

with the FedEx # 8747 7459 5260. Ex. B at p. 14. Sports Medicine could not possibly have received Mr. McBean's Urine Specimen on August 10, 2011, as Mr. McBean's urine specimen was not even collected until August 16, 2011. Mr. Henderson admitted that there is "[n]o clear explanation for the discrepancy..." concerning Mr. McBean's urine specimen.

The NFL documents also include the hand-written notes and a memorandum created by Chris Guinty, Vice President of Drug Free Sport, describing Drug Free Sport's investigation into the collection and handling of the Williams Urine Specimen and McBean Urine Specimen. Ex. A at p. 134-39. These documents similarly support that the NFL cannot satisfy its initial evidentiary burden. Mr. Guinty and Drug Free Sport determined that the Specimen Collector failed to follow the NFL Specimen Collection Procedures for collecting and safeguarding Mr. Williams' and Mr. McBean's urine specimens. As a result, Drug Free Sport barred the Specimen Collector from performing any more specimen collections on behalf of the NFL. *See* Ex. K.³ Drug Free Sport's investigation did not yield any evidence that the Players had engaged in any wrongdoing.⁴

³ Mr. Guinty testified to the Specimen Collector's failure to follow the NFL Specimen Collection Procedures, and resulting termination, during the hearing:

GUINITY: We instructed our collection contractor that this collector could no longer perform collections for Drug Free Sport.

GINSBERG: And why is that, Mr. Guinty?

GUINITY: Because we thought this step – part of what happened in this occurrence violated the core competency of his job.

GINSBERG: Let's talk about that concept of core competency; what do you mean by that?

GUINITY: In this particular case the validation process was compromised after our investigation was complete.

GINSBERG: So in Mr. Williams' situation, you concluded that the validation process had been compromised; is that fair.

GUINITY: That is fair to say. In our investigation we determined that the validation process wasn't done in accordance with our standard protocols.

Ex. C at 89:2-20.

⁴ GINSBERG: Mr. Guinty, when [the Specimen Collector] gave inconsistent comments to you, he never identified Mr. Williams as having engaged in anything but the normal, proper procedure for voiding, correct?

GUINITY: He didn't mention any players specifically did or did not have the validation done correctly or incorrectly. There was no discussion as to specific players, so.

(continued...)

Mr. Henderson inappropriately placed the burden on the Players despite the NFL's clear failure to satisfy its initial evidentiary burden. Mr. Henderson presumed that the Players had violated the Steroid Policy based on the NFL's documents and proceeded to require the Players to prove otherwise.⁵ Mr. Henderson ignored the Steroid Policy and failed to place the burden on the NFL to prove that the departures from the required procedures did not materially affect the validity of the tests – and the NFL made no effort to make that showing. The procedures invoked at the arbitration hearing are in violation of the law of the Steroid Policy.

III. MR. HENDERSON'S MISCONDUCT PREJUDICED THE PLAYERS

The Arbitration Awards also should be vacated as a result of Mr. Henderson's failure to issue rulings within five calendar days as required by the Steroid Policy. *See* Ex. A at p. 121 ¶ A(9). Vacatur is appropriate where an award is "issued after the time prescribed by the agreement," the party has "has made a timely objection to issuing an award after the time limitation" and the party "has been prejudiced by the delay." *Sopko v. Clear Channel Satellite Services, Inc.*, 151 P.3d 663, 667 (Colo.App. 2006); *see also* Colo. Rev. Stat. § 13-22-219 (requiring that an arbitration award "be made within the time specified by the agreement to arbitrate"). The Players satisfy each of these requirements.

(continued)

GINSBERG: And you asked him who the specific players were, correct?

GUINTY: Correct.

GINSBERG: And he did not identify Mr. Williams as having done anything abnormal or inconsistent with the process, correct?

GUINTY: He didn't specifically speak to Mr. Williams, so he didn't say yes or no to any player.

Ex. C at 107:21-25 – 109:1-12.

⁵ MR. FERAZANI: We rest with the presumption of the lab packet.

THE HEARING OFFICER: Mr. Ginsberg.

Ex. C at 36:20-22.

First, the Williams and McBean cases were closed on December 9 and 13, 2011, respectively. Mr. Henderson was required to issue awards in the cases by December 14 and 18, 2011, respectively. *See* Ex. A at p. 121 ¶ A(9). Mr. Henderson did not issue timely rulings but, instead, improperly engaged in *ex parte* communications with Mr. Pash concerning the Players' cases after the appeal hearings. Mr. Henderson acquiesced to Mr. Pash's and the NFL's directive to delay a decision on the Players' cases, done without the Players' knowledge or permission, and in violation of the Steroid Policy.

Second, the Players objected to Mr. Henderson's failure to issue a timely ruling by separate motions dated January 16, 2012. Exs. F, G. Mr. Henderson finally issued the Arbitration Awards on February 6, 2012, Exs. J, K, 54 and 58 days after the Steroid Policy required.

Third, Mr. Henderson's failure to issue a ruling within the mandated time prejudices the Players personally, financially and professionally. The Players were forced to live for months, rather than days, with the threat of a suspension hanging over their heads. The Players were further compromised because, by his delay, Mr. Henderson effectively jeopardized the Players' 2012 season rather than giving them the option of being suspended during the 2011 season. For the Players, the Broncos are likely to improve upon their 2011 AFC West Championship in the 2012 season, during head coach John Fox' second year and quarterback Tim Tebow's second year as the starter, but the Players' absence significantly affects the club's chances of winning. The Players were further prejudiced because their salaries will be higher in the 2012 season than in the 2011 season. By suspending the Players, without pay, in 2012 instead of 2011, the cumulative amount of salary to be withheld from the Players is greater.

It is worth noting that the NFL was riding a wave of favorable publicity flowing from Mr. Tebow's rise to stardom. By pushing the possible suspensions beyond the 2011 season, the NFL commercially benefited by keeping the Broncos as competitive as possible during the 2011 media hype, for the NFL's pecuniary benefit and at the Players' expense.

IV. THE ARBITRATION AWARDS VIOLATE PUBLIC POLICY

The Arbitration Awards contradict the established laws of the international sports community and the public policy underlying those laws. "To be overturned on the ground that it violates public policy, an arbitration award must create an explicit conflict with other laws and legal precedents[.]" *Barnett v. Elite Properties of America, Inc.*, 252 P.3d 14, 21 (Colo.App. 2010) (internal quotations and citations omitted).

The Court of Arbitration for Sport ("CAS") requires that, if an athlete is subject to strict liability drug testing, the testers must also strictly follow the drug testing protocols. CAS is the preeminent arbitral body in the world of sports.⁶ The NFL has held out CAS as the standard-bearer in proceedings such as those at issue here. CAS has repeatedly affirmed that in "[t]he fight against doping... the rule-makers and the rule-appliers must begin by being strict with themselves." *USA Shooting & Q./Union Internationale de Tir (UIT)*, Ex. L at p. 1 (CAS May 23, 1995) (reinstating a skeet shooter's World Cup Gold Medal where shooter took banned substance inadvertently and strict liability was not the established policy); *see also Devyatovskiy and Tsikhan/IOC*, Ex. M at p. 75 (CAS June 10, 2010) ("If an athlete is to be sanctioned solely on the basis of the provable presence of a prohibited substance in his body, it is his or her

⁶ CAS, created in 1984 and based in Lausanne, Switzerland, "is an institution independent of any sports organization which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.... CAS has nearly 300 arbitrators from 87 countries, chosen for their specialist knowledge of arbitration and sports law. Around 300 cases are registered by... CAS every year." In addition, CAS sets up tribunals at each Olympic Games to provide expedited review of disputes. *See* www.tas-cas.org.

fundamental right to know that the... Testing Authority, including the... laboratory working with it, has strictly observed the mandatory safeguards”) (setting aside International Olympic Committee decision to strip two athletes of Olympic medals based on allegedly testing positive for a banned substance where the interruption of the automated testing procedure was not recorded).

A strict liability requirement has been adopted for Major League Baseball (“MLB”) and its drug testers. On February 24, 2012, an arbitrator vacated a 50-game suspension for an alleged violation of MLB’s Joint Drug Prevention and Treatment Program (“MLB Steroid Policy”) by reigning National League Most Valuable Player Ryan Braun. In Mr. Braun’s case, the specimen collector failed to immediately deliver the urine specimen to FedEx, as required by the MLB Steroid Policy. The specimen collector instead stored the sealed specimen in his refrigerator for two days. The arbitrator determined that the suspension could not stand in light of MLB’s failure to comply strictly with the MLB Steroid Policy protocols.⁷

The Arbitration Awards rationalize away the NFL’s seminal violations of the NFL’s duties and obligations under the Steroid Policy while punishing the Players strictly based on tests that may or may not be valid.

First, the NFL failed to maintain a valid chain of custody for the Williams and McBean Urine Specimens.

Second, the NFL Specimen Collection Procedures require the specimen collector to seal all vials in the player’s presence and for the player to sign a Custody and Control Form certifying that the specimen was collected in accordance with the NFL Specimen Collection Procedures.

⁷ See Ken Belson and Michael S. Schmidt, *Star Player First to Win Appeal On a Drug Test*, N.Y. Times, Feb. 24, 2012, available at 2012 WLNR 3982890.

Ex. A at p. 143. Mr. Williams did not see anyone seal his urine specimen, Ex. C at 220:19-21,⁸ and Mr. McBean did not sign a Custody and Control Form for the Steroid Policy test, Ex. D at 183-84, and did not witness the Specimen Collector seal two of four vials used to collect his urine specimen, *id.* The NFL offered no evidence at the arbitration hearings to contradict Mr. Williams' or Mr. McBean's testimony that the urine specimens were not sealed in their presence.

Third, the Steroid Policy and NFL Specimen Collection Procedures require all players to initial and date a collected urine specimen seal on the side of the specimen vial. Ex. A at p. 142 ¶ 5(h). Mr. Williams did not initial and date his urine specimen seals on the side of the vials. Ex. C at 221-223.⁹ The NFL offered no evidence at the arbitration hearing to contradict Mr. Williams' testimony regarding this fact.

The NFL and its agents admitted they did not follow the NFL Specimen Collection Procedures in collecting and processing Mr. Williams' and Mr. McBean's urine specimens. The Specimen Collector was terminated for his failure to do so. *See* Ex. A at p. 138.

The NFL must abide by the same arbitral law and guidelines of fundamental fairness as the rest of the sports world.

V. MR. HENDERSON MANIFESTLY DISREGARDED THE LAW

The Arbitration Awards should be vacated because Mr. Henderson disregarded established law concerning the safeguarding of the urine specimens and chain of custody. An

⁸ GINSBERG: Did you ever see the tester seal any bottles?

WILLIAMS: No.

⁹ GINSBERG: Do you recall on August 9 signing your signature or affixing your signature on to the bottle?

WILLIAMS: No.

GINSBERG: Where did you sign your name?

WILLIAMS: On the tab thing, but it wasn't on the bottle.

GINSBERG: You never saw the tab being placed on the bottle; is that right?

WILLIAMS: No.

arbitration award is properly vacated where the record shows “the arbitrator[] knew the law and explicitly disregarded it.” *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotations and citation omitted). The proponent of evidence that is not readily identifiable and is susceptible to alteration by tampering or contamination, such as Mr. Williams’ and Mr. McBean’s urine specimens, “must lay a foundation establishing chain of custody sufficient to render it improbable that original item has either been exchanged with another or been contaminated or tampered with.” *U.S. v. Washington*, 11 F.3d 1510, 1514 (10th Cir. 1993) (internal quotations and citations omitted); *see also People v. Herrera*, 1 P.3d 234, 240 (Colo.App. 1999) (“[t]he chain of custody rule requires that the proponent of real evidence establish that the evidence was involved in the incident and that the condition of the evidence at trial is substantially unchanged”) (citation omitted). Mr. Henderson improperly affirmed the Players’ suspensions despite facts which, as a matter of law, could not establish the validity of the urine specimens.

Mr. Guinty confirmed that the NFL Specimen Collection Procedures and chain of custody are crucial to the integrity of the Williams and McBean Urine Specimens:

GINSBERG: If there is an issue with the chain of custody, is it fair to say that you cannot stand behind the integrity of the process?

GUINTY: I would say if there is a proven issue with the chain of custody, that is an accurate statement.

Ex. C at 76:25 – 77:1-5.

GINSBERG: Is it fair to say that each of the protocols on [the NFL Specimen Collection Procedures] are crucial to ensuring the integrity of the collection process?

GUINTY: I would say that is accurate. I would say they are crucial steps to help ensure a sample that is collected with integrity, correct. Some more so than others.

Ex. C at 80:24-25 – 81:1-2.

The failures in the collection processes and chain of custody are abundantly clear. Mr. Henderson even described the NFL's Specimen Collection Procedures as "an environment of haste, rushing, confusion and short cuts." Ex. J. Mr. Henderson admitted that the break in the chain of custody for the Williams Urine Specimen from 12:18 p.m. to 3:08 p.m. is "troubling." Ex. J. The NFL and Drug Free Sport terminated the Specimen Collector involved. *See* Ex. A at p. 138.

The documentary evidence and testimony presented failed to establish a valid collection process for either Player's urine specimen or a "chain of custody sufficient to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with," as required by law. *See Washington*, 11 F.3d at 1514. In fact, the more logical conclusion is that Mr. Williams' and Mr. McBean's urine specimens were contaminated or were the subject of tampering.

Mr. Henderson ignored the legal standard applicable to the collection process, safeguarding of the specimens and chain of custody and affirmed the suspensions in manifest disregard of the law.

VI. MR. HENDERSON WAS NOT AN IMPARTIAL ARBITRATOR

The Arbitration Awards should also be vacated as a result of Mr. Henderson's partiality. Evident partiality exists where "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (citation omitted) (vacating arbitration decision based on arbitrator's failure to disclose conflict). The only reasonable conclusion in

these cases is that Mr. Henderson, an NFL employee for over twenty years,¹⁰ was partial to the NFL.

Mr. Henderson took clear direction from Mr. Pash in violation of his duties and obligations to the Steroid Policy. Mr. Henderson was the NFL's Executive Vice President for Labor Relations for sixteen years, a role in which he was involved in the negotiation, administration and enforcement of the Steroid Policy. Moreover, like the persons responsible for investigating and prosecuting the Players' alleged violations, Mr. Henderson reports to Mr. Pash and Commissioner Goodell. And, as the communications with and directions from Mr. Pash show, Mr. Henderson is unable to fulfill the responsibilities of a neutral arbitrator.

ARGUMENT IN FAVOR OF MOTION FOR PRELIMINARY INJUNCTION

I. STANDARD OF REVIEW ON A MOTION FOR PRELIMINARY INJUNCTION

A party is entitled to a preliminary injunction where it has established the following elements: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) lack of a plain, speedy, and adequate remedy at law; (4) no disservice to the public interest; (5) balance of equities in favor of the injunction; and (6), the injunction will preserve the status quo pending a trial on the merits. *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004).

The Players satisfy each of the elements necessary to obtain a preliminary injunction.

II. THE PLAYERS ARE LIKELY TO SUCCEED ON THE MERITS

As discussed above, the Players are entitled to vacatur of the Arbitration Awards pursuant to the FAA in light of: (1) Mr. Henderson's having exceeding his powers; (2) Mr. Henderson's

¹⁰ See biography of Mr. Henderson, a Member of the Board of Advisors to the Alliance for Digital Equality, at www.digital-equality.org.

misconduct; (3) public policy; (4) Mr. Henderson's manifest disregard of the law; and (5) Mr. Henderson's partiality.

III. THE PLAYERS WILL SUFFER IRREPARABLE HARM FOR WHICH THERE IS NO ADEQUATE REMEDY AT LAW UNLESS THE NFL IS ENJOINED FROM SUSPENDING THEM

The sanctions threatened to be imposed on the Players by the NFL's Arbitration Awards will cause the Players immediate and irreparable injury. The NFL's decision to bar the Players from participating in six NFL games, practicing, attending team and individual meetings, training at the Denver Broncos' practice facility, or collecting their salaries will damage the Players' reputations, standing in the community and cause the Players to miss a significant portion of one of the most competitive seasons of their short professional careers as well as to lose their weekly wages. Moreover, suspension under the Steroid Policy will preclude the Players from being included on the NFL Pro Bowl team, an all-star football team and prestigious honor.

The Players' playoff season is also in jeopardy since the suspensions will threaten the success of the Broncos' chances to qualify. The Broncos are likely to improve upon their 2011 AFC West Championship during the 2012 season, during head coach John Fox's second year and quarterback Tim Tebow's second year as the starter. The Players' absence significantly affects the club's chances of winning.

Mr. Williams' contract with the Denver Broncos also contains acceleration and bonus clauses that will necessarily be affected by punishment wielded by the NFL. Mr. McBean is a free agent as of March 13, 2012. The monetary losses due to the suspensions cannot be accurately calculated for purposes of a preliminary injunction because of the snowball effect the NFL's suspensions would have on the reputation, earning potential and NFL standing of the Players.

Injunctive relief is necessary to prevent professional athletes from being victimized by unfair suspensions. In *Williams v. The National Football League*, 27-cv-08-29778, 2009 WL 6423837 (Minn.Dist.Ct. July 9, 2009), the plaintiff NFL football players sought a temporary restraining order to prevent the NFL from enforcing a four-game suspension of the plaintiffs for an alleged violation of the Steroid Policy. The court determined that “loss of NFL playing time is sufficient to constitute irreparable harm” and granted the players a temporary restraining order. *Id.*

Later, refusing to vacate the temporary restraining order, the United States District Court for the District of Minnesota found that “[i]mproper suspensions... can undoubtedly result in irreparable harm.” *National Football League Players Ass’n v. National Football League*, 598 F.Supp.2d 971, 982 (D.Minn. 2008).

The players are certainly harmed by the impending suspensions... [A] player who has been suspended under the [Steroid] Policy is ineligible for post-season awards such as the Pro-Bowl. Those honors carry significant economic and non-economic benefits. Moreover, at least some of the players are central to their team’s chances of making the playoffs. The failure to make the playoffs and the effect of that failure on the players, teams, and fans is not compensable monetarily and is therefore irreparable harm.

Id.; see also *Jackson v. National Football League*, 802 F.Supp. 226, 231 (D.Minn. 1992) (football players granted a TRO against NFL’s plan to restrict players’ movement between teams: “The existence of irreparable injury is underscored by the undisputed brevity and precariousness of... players’ careers in professional sports, particularly in the NFL”); *Linseman v. World Hockey Ass’n*, 439 F.Supp. 1315, 1319 (D.Conn. 1977) (granting injunctive relief, finding that money could not adequately compensate player for the loss of his ability to play professional hockey for a season and noting, “the career of a professional athlete is more limited than that of persons engaged in almost any other occupation. Consequently the loss of even one

year of playing time is very detrimental”); *Bowman v. National Football League*, 402 F.Supp. 754, 756 (D.Minn. 1975) (recognizing players suffered irreparable harm when the NFL's boycott of former World Football League players prevented them from playing).

The United States Supreme Court has similarly recognized the inequity and irreparable injury that results from prohibiting a professional athlete from playing. In *Haywood v. National Basketball Association*, 401 U.S. 1204 (1971), a professional basketball player was granted a temporary restraining order enjoining the National Basketball Association from preventing him from playing due to its eligibility rule. In granting the temporary restraining order, Justice William O. Douglas declared that injunctive relief was necessary to allow the athlete to compete or he would otherwise “suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, his public acceptance as a super star will diminish to the detriment of his career, his self-esteem and his pride will have been injured and a great injustice will be perpetrated on him.” *Id.* at 1205, quoting *Denver Rockets v. All-Pro Management, Inc.*, 325 F.Supp. 1049, 1057 (D.C.Cal. 1971).

The Players have and will continue to suffer from the NFL’s proposed suspensions. The granting of a temporary injunction is necessary to prevent more harm while the merits of this case are determined.

IV. AN INJUNCTION IS FAVORABLE TO THE PUBLIC INTEREST

A preliminary injunction in this matter would serve the public interest, rather than be adverse to it. As explained above, the Arbitration Awards are an affront to public policy for their failure to comply with well-established and international sports law concerning drug testing procedures.

Moreover, the City of Denver, its surrounding cities and towns, and the entire State of Colorado stand to lose substantial revenue if the Players are not able to assist the Broncos in their run for the playoffs and a Super Bowl title. There is no conceivable harm to the public in granting the Players' motion for a preliminary injunction.

V. THE THREAT OF INJURY TO THE PLAYERS OUTWEIGHS ANY DAMAGE AN INJUNCTION MAY CAUSE THE NFL AND PRESERVES THE STATUS QUO PENDING A DECISION ON THE MERITS

The relief herein sought would cause minimal hardship to the NFL and merely preserves the *status quo* pending a decision on the merits. Even if the NFL were to prevail on the merits in this action, it could always move forward and institute the suspension upon resolution of this case. Injunctive relief only seeks to maintain the *status quo*, and provide the Players with the opportunity to defend their good names and expose the bad acts of the NFL. *See Rathke v. MacFarlane*, 648 P.2d 648, 651 (Colo. 1982) (“preliminary injunctive relief is... designed to protect a plaintiff from sustaining irreparable injury and to preserve the power of the district court to render a meaningful decision following a trial on the merits”). As Justice Douglas explained in *Haywood*, any harm suffered by the NBA as a result of the athlete's continuing to play in the event that the NBA eventually prevailed could be remedied at a later time. 401 U.S. at 1205.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to vacate the Arbitration Awards, preliminarily enjoin the NFL from effectuating the threatened suspensions pending resolution of the instant action, and grant such other relief as the Court deems just and proper.

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