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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK  
2 -----X  
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3 NATIONAL FOOTBALL LEAGUE  
3 MANAGEMENT COUNCIL,  
4  
4 Plaintiff,

5 v. 15 Civ. 5916 (RMB)

6 NATIONAL FOOTBALL LEAGUE  
6 PLAYERS ASSOCIATION,  
7  
7 Defendant.

8 -----X  
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10 NATIONAL FOOTBALL PLAYERS  
10 LEAGUE PLAYERS ASSOCIATION, on  
11 its own behalf and on behalf  
11 of TOM BRADY,  
12  
12 Petitioner,

13 v. 15 Civ. 5982 (RMB)

14 NATIONAL FOOTBALL LEAGUE and  
14 NATIONAL FOOTBALL LEAGUE  
15 MANAGEMENT COUNCIL,  
16  
16 Respondents.

17 -----X  
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18

19 August 19, 2015  
19 10:05 a.m.

20 Before:

21 HON. RICHARD M. BERMAN,  
21  
22 District Judge

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APPEARANCES

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1 (In open court)

2 THE COURT: Nice to see you all.

3 I am tempted to make some comment about sketch artists  
4 at the outset. Christine told me not to, keep it serious, so  
5 I'll skip that conversation.

6 So here's where things stand. As all of you know, the  
7 case has proceeded on two tracks since it got to federal court  
8 a few weeks ago, and those two tracks are continuing, both  
9 settlement discussions with the assistance of very able  
10 Magistrate Judge James Francis and myself, and the legal  
11 analysis goes forward by me.

12 You may remember I agreed at the outset to try to get  
13 a legal ruling done before September 4, which is a pretty quick  
14 turn around. That ties in with the start of the NFL season,  
15 and that would be in the event that there is no settlement.  
16 There is no settlement at this point, so even though it is a  
17 quick turn around, my current plan is to meet that deadline.  
18 But one prerogative of being the judge is you can't hold me to  
19 it necessarily.

20 So I have continued my research into the legal issues  
21 in this case. I continue to have an open mind about the  
22 outcome, although I think I understand the record and the  
23 issues in more depth than I did before, and I am still of the  
24 view that there are enough strengths and weaknesses on both  
25 sides which lead, in my opinion, all the more reason why a

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1 settlement seems like a logical and rational outcome; doesn't  
2 mean it's going to happen, but that's my opinion.

3 Today is for the lawyers, the principals' appearance  
4 was optional, and it is for the final what we call oral  
5 argument of the parties' respective positions. You recall also  
6 that there are cross motions here, motion by the NFL to confirm  
7 an arbitration award, and a cross motion by the Players  
8 Association on behalf of Mr. Brady to vacate that award. I may  
9 have some questions during that oral argument. We'll switch  
10 order today and have Mr. Kessler go first. Last time Mr. Nash  
11 went first.

12 Following the oral argument, I will speak briefly  
13 again with the lawyers privately. This will be about  
14 settlement, and that will be off the record and that will  
15 follow today's court session.

16 The next court appearance is likely to be August 31st  
17 at 11:00 a.m. We'll talk about that schedule and some  
18 flexibility, but I think that is the date that we will keep.  
19 And that we will require that the principals be present, both  
20 Mr. Brady and Mr. Goodell, at that court appearance.

21 So with that, let's start with Mr. Kessler.

22 MR. KESSLER: Thank you, your Honor, good morning.

23 THE COURT: Good morning.

24 MR. KESSLER: Your Honor, I'm going to start first  
25 with the legal standard before you, because, as you know, the  
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1 NFL's papers heavily, if not almost exclusively, revolve around  
2 a single legal argument, which is that this Court should defer  
3 to the arbitrator, who, according to the NFL, has virtually  
4 limitless power, and the Court should basically defer to that  
5 decision. So I want to spend a little bit of time on that  
6 argument to start.

7 THE COURT: Just so you know, federal judges always  
8 have a little difficult with deferring, but that is definitely  
9 the legal standard.

10 MR. KESSLER: Thank you, your Honor.

11 The short answer to this entire point is provided by  
12 the Second Circuit in the Leed Architectural Products case,  
13 which I believe your Honor is familiar with because you  
14 yourself have vacated a labor arbitration award within the last  
15 four months.

16 So I'm not going to spend a lot of time on this, but  
17 briefly, I think Leed says it all, and I'm quoting, "This great  
18 defense, however, is not the equivalent of a grant of limitless  
19 power. An arbitrator's authority to settle disputes under a  
20 collective bargaining agreement is contractual in nature, and  
21 is limited to the powers that the agreement confers. He may  
22 not shield an outlandish disposition of a grievance from  
23 judicial review simply by making the right noises, noises of  
24 contract interpretation. Likewise, he may not dispense his own  
25 brand of industrial justice."

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1           Your Honor, what we are arguing is that this case  
2 fails the test laid out by the Second Circuit for where the  
3 arbitrator is dispensing his own brand of industrial justice.  
4 In fact, if you read the NFL's papers, what they basically say  
5 is because Commissioner Goodell is the Commissioner, he is  
6 entitled to dispense his own brand of industrial justice.

7           But the problem with that argument legally is that  
8 there is a difference from his role as the disciplinarian at  
9 the first level of discipline, which in this case he gave to  
10 Mr. Vincent, when he can in fact say what he thinks is conduct  
11 detrimental and make his determination, and the role at the  
12 second level, which he's assuming here as the arbitrator where  
13 he is limited by the law of the Federal Arbitration Act and the  
14 Labor Management Relations Act. And this is not an accident,  
15 it's because the NFL wants the protections of having an  
16 arbitration, because otherwise your Honor knows we could sue  
17 directly in federal court for a wrongful act. So they want the  
18 protections of arbitration, they must also take the limitations  
19 of arbitration that go with it.

20           So that is all I'm going to say about the standard.  
21 We recognize it's our burden to show to you that we satisfy  
22 that standard. I would note, your Honor -- and I was going to  
23 hand this up, I won't -- there are at least 18 different cases  
24 we cited in the Southern District or the court of appeals in  
25 our brief in which arbitrations of this type have been set

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1 aside. And you can find all those citations in various  
2 footnotes and parts of our brief on one of the grounds that we  
3 have done.

4 So I will now move to the four grounds, your Honor,  
5 and it's important to note that on any one of these four  
6 grounds we believe the arbitration should be set aside. So if  
7 we win on one of the four, we still think it must be set aside.  
8 Obviously we only have to win on one, but your Honor, we  
9 believe, should consider all four grounds if you find it  
10 necessary to do so.

11 So ground number one: Is the essence of the agreement  
12 based on lack of notice? And I want to start, your Honor, by  
13 saying that there really is no dispute that notice is required  
14 under this CBA. If you read the NFL's papers, they don't argue  
15 that notice of both the discipline and the consequences is  
16 required. Instead, they argue the notice has been provided.  
17 And this is very significant, your Honor, because all of the  
18 debate about law of the shop is really irrelevant now to this  
19 issue because there's no dispute that some notice is required.  
20 That goes back for 20 years under the CBA. So the question is:  
21 Was it here?

22 So the first notice argument I want to address is the  
23 generally aware issue, because I think, your Honor, this is  
24 frankly the easiest part to concluding the notice wasn't  
25 provided. Your Honor, as you know, Mr. Vincent, who was the

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1 disciplinarian here, he issued the letter, and Exhibit 10 is  
2 that letter, made it clear that he was imposing his discipline  
3 solely based on the Wells Report's findings, not any other  
4 findings. He testified that he did not do any factual  
5 investigation of his own.

6 And the two findings of the Wells Report that he  
7 seized upon was, number one, that Mr. Brady was generally aware  
8 of inappropriate actions by others. Your Honor said: Do we  
9 know what that means? We only know the words, we don't know  
10 what that means, but we know it is not participation, it is not  
11 supervised by, it is not directed, it is not Mr. Brady telling  
12 someone to do anything. How do I know that? Because Mr. wells  
13 testified to that. We did get to ask him that at the hearing  
14 and he said no, he did not find any direction.

15 And number two --

16 THE COURT: Before you get to number two, you would  
17 contrast the finding by Mr. Wells with the finding by  
18 Mr. Goodell which would appear to be substantially broader than  
19 a finding of general awareness.

20 MR. KESSLER: Yes, your Honor.

21 THE COURT: Indeed, he talks about a scheme, I think  
22 he talks about participation, he talks about compensation, he  
23 talks about knowledge, et cetera. So there is a bit of a  
24 quantum leap, right, from the finding of Mr. Wells and the  
25 finding of Mr. Goodell?

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1 MR. KESSLER: Absolutely, your Honor, and we believe  
2 that quantum leap exceeded the Commissioner's authority as the  
3 arbitrator on an appeal. And let me explain that argument,  
4 because it's an important argument.

5 THE COURT: I interrupted you. Before you get to  
6 quantum leap --

7 MR. KESSLER: The second point was there was also a  
8 lack of cooperation, which I will address. In other words,  
9 Mr. Vincent had two points, one was lack of cooperation and the  
10 other was generally aware.

11 So your Honor has correctly pointed out that  
12 Commissioner Goodell has very different findings or conclusions  
13 in his award, and the question becomes: What does that mean  
14 for the Court's analysis?

15 Well, of the first thing I would say, your Honor, is  
16 that the Peterson decision, which is legally preclusive on this  
17 issue, so they don't even get to relitigate this issue before  
18 the Court because even though it's on appeal, as your Honor  
19 knows, and they don't contest this, that in the Second Circuit,  
20 like the Eighth Circuit, if you don't seek a stay, you are  
21 legally precluded from challenging this. So the Peterson  
22 decision found, in the case of Arbitrator Henderson, who was  
23 sitting in the same Article 46 role as Arbitrator Goodell in  
24 this matter, that Mr. Henderson had said I can justify the  
25 discipline of Mr. Peterson under the old policy, because he had

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1 been disciplined by the disciplinarian under the new policy, so  
2 therefore, even if you cannot apply the new policy  
3 retroactively, I will justify it on that basis, we win, the NFL  
4 wins.

5           Judge Doty ruled, and it's now conclusive on the NFL  
6 in this case, that that exceeds the authority of the  
7 arbitrator. And the reason is very simple, and there is  
8 Supreme Court authority for this, an arbitrator can only decide  
9 the issues presented to the arbitrator. What this is under  
10 Article 46, and the language is very clear, is an appeal of  
11 discipline. So what the arbitrator is deciding is was that  
12 discipline correct or not; not is there some other discipline  
13 that could be imposed or is there some other basis for it.

14           In fact, the way we know that, the only evidence  
15 Mr. Goodell cites at the new hearing actually is Mr. Brady's  
16 testimony itself, because nothing else even related to the  
17 issue. Had we not called Mr. Brady, there would be no  
18 evidence. And the reason I'm mentioning that, it shows you  
19 that the appeal process is simply an appeal, it's not an  
20 independent inquiry by the arbitrator to determine new facts.

21           And finally on this point, your Honor, and this is  
22 very important, the NFL in its brief actually recognizes this.  
23 At page 7 of the brief they filed last they state as follows:  
24 Moreover, in no sense did the Commissioner depart from the  
25 original basis for Brady's discipline as the union contends.

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1 What they end up saying is in concluding that Brady -- this is  
2 the Commissioner -- knew about, proved up, consented to and  
3 provided inducements in support of the ball tampering, which is  
4 what the Commissioner found, the Commissioner confirmed the  
5 initial basis for the discipline, this is their saying it,  
6 "Brady's role in the use of underinflated footballs in  
7 violation of longstanding player rules, as evidenced by  
8 substantial and credible evidence, that" -- and here's the  
9 punchline -- "he was at least generally aware of the actions of  
10 the plaintiff's employees involved."

11 So when you circle all this back, what you come down  
12 to is even they recognize all the Commissioner could do as  
13 arbitrator was affirm or overturn the generally aware standard.  
14 And the reason this is dispositive is the NFL does not even  
15 contend there was any notice under any of the policies, under  
16 conduct detrimental, under the player policies, under the  
17 competitive integrity policy, that anyone told a player that  
18 you could be punished for being generally aware that someone  
19 else was doing something wrong.

20 As we note in our brief, it was be as if in the drug  
21 policies the Commissioner had said the following: Well, taking  
22 drugs, steroids, is also conduct detrimental, so in addition to  
23 violating the drug policies, I think it's conduct detrimental,  
24 and if you are generally aware that your teammate is taking  
25 drugs, I could suspend you. I would suggest, your Honor, that

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1 decision would be contrary to essence of the CBA and the notice  
2 provisions, and the same thing applies in this area.

3 If the NFL wants to -- I want to be clear, if they  
4 want to publish new policies that players could be liable for  
5 being generally aware, there would probably be a grievance  
6 whether that's allowed under the CBA or not, but at least they  
7 would provide notice to players. There's no notice of that.  
8 So that's our first notice issue.

9 THE COURT: So bringing that to this case, so to  
10 speak, so you're saying -- I guess you're arguing that the  
11 Commissioner did not affirm the general awareness. He seemed  
12 to come back to it in that statement that you read. So you're  
13 saying it doesn't matter because there is no notice that  
14 generally aware is an offense?

15 MR. KESSLER: That's correct, your Honor. In other  
16 words, they lose either way. If their new position is he just  
17 affirmed generally aware, they lose because there's no notice  
18 of generally aware. If their alternative position is that the  
19 Commissioner found new findings, Peterson is preclusive, he  
20 can't make new findings. So either way they are blocked from  
21 utilizing those findings as a substitute.

22 THE COURT: Got you. So before you said these are  
23 different grounds, that if you win on one, so to speak, if you  
24 are presenting the correct legal argument on one, it doesn't  
25 matter what the others are. Is that your position now? If

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1 there were -- the Commissioner has its own point of view about  
2 whether there was notice, but if there were no notice of the  
3 generally aware or no ability of the Commissioner to come up  
4 with the scheme that he did, what is the implication for the  
5 award? Because as you know --

6 MR. KESSLER: The award would have to be set aside as  
7 being contrary to the essence of the CBA because it didn't  
8 provide the notice that everyone concedes is required under the  
9 CBA. And number two, this is something that could not be  
10 cured. So this would be the end of the proceedings if we win  
11 on lack of notice, because obviously providing notice now is  
12 going to be after the fact.

13 And I say, your Honor, we got to this point because  
14 the NFL set up this structure. If they wanted to set up a  
15 structure of generally aware, as I said, either it's allowed or  
16 not allowed under the CBA, but they never tried to set up a  
17 structure. And as you're going to see over and over again is  
18 the problems with this award is it's trying to ignore all of  
19 the obstacles that the NFL itself created to doing this.

20 Let me move on because I know I'm limited in time.

21 THE COURT: Go ahead, but wait, before you do, just so  
22 I understand your position, another grounds that you're going  
23 to come to is Mr. Brady's non-cooperation.

24 MR. KESSLER: Yes.

25 THE COURT: Last week when we spoke you acknowledged  
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1 that Mr. Brady acknowledges that if he had to do that over  
2 again, so to speak, there's merit to the non-cooperation  
3 generally.

4 MR. KESSLER: Right.

5 THE COURT: So if there's no notice, as you point out,  
6 in this very first step, what happens to non-cooperation?

7 MR. KESSLER: I will move to that now.

8 THE COURT: All right. If you are getting there, as  
9 long as you cover it.

10 MR. KESSLER: I will go back to my other point, but  
11 let me address your question now. Non-cooperation suffers from  
12 the same fatal notice defect when we're talking about a  
13 suspension for non-cooperation. So let me explain that point  
14 very clearly.

15 THE COURT: But you're saying in your papers that  
16 non-cooperation has its own notice requirement, right?

17 MR. KESSLER: Actually, your Honor, there's a problem  
18 even at that level that I will get to.

19 THE COURT: I will agree with that, but does it fall  
20 automatically if the no notice of generally aware falls? Does  
21 that doom non-cooperation?

22 MR. KESSLER: No, I think I still have to address the  
23 non-cooperation.

24 THE COURT: All right.

25 MR. KESSLER: So non-cooperation fails on notice at  
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1 several levels, and let me explain that.

2 THE COURT: Its own notice.

3 MR. KESSLER: On notice. The first level it fails at  
4 is that Mr. Wells testified that he never gave the player any  
5 notice. He was very clear about this, in fact emphatic, that  
6 there would be any consequences if he didn't turn over his  
7 electronic information.

8 And the reason this is significant is that in every  
9 other aspect of cooperation Mr. Wells said Mr. Brady was  
10 cooperative. So while there is generally an understanding that  
11 players have to agree to be interviewed, they have to  
12 cooperate. Mr. Brady did all that. What there is not is any  
13 specific notice ever given by the NFL specifically on this  
14 issue of electronic communications.

15 And how do I know that? Judge, in this very case  
16 there was another player on the team, the kicker, who also  
17 didn't give his electronic communication that was asked for,  
18 and there was no penalty imposed on the kicker at all. And  
19 there's never been a case in the NFL where anybody has been  
20 punished for failure to give electronic communications. So  
21 there's a separate notice problem, and they could have cured  
22 that. Mr. Wells could have said: Mr. Brady, I want you to  
23 know that if you don't turn this over, the NFL might consider  
24 this to be conduct detrimental in some way and fine you. But  
25 he was never told that. So it's another thing where the NFL

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1 didn't provide the notice.

2 THE COURT: But isn't there a notice in the player  
3 policy? I think you mentioned it in your earlier filing.

4 MR. KESSLER: Actually, your Honor, there is not.

5 THE COURT: Isn't there a requirement of cooperation  
6 there?

7 MR. KESSLER: The requirement of cooperation in the  
8 player policies are in the personal conduct policy.

9 THE COURT: Okay.

10 MR. KESSLER: The personal conduct policy specifically  
11 does not apply to anything involving this type of an  
12 investigation. So again, I think the player policies are very  
13 important. I urge your Honor to look through Exhibit 114,  
14 which is all the policies the players are given. It's  
15 everything from game-related misconduct, uniform and on-field  
16 policies, cooperation with the news media -- the press here  
17 would be interested in that -- communications, personal conduct  
18 policy, guns and weapons, substance of abuse, gambling, ticket  
19 scalping, bounties. These are all the policies the players are  
20 given. And your Honor is right, in the personal conduct policy  
21 now, the new one, it specifically says if you don't cooperate  
22 it will be conduct detrimental.

23 THE COURT: Right.

24 MR. KESSLER: Is there any such notice of any of these  
25 policies that could be applicable to this conduct? The answer

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1 is no. Now again, whose failure is that? The NFL publishes  
2 these policies. They give these policies to players so they  
3 will have notice. It says on the bottom of them: To be  
4 retained by player for the entire season. So they should know  
5 about it. So this was their problem in not giving players  
6 notice about it.

7 The other notice issue is even if I were to be found  
8 wrong that there was somehow notice about electronic  
9 communications, the problem is, as Commissioner Tagliabue ruled  
10 in Bounty, that in his 40 years in the league, no player had  
11 ever been suspended for obstructing -- and I use the word  
12 "obstruct" specifically because Commissioner Tagliabue did --  
13 obstructing or not cooperating with an investigation.

14 Why is this important? Mr. Nash argues, and as well  
15 Commissioner Goodell distinguished Bounty; there was different  
16 facts, the coaches were involved, so somehow you should defer  
17 to that. Here's the problem with that: It's not that we're  
18 arguing that Bounty is an on points case, that you can't  
19 distinguish the facts, that's not the issue with Bounty, it's  
20 that Commissioner Tagliabue, as the Commissioner for 40 years,  
21 said that there is no history or notice of that principle of  
22 this. He said I affirm Commissioner Goodell it was  
23 obstruction, but I reversed Commissioner Goodell because there  
24 was no notice that obstruction could lead to a suspension as  
25 opposed to a fine.

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1 THE COURT: Wait, help me out here. I do have the  
2 personal conduct policy dated December 2014 in front of me, and  
3 it does seem to provide notice when a player is supposed to  
4 cooperate with a league investigation.

5 MR. KESSLER: In a personal conduct investigation. So  
6 let me be very clear, the league has a separate mechanism, and  
7 its new policy, which is Exhibit -- the new policy for personal  
8 conduct is Exhibit 125, because it's been updated, and it makes  
9 it very clear there is a whole different set of procedures,  
10 presumptions. There's a six-game minimum suspension, a whole  
11 different set of rules, and it says "in these investigations."  
12 So it has nothing to do with it. As you can see, the NFL has  
13 numerous policies and investigations. So that's the problem.

14 Now in any event, even the personal conduct policy  
15 doesn't say suspensions. So again, even if you thought the  
16 personal conduct policy gave some notice that you have to  
17 cooperate, there's nothing about suspensions. And that's  
18 Mr. Tagliabue's observation as the Commissioner of the NFL for  
19 17 years and outside counsel for another 30 years, I think, or  
20 something like that. He said we never suspend for lack of  
21 cooperation or for obstruction, so there can't be any notice.  
22 And it doesn't matter if they distinguish the facts of Bounty,  
23 they can't distinguish Commissioner Tagliabue's observation of  
24 40 years of history.

25 THE COURT: In the document that I'm referring to, I  
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1 don't know if it applies or doesn't apply, but on page 6 it  
2 does say depending on the nature of the violation and the  
3 record of the employee, discipline may be a fine, a suspension  
4 for a fixed or indefinite period of time, a requirement of  
5 community service, combination of three, et cetera, et cetera,  
6 et cetera.

7 MR. KESSLER: Which document are you reading?

8 THE COURT: A document called "Personal Conduct."

9 MR. KESSLER: The personal conduct policy has its own  
10 penalties, its own procedures, its own notice. So, for  
11 example, this is basically domestic violence, it's --

12 THE COURT: Child abuse.

13 MR. KESSLER: It's off-field criminal behavior.  
14 That's what that refers to. Nothing to do with the game. So  
15 that's the issue.

16 So your Honor, the other reason I ask you to look at  
17 this, this is the last one I will make about notice, is that if  
18 you compare the league policies to the arguments they make  
19 here, your Honor said: Well, is it ambiguous that the player  
20 policies say first-time offense, fine, while some other parts  
21 say it could be something higher?

22 I would suggest, your Honor, and if I had more time I  
23 would do this with you, but if you go through all the aspects  
24 of it you will see it's not ambiguous. What it does is, for  
25 example, for a safety violation, safety, player safety, it

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1 actually make it clear to contrast that, and I will just do  
2 this one, on page 18 of the personal conduct of the player  
3 policies, it says the league has emphasized when circumstances  
4 warrant, suspension even for first-time offenders is  
5 appropriate. Contrast that with the specific statement two or  
6 three times, two or three times that for equipment violations  
7 involving competitive integrity -- I want to be very clear,  
8 this is competitive integrity -- it says first-time offenses,  
9 fines. And that's why the league does not claim to apply this  
10 policy, because they can't apply this policy and impose a  
11 suspension.

12 THE COURT: So you're saying player policies is the  
13 one policy relating to equipment, uniforms, et cetera, which  
14 might include deflating a game ball, is the one that players  
15 are on notice of?

16 MR. KESSLER: Yes.

17 THE COURT: And if one is found to have violated that  
18 policy and is a first offender, the maximum penalty is a fine,  
19 is that right?

20 MR. KESSLER: Yes. And I will say two more things on  
21 this. One is even the player policies don't say you could be  
22 punished at all for being generally aware. So there's no  
23 notice of that.

24 And number two, and this is important, the NFL's  
25 argument -- and you will hear this from Mr. Nash -- is we don't

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1 need to rely on any policies because in the player contract it  
2 says the Commissioner could decide what is conduct detrimental  
3 and there could be a fine and suspension.

4 Let met easily demonstrate why that is wrong. The  
5 Commissioner could come in tomorrow and say if you take  
6 steroids that is also conduct detrimental to the league. The  
7 Commissioner could not say that if you took marijuana, which  
8 under the substance of abuse policy says for the first time  
9 offense you get no penalty at all, you just go into a testing  
10 program, he could not say because I have the power and you are  
11 on notice of conduct detrimental that I could say instead of  
12 you going just into a program, I'm going to say it's a game  
13 suspension. In other words, once you put the players on  
14 notice, everything in these policies that has specific fines  
15 also could theoretically be conduct detrimental. So this is  
16 the normal contract principle of New York that governs the CBA,  
17 governed by New York law, which is the specific governs over  
18 the general, and because they put in the fines -- this is very  
19 important, your Honor, the fines in the player policies are  
20 collectively bargained.

21 THE COURT: I understand that. So the direct question  
22 is: Can Mr. Brady be fined under the equipment section of the  
23 player policies in this case?

24 MR. KESSLER: He could be if the finding was not just  
25 generally awareness but the finding was that he actually

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1 participated in altering his equipment, then as a first-time  
2 offender he would be subject to the fine under the player  
3 policies.

4 THE COURT: But within the context of this award, is  
5 it possible for the Commissioner to fine Mr. Brady for  
6 violation --

7 MR. KESSLER: I don't believe so because it's a  
8 generally aware problem. That problem trumps all the other  
9 problems on the notice.

10 THE COURT: You're saying he can't be punished at all  
11 for ball tampering?

12 MR. KESSLER: Because of -- and remember, this wasn't  
13 an accident. The Wells Report took five months of  
14 investigation, spent millions of dollars, and Ted Wells, who I  
15 have a lot of respect for as a lawyer, came in and honestly  
16 said: You know what, I spent all this money, we did all this  
17 work, I looked at, by the way, the electronic communications of  
18 all the other employees, and all I could conclude was generally  
19 aware. So that's -- this is not a problem in that Mr. Brady's  
20 getting away with something, it's a problem that the facts did  
21 not support, according to Mr. Wells, anything more. And the  
22 Commissioner -- this again was the NFL's decision -- decided to  
23 rely on Mr. Wells. Mr. Vincent could have done something else.  
24 He could have said: You know what, generally aware is not  
25 enough to discipline, but I'm not satisfied, I'm the

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1 disciplinarian, I'm going to put Mr. Wells aside and do my own  
2 factual investigation. He had the authority to do that.

3 THE COURT: But he didn't.

4 MR. KESSLER: He could have called in Mr. Brady. He  
5 could have called in Mr. McNally. He could have called  
6 Mr. Jastremski. And Mr. Vincent could have made his own  
7 findings recognizing generally aware was not enough, but the  
8 NFL, again, chose not to do it. Over and over again it's the  
9 consequences of their choices here.

10 Let me move on, your Honor, because I have some other  
11 important articles. I'm afraid I'm straining the Court's  
12 patience with time.

13 THE COURT: This is an important issue. As you point  
14 out, the conclusion by Mr. Wells, or one of them, was as  
15 follows: Based on the evidence, it is also our view that it is  
16 more probable than not that Tom Brady, the quarterback for the  
17 New England Patriots, was at least generally aware of the  
18 inappropriate activities of McNally and Jastremski involving  
19 the release of air from Patriots game balls.

20 So that's his key finding.

21 Now I read that, and I don't find any additional  
22 comment, certainly not in that sentence, that the general  
23 awareness relates to January 18, 2015 AFC game. I may be  
24 making more of this than appropriate, but this says release  
25 from Patriots' game balls. It does not say, which is the only

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1 finding that we're considering, is what happened in the AFC  
2 game. Am I making too much of the absence?

3 MR. KESSLER: No, your Honor, I think that is an  
4 outstanding observation. Because what has been lost here, and  
5 your Honor is quite right to point this out, the discipline was  
6 only with respect to this game. And the reason that's  
7 important is much of the evidence cited by Mr. Wells, even for  
8 the generally aware finding, has to do with events that have  
9 nothing to do with the AFC championship game. And again,  
10 Mr. Vincent could have looked at that and said: I need to do  
11 more examination, I need to call more witnesses. But he did  
12 not at that point.

13 And again, perhaps Mr. Wells did not get a clear  
14 direction on his mission. So for example, we know he testified  
15 that he thought he was proceeding under only the competitive  
16 integrity policy, and that's the only policy he knew about, and  
17 it was only the day of the hearing when he testified because I  
18 informed him and he heard Mr. Vincent's testimony that the  
19 first time anyone told him from the NFL: By the way, that  
20 policy doesn't apply to players. So there could really be a  
21 disconnect between what Mr. Wells thought he was looking at  
22 versus what actually ends up being the discipline that  
23 Mr. Vincent is applying. That's the leap, that's the chasm  
24 they can't jump over.

25 Let me move, your Honor, now, if I can, to the second  
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1 important point, which is the failure to have standards and  
2 what this means, because we didn't get to discuss this yet, and  
3 I think this is critical. Your Honor, I don't have the time to  
4 read the testimony, but Mr. Vincent, Mr. Wells, Mr. Caligiuri,  
5 their expert from Exponent, and all the other experts from  
6 Exponent, said over and over again under oath that there were  
7 no standards, there were no protocols for measuring pressure in  
8 footballs either before the game started or after the game  
9 started.

10 The consequence was, according to Exponent, their own  
11 expert, and Mr. Wells said this, too, they didn't collect the  
12 right information. What the problem was, no one at the NFL  
13 knew about the ideal gas law, which is surprising because I  
14 think I studied that in ninth grade chemistry. I could be  
15 wrong, but I think I did. And the basic principle was when you  
16 go from a cold locker room to a warm environment, you always  
17 lose pressure. If you go from a dry ball to a wet ball, you  
18 always lose pressure. So therefore, thousands of footballs in  
19 the NFL over the years have been below the 12.5 standard. I  
20 could state that as a matter of certainty. How do I know?  
21 Because there are thousands of footballs that were put out  
22 there which naturally lost pressure. And no one tested them.  
23 There had never been, to my knowledge, any ball tested at  
24 halftime in the history of the NFL.

25 So what do the experts do? They said we have to make

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1 assumptions. That's what experts do. But assumptions doesn't  
2 mean it's a fair and consistent basis for discipline. And let  
3 me show your Honor, I made one demonstrative I would like to  
4 ask Mr. Greenspan to please hand out, which I think brings this  
5 point home in a way, frankly, that sometimes when you're  
6 preparing for argument things click in a way that they don't  
7 when you're writing your briefs.

8 And I call this chart Angels Dancing on the Head of a  
9 Pin. And what this does is it says let's look at what the  
10 NFL's experts said. So none of this is me. What the NFL  
11 experts said in Table 11 is here is the actual measurements  
12 that they believe of the Patriots' balls at halftime. That's  
13 what table 11 is. And your Honor could see, depending on which  
14 gauge you think it was, we'll take the worst case for Tom  
15 Brady, the worst case for Tom Brady is 11.09 on average, that's  
16 their average. So giving every benefit of their assumptions  
17 it's 11.9.

18 Then look at what they say many pages later in their  
19 report, and I'm quoting their report again, they say they do  
20 all of their assumptions for time, for temperature, for  
21 wetness, and they say these are the assumptions we're adopting,  
22 and they go these equations -- this is their expert -- predict  
23 the Patriot balls should have measured between 11.52 and 11.32  
24 at the end of the first half. So let's start with that. Not  
25 at 12.5. Their assumptions are it was going to go down from

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1 12.5 to 11.52 and 11.32.

2 Then it occurred to me as I'm preparing this argument,  
3 how much of a difference is that? And what it turns out, it's  
4 one or two-tenths of a difference of PSI. What does that mean?  
5 It means how much do you think we have to alter the assumption  
6 to overcome one or two-tenths of PSI. It means their  
7 conclusion is Mr. McNally, the attendant, went into the  
8 bathroom to lower the PSI one or two-tenths of a PSI. I would  
9 say, your Honor, even the NFL would not contend that a  
10 quarterback could even feel the difference of one or two-tenths  
11 of PSI, let alone in making a difference in play.

12 So what you have here, it would be as if you were a  
13 traffic cop and they stopped you and said you have been going  
14 one mile over the speed limit, you are getting a ticket. How  
15 do you know that, Officer? Did you have a radar gun? No. Did  
16 you have some other measure to test? No. How do you know?  
17 Well, I watched your car go, and I called one Mississippi, two  
18 Mississippi, three Mississippi, and I can tell that means you  
19 were one mile over. That would be thrown out of court because  
20 you would say there's no fair and consistent basis to determine  
21 discipline.

22 And so here we have a situation where, again, it's the  
23 NFL's decisions. They could have had standards, they could  
24 have measured temperature, they could have required all balls  
25 to be measured at halftime.

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1 THE COURT: Because we are running short, so this  
2 obviously goes to the tampering issue, this is another basis  
3 why he can't -- you're saying he can't be --

4 MR. KESSLER: But I can't question the facts, so what  
5 I am questioning is something else. They're going to say I'm  
6 arguing the facts here. I'm not. What I'm saying is that  
7 because there were no procedures they couldn't meet the  
8 admitted CBA tests of fair and consistent discipline because  
9 there are going to be hundreds of other players who may have  
10 balls that are lower or higher, nobody knows. We don't know  
11 what the Colts' balls would be if you tested them this way.  
12 They never tested all the Colts' balls, they tested four of  
13 them. We know a Colts ball official took one of the balls, the  
14 so-called twelfth ball, and by the way, violated the rule by  
15 tampering with the ball during the game. He wasn't  
16 disciplined.

17 The point here is this has never been a serious issue  
18 for this league. And they could decide today, they could  
19 decide -- Commissioner Goodell could say I'm publishing a new  
20 competitive integrity policy, we're going to test balls, we're  
21 going to measure temperature, we're going to do it at halftime,  
22 but he can't do it after the fact. That's my second point.

23 THE COURT: So you're saying this is a legal issue.

24 MR. KESSLER: Correct, because the league concedes --  
25 it's in his opinion, Commissioner Goodell says I concede that I

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1 have to be fair and consistent in my imposition of discipline.  
2 He concedes that's under the CBA. I'm saying as a matter of  
3 law where it is undisputed that there were no standards and  
4 tests put into place -- because I argued before it would be  
5 like in a drug program if you just sent me into the locker room  
6 and said to player I don't know, piss in a cup. What am I  
7 going to do with it? We have procedures. We have pee samples.  
8 We have testing. And if you don't follow those procedures,  
9 guess what, there's no discipline, because there has to be a  
10 fair and consistent method.

11 The third ground, I want to talk briefly about evident  
12 partiality. And this ground, your Honor, their basic argument  
13 is that well, we agreed to the Commissioner, and he is  
14 inherently biased, so stop crying about it.

15 THE COURT: That's not what he said. Aren't you going  
16 to talk about the notes and Mr. Nash or not?

17 MR. KESSLER: Yes, you're right. I will come back to  
18 fundamental fairness. I want to argue first about evident  
19 partiality.

20 On evident partiality, our argument is as follows:  
21 Even when you agree to an arbitrator who has an inherent bias,  
22 as we did here in the CBA, there's no dispute about that, what  
23 the case law says, and I refer you to the Bettman case that was  
24 decided in this Court, as well as the Virginia Squires case  
25 that was decided in this Court, and the New York State Court

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1 Morris Shuler case that you don't agree to unexpected things  
2 happening where the arbitrator's own conduct becomes part of  
3 what he has to decide.

4 So this happened here because there was a very  
5 significant issue as to whether or not Mr. Goodell improperly  
6 delegated his first-level disciplinary authority to  
7 Mr. Vincent. And we wanted witnesses on that point. We wanted  
8 Commissioner Goodell to testify on that point. We wanted  
9 Mr. Vincent to testify on that point. We wanted to develop a  
10 fact record.

11 And what Commissioner Goodell did, before we even got  
12 to the hearing, was he said: I know what happened. Of course  
13 he knows what happened. Here's what happened. That's not  
14 delegation. I did not violate the CBA. An arbitrator can't  
15 rule on that. And here's how I know this is correct: In the  
16 Rice case, Commissioner Goodell himself said I will step aside  
17 because my conduct is at issue, and he had Judge Jones do this  
18 himself.

19 THE COURT: Judge Jones served as the arbitrator.

20 MR. KESSLER: Correct. And he said I'm recusing  
21 myself. And the reason that's significant is he recognizes  
22 there are cases where we haven't consented to his bias that he  
23 must recuse.

24 And to me, this is the clearest possible case. This  
25 wasn't a frivolous argument we made up, your Honor. We have

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1 pending an arbitration agreement before a neutral arbitrator as  
2 to the limits of the delegation of the Commissioner's  
3 authority. This is a very serious in the CBA. He didn't let  
4 us make a record and summarily dismissed it.

5 And the second thing he did is he again confuses his  
6 roles. Once he became the arbitrator he wasn't supposed to  
7 come out and publicly proclaim his views on this. I'm sorry,  
8 when you become an arbitrator you have to step back. He didn't  
9 step back. Instead, he went out and issued a press release  
10 after the Wells Report saying how comprehensive and thorough it  
11 was. And so the question is having done that, he now -- how is  
12 he going to issue a decision saying, "Guess what, I think the  
13 Wells Report was wrong," which was the issue before him as the  
14 arbitrator.

15 So he just -- and the reason this is so perplexing is  
16 this was the reason he stepped aside in Bounty. He knew this.  
17 So he knew the history because in Bounty he actually went on  
18 ESPN, I believe, or some TV show and gave interviews, and even  
19 he recognized I better step aside, and he let Paul Tagliabue  
20 decide this.

21 And the question is we have to have -- his power is  
22 not limitless, it is limited by the Federal Arbitration Act,  
23 the Labor Management Relations Act and the CBA. And that's  
24 what he has to understand in terms of this. That's evident  
25 partiality.

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1 My last argument is fundamental fairness.

2 THE COURT: In leaving this for last, do you think  
3 it's of less significance?

4 MR. KESSLER: No, it's just that I have to order them  
5 somehow, and I debated all night which order to use. So you  
6 could put this one first because we win on any one of them.

7 So on fundamental fairness, even they concede, because  
8 the Second Circuit authority says you have to have access to  
9 relevant evidence to be able to be present your case, there's  
10 no dispute, they don't deny that. Again what they deny is that  
11 didn't happen.

12 And so what did they deny us here? First and most  
13 importantly, the whole factual issue at the hearing was whether  
14 the Wells Report's findings were correct. Why? Because that  
15 was the basis for the discipline, according to Mr. Vincent.

16 How could we attack the Wells Report? We didn't have  
17 access to any of their underlying materials. We couldn't get  
18 them. And the NFL did. Why do I say the NFL did? Because lo  
19 and behold, Mr. Wells' partner shows up as the person who  
20 cross-examines Tom Brady, the only person who cross-examined  
21 Tom Brady, the only person who cross-examined our experts, and  
22 those were our witnesses.

23 It's true Mr. Nash cross-examined Mr. Wells and  
24 Mr. Birch, who he called as adverse witnesses, but Paul Weiss  
25 was the lawyers, and Mr. Wells said yes, I'm being paid for

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1 this, or his words were I hope I'm being paid for this, and he  
2 said yes, I understood they're our client in doing this. So  
3 they had all these materials and we didn't.

4 THE COURT: You're talking about, to be clear,  
5 Mr. Reisner now, Lorin Reisner.

6 MR. KESSLER: Correct, Mr. Wells' partner, who was the  
7 co-author of the Wells Report.

8 THE COURT: Got it. And he cross-examined some of the  
9 key witnesses and did some direct as well and he, you're  
10 saying, because he's a partner of Paul Weiss, had access to  
11 these investigation notes.

12 MR. KESSLER: In fact they were his notes.

13 THE COURT: You didn't.

14 MR. KESSLER: That's correct. All the underlying fact  
15 information.

16 So what Mr. Nash says is he -- in fact, it's peculiar,  
17 because he cites Judge Jones for this, he says well, in Rice  
18 Judge Jones somehow said you don't get that type of discovery  
19 under this CBA, and here's why that's wrong. So this issue  
20 first came up in Bounty, and in Bounty we asked for the  
21 investigator notes, and the NFL said no, the CBA doesn't  
22 provide for them. And Commissioner Tagliabue said yes, it's  
23 required for fundamental fairness, and so the notes were all  
24 turned over in Bounty.

25 In Rice the NFL, when we asked for the notes in Rice,  
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1 just gave them to us because they knew they lost in Bounty. So  
2 we never presented to Judge Jones the issue of whether we were  
3 entitled to the investigator notes because the NFL voluntarily  
4 turned them over.

5 So what Judge Jones was called to decide was two  
6 issues. One is should she compel testimony of witnesses to  
7 give us a chance, and she did, she compelled in particular the  
8 testimony of Commissioner Goodell in Rice, who they refused and  
9 resisted, and she said no, Commissioner Goodell must testify,  
10 he's an essential witness. Number two, we did lose on one  
11 point, we asked for documents from the Ravens, not from the  
12 NFL, a team. And Judge Jones ruled well, that she thought was  
13 beyond what was contemplated in the discovery. That had  
14 nothing to do with this fundamental right to get the basis of  
15 the discipline. In other words, the Ravens facts had nothing  
16 to do with the discipline being imposed, so I understand that's  
17 a decision of the judge. So we think we were absolutely  
18 entitled to that.

19 Number two, Mr. Pash's testimony, Mr. Goodell's  
20 testimony, and Mr. Birch's testimony. We were entitled to  
21 Goodell and Birch on the issue of delegation. We were  
22 precluded from making any fact record on the delegation issue.  
23 In fact, the reason, your Honor, you could say why am I not  
24 arguing delegation to you? I was never able to present it  
25 below. I have no record. I have no facts. All I have is

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1 Commissioner Goodell's testimony and his pronouncement that as  
2 the arbitrator I find I am credible and I'm telling the truth  
3 and I did nothing wrong. That's Commissioner Goodell's finding  
4 about himself.

5 So I didn't get Goodell's testimony, which I asked  
6 for, he refused. I didn't get Mr. Birch -- sorry, Mr. Vincent  
7 to testify about the delegation. He let me cross-examine  
8 Mr. Vincent about the lack of procedures, what happened on the  
9 game day on the AFC championship, but he never let me examine  
10 him at all on delegation.

11 And finally, with respect to Mr. Pash, so Mr. Pash --  
12 again, the NFL makes their own bed and they don't want to lie  
13 in it. They announce to the world Mr. Pash is the co-lead  
14 investigator in the Wells Report. That was their press  
15 release. It's written in the Wells Report. That was their  
16 decision. I then said okay, you're giving me Ted Wells'  
17 testimony. First they said no, by the way, your Honor, and I  
18 found out the day of the hearing, yes, which is nice for a  
19 litigator, but I go in terms of that, and they said okay,  
20 you'll get Mr. Wells today.

21 But Mr. Pash, they said well, we don't have to provide  
22 him because he didn't really do anything. Well, in all due  
23 respect, I'm entitled to probe that factually in a  
24 fundamentally fair hearing. So I asked Mr. Wells about this,  
25 he said he knows Mr. Pash made comments. Mr. Wells didn't know

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1 what those comments were. Why? Because he probably gave them  
2 to Mr. Reisner or one of the other associates or people at Paul  
3 Weiss. So Mr. Wells sort of isolated himself. He didn't even  
4 know how much those comments affected what was in there or not,  
5 nobody knows because there was no record, or what other  
6 involvement he had. Mr. Wells said he was a facilitator. What  
7 did he facilitate?

8 THE COURT: Well, Mr. Pash, as I understand, he's a  
9 very senior executive in the NFL, also a Harvard-trained  
10 lawyer, former partner at Covington & Burling, et cetera, and  
11 if I'm not mistaken, instrumental in negotiating the collective  
12 bargaining agreement in 2011.

13 MR. KESSLER: Yes.

14 THE COURT: So he would be someone who would be  
15 expected to have the kind of information that would have helped  
16 you in this.

17 MR. KESSLER: No question. And exactly for the same  
18 reason Judge Jones said fairness required that we get  
19 Commissioner Goodell's testimony in the Rice case, we should  
20 have gotten Mr. Pash's testimony in this case. It could have  
21 been very informative on many of the issues that came up here,  
22 and it was denied.

23 So your Honor, to sum up, and I know I exceeded my  
24 time, and I apologize for that. I will sum up by saying your  
25 Honor asked at the last hearing where was the gate in

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1 deflategate. It's a good question. I don't know where the  
2 gate is, but I'll tell you what I hope the gate is. I hope the  
3 gate leads through this courtroom to a fair result under the  
4 legal requirements of the Federal Arbitration Act, the LMRA,  
5 and the CBA. That's all that we could ask for is that the NFL  
6 comply with the rules. This happened in Bounty. It happened  
7 in Rice. It happened in Peterson. It happened in Hardy. The  
8 last thing I want to do, your Honor, is to keep fighting these  
9 things. But until it becomes clear to the NFL that the gate  
10 has to be to comply with the law and the requirements, I'm  
11 afraid, again by their own decisions, they force us to take up  
12 the valuable resources of the Court because we have to  
13 vindicate the CBA rights.

14 Your Honor, again I apologize for taking all this  
15 time.

16 THE COURT: No, we'll give the other side the same  
17 amount of time.

18 One final question, the final question is this,  
19 throughout the Wells proceeding, throughout the hearing and  
20 throughout these proceedings, Mr. Brady has been steadfast in  
21 his position that he did not -- was not involved in this  
22 January 18 deflate situation. But last week you said that when  
23 it came to the non-cooperation something to the effect that he  
24 wished -- I think you said, and I think right now Mr. Brady has  
25 concluded that it should have been done in a different way

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1 because in this proceeding he did everything that Mr. Wells  
2 asked for. There was some acknowledgment, I thought, by you  
3 then, last week, that he could have done better in turning over  
4 his emails.

5 MR. KESSLER: Your Honor, what I was acknowledging was  
6 not that he violated any CBA obligation, because I don't think  
7 he did, but that had others been involved in counseling him, or  
8 if Mr. Wells had said there is going to be consequences --  
9 which he deliberately did not say -- for not turning this over,  
10 then I know, in talking to Mr. Brady -- and he testified to  
11 this, this is not attorney-client privilege -- he said if I  
12 knew there were going to be consequences this way, if it would  
13 become this issue, I would have turned it all over despite my  
14 privacy concerns because, one, I didn't want the consequences,  
15 and number two, there was nothing there.

16 That's why I said last time when you draw this whole  
17 circle, there's nothing there, because we know they had those  
18 texts. And we know, as you pointed out, most of the texts that  
19 we looked at have nothing to do with the championship game. So  
20 yes, if Mr. Brady was in a different spot, what he knows today,  
21 I think he would have said let's turn this over and not make it  
22 an issue. Because if it wasn't an issue, I don't know what the  
23 NFL would have said in their brief.

24 THE COURT: And that covers the phone, too?

25 MR. KESSLER: Yes, no question about that. And

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1 remember, there was no arbitration pending yet, there was no  
2 legal proceeding pending yet, he didn't receive anyone's advice  
3 that oh, there's a pending case, as you would, as your Honor  
4 knows in other situations, you have to preserve this.  
5 Mr. Wells didn't say: Would you please preserve evidence. He  
6 had no notice or understanding of that either, he just did what  
7 he's always done, given the celebrity life that he leads.

8 THE COURT: Thanks.

9 MR. KESSLER: Thank you, your Honor.

10 THE COURT: You may have longer than you might have  
11 anticipated. Take as much time as you need.

12 MR. NASH: Thank you, your Honor. Subject to your  
13 Honor's questions, I don't think I will have as long, because I  
14 think the answer to most of what Mr. Kessler had to say is  
15 found in the legal standard that he can't disagree with, and  
16 that is a disappointed grievant in a CBA arbitration, which is  
17 what we have here, this was a disciplinary decision that was  
18 issued in accordance with the collective bargaining agreement,  
19 Mr. Brady was given, as I said last week and as we said in the  
20 papers, all of the rights available to him under the CBA, we  
21 had a hearing and the Commissioner issued a decision that is  
22 final and binding.

23 Now Mr. Kessler says well, there are exceptions to the  
24 general rule where the arbitrator imposes his own views on  
25 industrial justice. The answer to that argument, your Honor,

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1 though, and I think the answer to virtually all of the  
2 arguments that you just heard can be found in Commissioner  
3 Goodell's award itself.

4 I'm not going to be able today to respond to all of  
5 what I believe are misstatements of the record or disagreements  
6 about how the various policies should be interpreted or  
7 disagreements about the underlying facts, I am going to rely on  
8 the findings that the Commissioner reached and which are  
9 entitled to deference.

10 I will say this, though, I think Mr. Kessler's  
11 presentation this morning proved the basic point that what we  
12 are now doing is we are rearguing Mr. Brady's appeal. He is  
13 asking you to stand in the shoes of the arbitrator. And for  
14 example, he's even given you a new exhibit about the  
15 measurements of the footballs and asking you to look at that  
16 and make judgments about well, if there were different  
17 procedures in place, maybe there would have been natural causes  
18 for the conclusion of the deflation.

19 But what he's ignoring is we had a ten-hour hearing on  
20 this, that he presented an expert witness on this and other  
21 expert witnesses relied on and documented in the Wells Report  
22 who also testified and Mr. Kessler also had the opportunity to  
23 cross-examine. And following that hearing the Commissioner  
24 made a conclusion based on that evidence, based on the entire  
25 record, that the argument that he just asked you to accept and

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1 the exhibit that he just asked you to consider does not provide  
2 any basis to alter the underlying conclusion that the balls  
3 were tampered with.

4 And he did so in a reasoned decision, and based on,  
5 simply put, the head of the physics department at Princeton  
6 University who convinced him, based on his testimony and based  
7 on all of the scientific analysis that was presented in the  
8 hearing, that these explanations or these criticisms -- because  
9 what really what you're hearing today are criticisms about how  
10 things could have been done or should have been done. But what  
11 happened at the hearing, the Commissioner reviewed the evidence  
12 and made a judgment and made a judgment in agreement with the  
13 evidence that was presented. Under the law, there's no basis  
14 for the Players Association to come in here, whether they give  
15 you a new exhibit or ask you to parse through the records or  
16 look at this line in the testimony or this document, under the  
17 law, they don't get to reargue that point.

18 Under the law, all that is required is that the award  
19 that was issued by the Commissioner, the award that is under  
20 review in this Court, is grounded in the collective bargaining  
21 agreement. The Commissioner was reviewing the evidence and  
22 making factual findings. The Commissioner was interpreting the  
23 CBA and applying the CBA. The Commissioner considered  
24 arguments that they made and, frankly, rejected them. He  
25 considered their arguments about precedent in Bounty and others

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1 and did not agree. Those were judgments for the Commissioner,  
2 and as long as he under the law is arguably, even arguably  
3 applying those, those are final and binding.

4 THE COURT: It's also true he was relying on the  
5 conclusions in the Wells Report, is that right?

6 MR. NASH: Yes, he relied on the conclusions in the  
7 Wells Report, and he says this very explicitly in the award, he  
8 relied on the entire record.

9 And to that point, your Honor, the question about I  
10 think you said the leap from the Wells Report to the  
11 Commissioner's judgment, let's be clear here, again this is  
12 parsing that is going on. Mr. Kessler comes in and says look  
13 at the original disciplinary letter and says it's based on the  
14 Wells Report and it's just generally aware, and now somehow the  
15 Commissioner exceeded his authority based on the evidence  
16 presented at the hearing.

17 First of all, he's misstating the record. The Wells  
18 Report also concludes, and I think it does so on page 9, not  
19 only that Mr. Brady was generally aware, but that the actions  
20 of the Patriots' employees would not likely have the occurred  
21 without his knowledge and approval. That's in the Wells Report  
22 as well.

23 But most importantly, under the CBA, the judgment  
24 about Mr. Brady's culpability, his involvement in the ball  
25 tampering, his knowledge and awareness and beyond was one for

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1 the Commissioner to make. And that was the entire purpose of  
2 the appeal hearing. Mr. Brady was given the initial  
3 disciplinary letter, his union representative filed an appeal,  
4 he had his hearing, and following that hearing, as the  
5 Commissioner says in his award, he made judgments based on the  
6 facts and the discipline and based on the entire record. It  
7 includes the Wells Report, but he is in no way limited to the  
8 Wells Report. I find it astonishing that I think he's being  
9 criticized here because he considered Mr. Brady's testimony.  
10 Well, that was the point of the hearing. That was Mr. Brady's  
11 opportunity under the collective bargaining agreement.

12 And this part is quite critical, this idea that the  
13 only thing that happened here was that Mr. Brady was generally  
14 aware is simply not correct as a matter of the findings in the  
15 award. It's not correct -- it's not a correct description of  
16 the Wells Report, I would suggest, but the responsibility of  
17 Ted Wells and the Wells Report were to document the facts, and  
18 the appeal hearing was Mr. Brady's opportunity to put in  
19 whatever facts he wanted, and from there the Commissioner was  
20 entitled to make a judgment based on the entire factual record.  
21 To say that he somehow exceeded his authority by relying on  
22 Mr. Brady's testimony in confirming his conclusion -- and let's  
23 be clear about their arguments about Peterson and the exceeding  
24 authority, the question on appeal here, they have no legal  
25 support for that. The only legal support they offer is the

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1 Peterson case and, your Honor, I would submit that their  
2 description of the Peterson case is not applicable here even if  
3 you accept it.

4 But under the law, an arbitrator's authority is --  
5 he's right it's a creature of contract, and here the  
6 Commissioner's authority is not only to impose the discipline  
7 in the first place, but also to consider the appeal and issue a  
8 final and binding award. And he did exactly this. He  
9 exercised his authority. He gave Mr. Brady his opportunity for  
10 appeal. He listened to the testimony, he considered all of the  
11 evidence, and then he made a judgment to affirm the discipline.  
12 There is no question that affirming the underlying discipline  
13 was well within his authority as an arbitrator under the Labor  
14 Management Relations Act, and they have no support to the  
15 contrary.

16 But as to this notice issue that they keep saying that  
17 is the critical issue, I think one of the critical issues, I  
18 think there are a lot of issues that were described as critical  
19 by Mr. Kessler, the problem with their entire argument is it is  
20 a question of fact and it is a question of interpretation of  
21 the collective bargaining agreement.

22 And I noticed a number of times in his argument that  
23 Mr. Kessler rarely described the award itself. He would say  
24 things like well, the NFL argues he had notice, or the NFL  
25 argues you should look at it this way. Well, yes, that's what

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1 we argued in the appeal. But what matters here is not what I'm  
2 arguing or not even what Mr. Kessler is arguing, because we're  
3 not here to retry the arbitration, what matters here is what  
4 the Commissioner found.

5 And on the issue of notice, he issued a clear,  
6 reasoned, thorough opinion based on his assessment of all of  
7 the record evidence, including Mr. Brady's testimony, and he  
8 concluded Mr. Brady was well on notice. He concluded that  
9 Mr. Brady was involved. He did not believe Mr. Brady. That is  
10 what arbitrators do, they assess credibility.

11 I was somewhat surprised in the papers that the  
12 Players Association filed on Friday that one -- a number of  
13 their arguments were well, Mr. Brady denied it under oath, or  
14 it's just generally aware that's not enough evidence. Well,  
15 no, if you read the award, the award carefully goes through the  
16 fact that the Commissioner considered that and did not believe  
17 Mr. Brady. He did not believe the explanations for the text  
18 messages that showed, despite Mr. Brady's denial that he didn't  
19 know Mr. McNally or didn't know who he was and never told  
20 anybody about his -- never cared about the ball pressure.

21 In fact I think one of the most interesting aspects on  
22 credibility at the hearing was Mr. Brady said he never really  
23 thought about ball deflation. It wasn't really an issue for  
24 me. And yet there was substantial evidence to the contrary.  
25 There were the texts. Probably the most direct piece of

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1 evidence on this point was the text from Mr. Jastremski to  
2 Mr. McNally saying that Mr. Brady brought him up and said: You  
3 must be under a lot of stress getting them done. Mr. Wells and  
4 the Commissioner here as well concluded that he was talking  
5 about the fact that Mr. Brady was aware that Mr. McNally was  
6 the deflating the footballs.

7 Now we can argue about how to interpret that text. I  
8 suggest it's pretty clear evidence. In considering that,  
9 consider one other thing: Mr. McNally had no responsibility  
10 for preparation of the game balls. This is all in the Wells  
11 Report, it's explained in the Commissioner's award. He had no  
12 responsibility. His responsibility was to carry the footballs  
13 next to referee and bring them out.

14 If that's so, why would Mr. Brady be telling  
15 Mr. McNally, boy -- Mr. Jastremski, boy, McNally must be having  
16 a lot of stress getting them done. Certainly, your Honor, it  
17 is a reasonable inference for both Mr. Wells in the first  
18 instance, but most importantly for the Commissioner in his  
19 award to reach the conclusion that Mr. Brady was not just  
20 generally aware, he was involved.

21 THE COURT: He was involved on January 18, 2015?

22 MR. NASH: Absolutely, your Honor.

23 THE COURT: So I asked the same question of  
24 Mr. Kessler. When Mr. Wells says that he was generally aware,  
25 et cetera, et cetera, he does not say in that sentence of what

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1 happened on January 18, 2015. Mr. Goodell clearly does.  
2 Right?

3 MR. NASH: I don't think that's a fair reading of the  
4 Wells Report.

5 THE COURT: That's going to be my question. You think  
6 that sentence does mean January 18, 2015 by Mr. Wells?

7 MR. NASH: Absolutely.

8 THE COURT: Why doesn't it say that? He's a pretty  
9 smart guy, Mr. Wells, I think we all agree, and he says --  
10 let's get it exactly right. He says more probable than not  
11 that Tom Brady was at least generally aware of the  
12 inappropriate activities of McNally and Jastremski involving  
13 the release of air from Patriot's game balls.

14 To me what is conspicuously absent from that sentence  
15 is his finding or a finding without any specific reference to  
16 January 18, 2015 game. You think I'm misreading the sentence?

17 MR. NASH: I think you can't read that one sentence.

18 THE COURT: So where else does Mr. Wells say that  
19 Mr. Brady was generally aware of what they did on January 18,  
20 2015? Anywhere?

21 MR. NASH: I would suggest that that is the only  
22 logical interpretation or understanding of the sentence that  
23 you just read. The entire investigation at the very beginning  
24 of the report says that the whole purpose of the investigation  
25 was to determine whether the footballs used in the AFC

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1 championship game, a very significant game, were purposefully  
2 deflated, and who was responsible.

3 He then goes on to make a number of findings about the  
4 activities of Mr. McNally and Mr. Jastremski relevant to that  
5 game. Mr. McNally going to bathroom. Now I understand, and  
6 you asked this question last week, well, he also noted the  
7 evidence about the texts that were before the AFC championship  
8 game. But that is certainly evidence that supports the idea  
9 that when Mr. McNally, for example, went into the bathroom  
10 completely out of protocol, that he was carrying out the  
11 activities probably that had been done before, but in any  
12 event --

13 THE COURT: That's a bit of a problem, too, "probably  
14 been done before," some guy from the Colts say they do it all  
15 the time, all that stuff, that's not what's found here. What's  
16 found here is that an infraction occurred on January 18, 2015.  
17 And I may be misreading, but all I'm trying to point out, to  
18 me, and maybe this is a misread, but I think that it's  
19 conspicuously absent from Mr. Wells' finding that there's no  
20 reference in that key finding, the January 18, 2015 game.  
21 Mr. Wells knows better than anybody that that's the game under  
22 consideration. And I'm just saying, at least that's the way it  
23 struck me, why wouldn't you say -- he's a smart lawyer -- on  
24 January 18, 2015.

25 And the reason you can, I'm sure, and everybody is

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1 entitled to interpret it differently, and maybe mine is the  
2 minority interpretation, that the report is all about that game  
3 and that's what is implied there, but the Wells Report goes  
4 back to a Jets game in October 2014 and it goes back to a lot  
5 of incidents, so does that finding of generally aware  
6 specifically embrace the January 18, 2015 game? You say it  
7 does. I say I have some pause because I think the kicker --  
8 not the kicker in football sense, but the real point here, or  
9 at least the question that I have in my mind is why didn't he  
10 say on January 18, 2015?

11 MR. NASH: I would suggest if you read the  
12 introduction of the Wells Report he explains what he was tasked  
13 to do.

14 THE COURT: I know it.

15 MR. NASH: And when he makes the conclusion that you  
16 just cited and he's talking about the inappropriate activities  
17 of Jastremski and McNally, he's talking about the factual  
18 findings that he just reviewed in his report about the day of  
19 the AFC championship game.

20 It's true that he relies on other evidence, but that's  
21 evidence including months earlier of Mr. McNally calling  
22 himself a deflator, saying I haven't gone to ESPN yet. He's  
23 not making a finding that it happened six months earlier, but  
24 what he's saying is, and I think it's certainly reasonable, and  
25 this is I think well documented in the report, that kind of

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1 text evidence certainly supports the view that on the day of  
2 the AFC championship game when Mr. McNally went into the  
3 bathroom he was carrying out that plan.

4 THE COURT: You have to infer that.

5 MR. NASH: Sure, but I think the evidence is pretty  
6 direct on that. And I think what really matters is, again,  
7 it's not what Mr. Wells found, what really matters is what  
8 Commissioner Goodell found in his award.

9 THE COURT: I get that.

10 MR. NASH: And he was clearly convinced that on the  
11 day of the AFC game that Mr. Brady was aware of and had  
12 knowledge of that activity and should be held responsible.

13 THE COURT: So what did he know that Mr. Wells didn't  
14 know that makes -- if he wrote that sentence, and he did,  
15 Mr. Goodell, he said on January 2, 2015, what was the  
16 difference between what he knew, Mr. Goodell, and what  
17 Mr. Wells knew?

18 MR. NASH: I'm not sure I would describe it as a  
19 difference, he had the opportunity to make the judgment based  
20 on the entire record and to consider Mr. Brady's explanations.  
21 Again, as I just said, in a number of places in the award  
22 Commissioner Goodell finds Mr. Brady's explanations not to be  
23 credible. And he did so, your Honor, based on his assessment  
24 of Mr. Brady's credibility based on his experience as the  
25 Commissioner of the NFL, which is what arbitrators do all the

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1 time.

2 THE COURT: I get that. Is there a particular  
3 question that was asked of Mr. Brady at the hearing about  
4 January 18, 2015 that Mr. Goodell disbelieved?

5 MR. NASH: Yes, that he denied any involvement, that  
6 he denied ever really caring about the inflation level of the  
7 football, that he basically had a complete denial that this  
8 ever even occurred to him.

9 THE COURT: But he denied that he didn't do anything  
10 wrong on January 18, 2015, right?

11 MR. NASH: Right.

12 THE COURT: Is there any particular basis to  
13 disbelieve that?

14 MR. NASH: I think it's very well documented in the  
15 award itself. The Commissioner makes the judgment based on  
16 that is just not believable for a 14-year quarterback in the  
17 NFL to come in and say: I only really care about the texture  
18 of the football, I don't care about the inflation, I never told  
19 anybody. Yet there's evidence from Mr. McNally -- who  
20 Mr. Brady said he didn't know who he was -- that Mr. Brady told  
21 me what he preferred for ball inflation. There was evidence in  
22 the record in the Wells Report that the game official, Walt  
23 Anderson, an experienced game official, when he arrived at the  
24 AFC championship game that morning he already knew Tom Brady's  
25 inflation preference at the low end at 12.5.

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1 THE COURT: But that's entirely legal, right? If a  
2 quarterback has a preference for a 12.5 inflation, there's  
3 nothing wrong with that, is there?

4 MR. NASH: No, no, no. It's interesting that you were  
5 just talking about inferences, and I agree that -- and we  
6 talked about this a little bit last week, we don't have a text  
7 from Mr. Brady saying do this.

8 THE COURT: I'm not drawing inference.

9 MR. NASH: But you can draw reasonable inferences  
10 based on this evidence.

11 THE COURT: If the quarterback said I have a  
12 preference for 12.5 inflation, you think you can draw an  
13 inference from that that he engaged in misconduct? That's  
14 perfectly legal. That's the reason for the league rules of  
15 12.5 to 13.5.

16 MR. NASH: No, my point, your Honor, is that he didn't  
17 have a preference. He didn't know where he picked 12.5. He  
18 didn't really think about it. And he considered all that and  
19 said you know what, that's -- your story is not matching up  
20 with all the evidence.

21 And there's one last very important point that  
22 happened at the hearing that Mr. Wells did not have. Now  
23 Mr. Wells did say -- he testified to it and he documents this  
24 in his report -- that Mr. Brady's failure to cooperate was very  
25 troubling to him. It was very troubling to the Commissioner.

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1 And what he learned at the hearing is that the evidence  
2 actually had been destroyed.

3 Your Honor, an arbitrator -- it certainly does not  
4 exceed his authority, and it certainly can't be his own brand  
5 of industrial justice to draw an inference that when somebody  
6 destroys evidence that they knew was being requested, that an  
7 inference can be drawn, and it confirms the failure to  
8 cooperate. So these are things that arbitrators, your Honor,  
9 do all the time.

10 And again, I would suggest that the discussion that  
11 we're having now is the kind of discussion that we might have  
12 in an arbitration hearing and we did have at this appeal. And  
13 this is why I started with what I said when I started, it's  
14 very difficult for me to come and stand up here today and  
15 respond to each and every what I believe are factual  
16 misstatements. The record is clear. The record -- the answers  
17 are in the award is what I would say about that.

18 THE COURT: Fair enough.

19 MR. NASH: And your Honor, on the idea that the  
20 discipline that was imposed here and Commissioner Goodell's  
21 affirmance of it was not fair and consistent, both on the  
22 question of notice and on the question of fair and consistent,  
23 Commissioner Goodell certainly applies those principles. He  
24 certainly goes through the arguments that you heard. He makes  
25 judgments. He doesn't agree that this is a mere equipment

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1 violation. You had a discussion about the policy, how do you  
2 read this policy about equipment violations.

3 I have responses to that. I think it was Exhibit 114.  
4 One of my responses is that Mr. Kessler is just reading part of  
5 it. I think you noticed it says -- on the very first page of  
6 Exhibit 114 it acknowledges the Commissioner's authority to  
7 impose discipline for conduct detrimental, including  
8 suspensions.

9 On page 20, the page of Exhibit 114 that they rely on,  
10 which is a fine schedule, in the very first paragraph it says  
11 these are minimums, and depending on the facts, they could  
12 be -- the discipline could be much more serious. So the idea  
13 that that document can now -- we could argue about how to  
14 interpret that document.

15 THE COURT: What does the sentence that says that for  
16 a first offense it's limited to a fine, what does that mean?

17 MR. NASH: It says the first offenses will be fines,  
18 but also before it says that -- it makes clear that these are  
19 minimums. First of all, on page 1 of the document it  
20 reinforces the notice that the Commissioner relied on that is  
21 in Mr. Brady's player contract, it's in the CBA, that players  
22 are all on notice, that they're subject to discipline,  
23 including suspension, including banishment from the league for  
24 engaging in conduct detrimental, conduct that affects the  
25 integrity of the game, and says up to and including suspension

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1 and banishment from the league.

2 And then on page 20 --

3 THE COURT: Is this in the award?

4 MR. NASH: No, I'm sorry, I'm reading from their  
5 Exhibit 114, the document that Mr. Kessler was talking about.

6 THE COURT: Which is entitled what?

7 MR. NASH: Entitled "Player Policies." I think you  
8 were referring to them earlier. But even the page that they  
9 rely on in the very beginning says: Fines listed below are  
10 minimums. Other forms of discipline, including higher fines  
11 and suspension, may be imposed.

12 So the point isn't that you need to resolve how to  
13 interpret this document. Even if you accepted Mr. Kessler's  
14 arguments about it, there's clearly an interpretive dispute,  
15 and under the law, that dispute is for the Commissioner. We  
16 don't -- they don't get to come in and start doing that here in  
17 federal court.

18 The same is true when they argue about how -- by the  
19 way, on the player policies, I should add your Honor observed  
20 and asked Mr. Kessler about the notice about the failure to  
21 cooperate. I thought the response was interesting. The  
22 response was: Well, I got to distinguish this, that's personal  
23 conduct policy, that's not really noticed here. Yet the case  
24 that he relies on entirely is the Peterson case, which was  
25 under the personal conduct policy. So I found that to be quite

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1 inconsistent.

2 But in any event, the point is we don't need -- you  
3 certainly, we would submit, your Honor, the Court need not  
4 resolve the best way to interpret these documents or to apply  
5 them to conduct here. That is, under the law, a decision for  
6 the arbitrator, in this case, the Commissioner. The same is  
7 true about arguments concerning how the Bounty case should be  
8 interpreted, how the Rice case should be interpreted and  
9 applied. We have this in our briefs, the law is clear, that is  
10 for the arbitrator to do.

11 They say it's undisputed, but clearly there are  
12 different views here about how it should be interpreted and  
13 applied, and what matters is how the Commissioner resolved  
14 those disputes. And that's true in terms of whether it was  
15 fair to discipline Mr. Brady based on both the involvement in  
16 the ball tampering as well as the failure to cooperate. This  
17 argument that he didn't have specific notice or didn't have  
18 enough notice was resolved against them. And that really,  
19 under the law, is and should be the end of the matter, your  
20 Honor.

21 THE COURT: Just so I understand, so the four-game  
22 suspension covers ball tampering, non-cooperation, and the  
23 non-cooperation is included the phone -- the destruction of the  
24 phone, those are all tied together?

25 MR. NASH: The destruction of the phone was cited as  
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1 evidence that confirmed the underlying failure to cooperate.  
2 It also was evidence interpreted by the Commissioner to  
3 reasonably draw an inference that supported the underlying  
4 finding about ball tampering.

5       Again, we get back into: Is there a text on the day  
6 of the AFC championship game? Maybe there is, but we don't  
7 know because it's undisputed that the phone that Mr. Brady used  
8 during that entire period was not the texts that were  
9 relevant -- and by the way, I think your Honor knows this, but  
10 last week Mr. Kessler said all Mr. Wells requested were the  
11 texts between Mr. Brady and three individuals. That's not  
12 correct. It's in the award. Mr. Wells requested texts about  
13 ball tampering with anybody. But we don't know, and your Honor  
14 certainly, as an arbitrator, as a judge, I'm sure you would be  
15 comfortable with this, you can certainly draw an inference from  
16 that action, and you can certainly draw the inference that it  
17 supports, and for purposes of this exceed authority, your  
18 Honor, it certainly is evidence that the Commissioner can rely  
19 on to affirm the underlying conclusion about the  
20 appropriateness -- about the factual findings and the  
21 appropriateness of the discipline.

22       He says this in his award, and I think it's important,  
23 the Commissioner does, that this is not mere ball tampering.  
24 This was a serious issue. This was the AFC championship game.  
25 There's a reason why there is so much attention. And I

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1 understand sports fans have different views about how this  
2 should be handled, but from the Commissioner's perspective this  
3 was a very serious issue. And I would submit from the  
4 perspective of others within the NFL and fans outside of the  
5 NFL, the question of whether during the AFC championship game  
6 there was this kind of effort to evade the rules after the  
7 officials certified a football is a serious matter. But also,  
8 as the Commissioner explains in his award, the integrity of the  
9 league in these kinds of matters depends upon cooperation and  
10 certainly not obstruction of investigation into these matters,  
11 and the Commissioner weighed all of that.

12 THE COURT: I got it. Are you saying that the penalty  
13 is or should be or could be greater in the AFC championship  
14 game than the first game of the season?

15 MR. NASH: I'm not saying that at all, and I'm not the  
16 Commissioner, so I don't know that I would say that. But what  
17 I would say is this idea that this should be minimized, I think  
18 the fact that it occurred in a game of this importance shows  
19 clearly that this was a significant issue. I think it would be  
20 significant in any game. I assume that the Commissioner would  
21 think that is true as well. But I'm just pointing that out in  
22 response to the efforts that you hear that this was not -- this  
23 should be deemed the same thing as a player's uniform not being  
24 appropriate or violating the rules. This was -- I don't  
25 think -- certainly let me put it this way, for the purposes of

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1 the legal standard, it can't be said that it would be  
2 unreasonable for the Commissioner, or that it is his own brand  
3 of industrial justice to say this is a serious matter. This  
4 called into question whether our rules are being followed and  
5 whether the games were being played on a fair and even playing  
6 field.

7 THE COURT: So the four-game suspension then, I think  
8 it's obvious, but just to confirm, covers ball tampering on  
9 January 18, 2015, plus failure to cooperate in the  
10 investigation, including destruction of the phone, right?

11 MR. NASH: No, I think the destruction of the phone  
12 was evidence that confirmed the underlying failure to  
13 cooperate.

14 THE COURT: So all of that is folded into the  
15 four-game suspension?

16 MR. NASH: Yes.

17 THE COURT: So which of the four games is attributable  
18 to ball tampering, and which is attributable to failure to  
19 cooperate?

20 MR. NASH: Well, the award doesn't specify, and I  
21 don't believe there's any requirement in the CBA to break it  
22 down that way. I think the Commissioner makes a judgment, and  
23 he says this in the award, he says taking the record as a  
24 whole, considering all of these factors, he determined that a  
25 four-game suspension was the appropriate sanction.

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1           There is another view, and there are people within the  
2 NFL who would express this view, that it should be more, it  
3 should be four games just for the ball tampering. But again,  
4 your Honor, we could argue about whether it should be one game.  
5 Let's be clear, they say it should be a fine. The Commissioner  
6 concluded a four-game suspension -- affirming the four-game  
7 suspension was appropriate based on this record. Someone has  
8 got to make the call, and under the CBA there's no dispute that  
9 that call is made by the NFL Commissioner. It's his judgment.

10           THE COURT: So the four games is based on the  
11 aggregation of the ball tampering and the non-cooperation?

12           MR. NASH: Yes.

13           THE COURT: I guess presumably on the January 18, 2015  
14 game, right?

15           MR. NASH: Right.

16           THE COURT: So the next time somebody tampers with a  
17 ball, for example, if that were to happen, but cooperates, what  
18 kind of sentence or discipline would he get?

19           MR. NASH: It would be up to the Commissioner to  
20 decide based on the facts that are presented. And here again,  
21 both the CBA and the long-standing precedent, including the  
22 Bounty case that they rely on, that these kinds of judgments,  
23 the parties have agreed clearly, unlike other parts of the  
24 collective bargaining agreement, that -- and the Commissioner  
25 says this in his award, there's no requirement that there be a

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1 specific fine schedule or suspension schedule, if you do this  
2 it will be this plus this. There's no maximum. It commits the  
3 judgment to the sound discretion of the Commissioner.

4 Commissioner Tagliabue in the Bounty decision explains  
5 why that is so. He says especially in integrity of the game  
6 matters that the parties have agreed to defer to the  
7 Commissioner's judgment on this point. They have also agreed  
8 not to operate in some sort of static -- I think he uses the  
9 word static, or it's in one of the arbitration decisions below,  
10 a rigid framework where it has to be X games.

11 That's not true for other things under the collective  
12 bargaining agreement. So for example, clubs are different.  
13 Clubs may impose discipline. Under the CBA, though, there are  
14 some greater limitations on that ability. They have fine  
15 schedules, proposed disciplinary schedules, and there are  
16 maximums. So clubs can discipline players for conduct  
17 detrimental, but there's a maximum of four games plus I believe  
18 a one-week fine. That doesn't exist for the Commissioner. And  
19 there's a reason. This was a purposeful bargain. And so  
20 ultimately the answer to your question, your Honor, is the  
21 amount of discipline would be within the sound judgment of the  
22 Commissioner, and that's the agreement.

23 THE COURT: I have a little trouble with that. In the  
24 award itself Mr. Goodell says, "In terms of the appropriate  
25 level of discipline" -- so he obviously also felt that he had

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1 to explain the level. He said, "the closest parallel of which  
2 I am aware is a first violation of the policy governing  
3 performance-enhancing drugs" -- he means steroid use, et cetera  
4 -- "and that the four-game suspension imposed on Mr. Brady is  
5 fully consistent with, if not more lenient than, the discipline  
6 ordinarily imposed for the most comparable effort by a player  
7 to secure an improper competitive advantage and by using a  
8 masking agent" -- masking presumably for the drugs -- "to cover  
9 up the underlying violation."

10 So he's trying to rationalize or explain or justify,  
11 as appropriate, what he did. So I have this question, though,  
12 and that is how are deflating footballs, assuming that's what  
13 Mr. Brady -- certainly is what Mr. Brady is found to have done  
14 by Mr. Goodell, and not fully cooperating with the  
15 Commissioner's investigation, legally comparable to steroid use  
16 and use of masking agents?

17 Relatedly, I'm going to ask you if there's any  
18 empirical or scientific comparability. How did he pick steroid  
19 use to explain why he fined Mr. Brady for -- why he suspended  
20 him for four games for deflating the balls and then not  
21 cooperating? How is that equal to steroid use?

22 MR. NASH: It starts with the premise of the findings  
23 regarding deflation of the football. He found not only were  
24 the balls deflated, but they were deflated purposely to gain a  
25 competitive advantage. The same is true when a player uses a

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1 performance-enhancing drug or steroids. It is used in order to  
2 gain a competitive advantage. I don't think he's saying this  
3 is exactly factually the same as steroid use, but I think the  
4 point is that both violations involve an effort to gain a  
5 competitive advantage.

6 Now there's also a distinction. As you read, he said  
7 that in fact he believed Mr. Brady's punishment was arguably  
8 more lenient. That's because, first of all, there's also this  
9 non-cooperation aspect of this matter. But also he concluded,  
10 and I hope you understand that they disagree, Mr. Brady denies  
11 it, but he concluded Mr. Brady was involved. Under the steroid  
12 policy, a player can take a supplement and then he can test  
13 positive, and if he said I didn't know it had a banned  
14 substance, he's still suspended for four games.

15 THE COURT: So I ask you the same question about that,  
16 how is that like deflating a football and not cooperating?  
17 Clearly the question is a fair question to pose because clearly  
18 Mr. Goodell felt that he had to explain the four-game  
19 suspension. And his explanation about steroid use, in my mind,  
20 only raised more questions than it answered, because I don't  
21 see -- I still don't see how the four games is comparable to a  
22 player using steroids and a masking agent.

23 MR. NASH: I think in the Commissioner's judgment it  
24 goes to integrity of the game.

25 THE COURT: Everything goes to integrity of the game.  
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1 MR. NASH: I don't think that's fair. Trying to get a  
2 competitive edge by using a prohibited substance affects the  
3 integrity of the game. I think, in the Commissioner's  
4 judgment, attempting to alter the footballs after the game  
5 officials have certified them is an effort to gain a  
6 competitive advantage that affects the outcome of the game. I  
7 think the fact that he explains that only shows that this  
8 certainly was his analysis of the underlying CBA. He also  
9 compares it to the Cleveland Browns incident.

10 So there's no question that he was applying this law  
11 of the shop principle that the Players Association is urging  
12 about fair and consistent discipline, but there's equally no  
13 question that he made that judgment based on his assessment of  
14 the facts, which are binding, and his interpretation of the  
15 CBA. The steroid policy is part of the CBA.

16 Your Honor, the only other points I would address, on  
17 the bias case I would submit respectfully that is -- they try  
18 to equate this with Rice. The difference with Rice obviously  
19 is the underlying issue in the Rice case was what did Ray Rice  
20 say to the Commissioner. As the Commissioner said here, he was  
21 not a factual witness to Mr. Brady's conduct. This would just  
22 rewrite the agreement. If they could create some sort of issue  
23 saying we want you as a witness, the agreement that the  
24 Commissioner would serve as a hearing officer would be  
25 nullified.

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1 I think the answer -- and I don't need to spend a lot  
2 of time on this -- is in the decision that the Commissioner  
3 issued before the hearing on recusal. He issued a careful  
4 decision explaining the reasons why, under his interpretation  
5 of the CBA, there was no basis for that claim.

6 I would note, by the way, they filed the same motion  
7 for recusal of the Commissioner in the Bounty case that they  
8 cite so often.

9 THE COURT: How about Mr. Pash? Why didn't you  
10 produce Mr. Pash for testimony? You're saying they're trying  
11 to knock out the Commissioner as arbitrator, but the Mr. Pash  
12 thing is totally different. He's a senior executive, co-author  
13 of the Wells Report. What's the problem with having him  
14 testify?

15 MR. NASH: Well, the answer to that question is found  
16 in the other ruling that the Commissioner issued before the  
17 hearing. It's the decision --

18 THE COURT: On the motion in which he denied Mr. Pash,  
19 the application.

20 MR. NASH: He granted -- for example, he compelled  
21 Mr. Wells to testify, but he made a judgment, like arbitrators  
22 and judges make all the time, that Mr. Pash was not a relevant  
23 witness.

24 But he did one other thing with respect to Mr. Pash.  
25 He said depending on what happens at the hearing, you can renew

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1 your motion. You can ask Mr. Wells. But what they did with  
2 Mr. Pash is they created this issue, frankly, because there was  
3 a press release that announced originally that Mr. Pash and  
4 Mr. Wells would be -- Mr. Pash would be a co-investigator,  
5 something like that, and they said that made Mr. Pash a  
6 relevant witness.

7 What the Commissioner did in the prehearing decision  
8 was to say I don't think that he was involved, but you can ask  
9 Mr. Wells.

10 THE COURT: I don't think what?

11 MR. NASH: Mr. Pash is a relevant witness.

12 THE COURT: He edited the Wells Report. Nobody else  
13 was given the authority to edit the Wells Report. So that's a  
14 big deal. He is a lawyer, right? He's a very senior  
15 executive. So he's the co-lead on the investigation. You  
16 allow one person, Mr. Wells, to be cross-examined, I don't  
17 understand what the thinking was behind not allowing Mr. Pash.

18 MR. NASH: Not allowing?

19 THE COURT: To be a witness.

20 MR. NASH: Because he was not a witness. The judgment  
21 was made that he was not a witness to any relevant facts  
22 underlying the decision.

23 Now again, though, and I think this is important, the  
24 Players Association was given the opportunity to renew that  
25 request at the hearing. What the Commissioner said in his

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1 prehearing ruling was I don't think Mr. Pash is a relevant  
2 witness, I think you're misdescribing the facts, but I am going  
3 to compel Mr. Wells to testify, and you can ask Mr. Wells about  
4 Mr. Pash's role. And they did. And after you ask Mr. Wells,  
5 you can renew your request for Mr. Pash, and they never did.

6 THE COURT: And the Commissioner also said Mr. Pash's  
7 testimony would be cumulative.

8 MR. NASH: Yes.

9 THE COURT: How do you know? Cumulative of what?  
10 Unless you know what he's going to testify to, how would you  
11 know it's cumulative?

12 MR. NASH: Because we argued to the Commissioner in  
13 response to that that Mr. Pash was not substantially involved.  
14 He was not a witness to any of the events at the AFC  
15 championship game. It was plainly sufficient, in the  
16 Commissioner's judgment, if Mr. Wells, who is the lead  
17 investigator, is going to be compelled to testify --

18 THE COURT: He's the co-lead. Mr. Pash's name is a  
19 co-lead.

20 MR. NASH: Your Honor, that's true only if you accept  
21 their argument about how to interpret a press release in  
22 February.

23 THE COURT: It's not my press release, so I didn't  
24 write it, so you all wrote it.

25 MR. NASH: But Mr. Wells explained.

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1 THE COURT: Was it not true?

2 MR. NASH: I can point you to Mr. Wells' testimony.  
3 He was asked about it.

4 THE COURT: I read it.

5 MR. NASH: He said no, that's a statement they put out  
6 because at the time they weren't sure how they were going to do  
7 it, but when I came on, it was made clear I am the lead  
8 investigator, Mr. Pash is not the co-lead investigator, and  
9 it's my charge alone.

10 In that respect, your Honor, this also goes to this  
11 independence argument that --

12 THE COURT: Well, we'll get to that in a minute, but  
13 who else but Mr. Pash had the opportunity to edit the Wells  
14 Report before it became public? Anybody?

15 MR. NASH: I'm assuming any number of lawyers at  
16 Mr. Wells' firm, but I don't think they -- I don't think  
17 there's any -- again, judges and arbitrators make judgments  
18 about this all the time. We can disagree. They can argue  
19 about it. But ultimately under the law, the decision as to --  
20 and I think the cases are quite clear about this, the decisions  
21 are clear that the arbitrator has the discretion to make  
22 judgments about whether something is cumulative or not  
23 cumulative. And again here, though --

24 THE COURT: You know, it's interesting, because under  
25 the law arbitrators don't have the authority to make decisions

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1 that testimony is going to be cumulative unless they specify in  
2 what respect they would be cumulative. They cannot just  
3 conclude oh, well, we can't have him because his testimony is  
4 cumulative. That's my understanding of what the cases say.

5 Some cases have been -- some arbitration awards have  
6 been, I believe, vacated precisely because an arbitrator made a  
7 finding that testimony would be cumulative and didn't specify  
8 in what respects it would be cumulative. I ask you who else  
9 but Mr. Pash could have given testimony about whether or not  
10 his edits or what his edits were about or how extensive they  
11 really were or if he was trying to support Mr. Goodell or any  
12 other things that an edit could cover, who else could have  
13 possibly given that testimony except Mr. Pash?

14 MR. NASH: Your Honor, Mr. Wells was asked about this.

15 THE COURT: I know he gave his answer, you know,  
16 Harvard trained, you always have some comments. Frankly, I  
17 didn't find that answer very enlightening. I think he said  
18 it's a thick report, and a Harvard trained lawyer, as Mr. Pash  
19 is, would always have something to say, but I don't know what  
20 that means.

21 MR. NASH: This goes back to our fundamental point  
22 about the CBA. There's nothing that prevents someone from the  
23 league office from being involved in the underlying  
24 investigation.

25 THE COURT: I didn't say he couldn't be involved, I'm  
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1 talking now about the cases which say that even though this is  
2 not Federal District Court and governed by the Federal Rules of  
3 Civil Procedure, there are some basic procedures of fairness  
4 that have to be followed, and one of them often is that you  
5 have to allow someone to make their case by calling witnesses,  
6 and I'm just trying to figure out what the big objection was in  
7 calling Mr. Pash. I submit to you that it's not sufficient to  
8 say or conclude without specifying that his testimony would  
9 have been cumulative.

10 MR. NASH: And not relevant to the core facts. We  
11 understand that one of the strategies in the appeal was to put  
12 Mr. Wells on trial or put the investigation on trial. But  
13 Mr. Pash had no firsthand knowledge of the underlying facts  
14 affecting Mr. Brady's involvement. He had no firsthand  
15 knowledge. He was not a relevant witness to any of these key  
16 issues.

17 Now your Honor, your description or the fact that  
18 there may be cases that get vacated, I would submit that what  
19 most all of the cases say, that these kinds of judgments are  
20 not a ground for vacatur, that's clearly the general rule, and  
21 that to the extent there is a case out there where an award has  
22 been vacated -- and let's keep in mind what happened here.  
23 Those cases are you didn't get an opportunity to put on  
24 witnesses. If Commissioner Goodell said I'm not letting you  
25 call testimony, those are all very extreme cases.

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1           What we have here is we had a dispute over -- a  
2 prehearing dispute over who should have to testify, who  
3 shouldn't. Briefs were submitted. The Commissioner issued a  
4 ruling. He granted their request for testimony and documents  
5 in some respects, he denied requests for the documents they  
6 sought. The cases all say, I think pretty clearly, that in  
7 that context, that's not denying somebody a fundamentally fair  
8 hearing. Moreover they have to show prejudice on top of that.  
9 And there's no way -- this was really -- the Mr. Pash issue was  
10 really a red herring and an argument that really didn't have,  
11 as the Commissioner found, a whole lot of weight. But again,  
12 as I said, he didn't slam the door, he said let's have the  
13 hearing, you can ask Mr. Wells, you can raise it again, and  
14 they didn't. So even if there were an argument here, your  
15 Honor, I submit it's been waived.

16           The statement about the notes, first of all, was --  
17 the argument about the notes was based on an inaccurate or at  
18 least incomplete statement of the record.

19           THE COURT: You're talking about the interview notes?

20           MR. NASH: Yes, the interview notes.

21           What I heard, I think, is that basically all they got  
22 was the Wells Report. But that's not true, and I think in the  
23 Commissioner's prehearing ruling on witnesses and documents  
24 they got not only the Wells Report, but they got the underlying  
25 documents considered by the investigators, including the

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1 interview notes conducted by NFL security. Those, by the way,  
2 are the interview notes that were produced to them in the Rice  
3 case. So this argument about Rice we got the notes but here we  
4 didn't. No, they got the same notes. They didn't get the  
5 lawyer notes in Rice either.

6 And Judge Jones is -- their effort to distinguish  
7 Judge Jones' decision just doesn't work. She's quite clear,  
8 and it goes back to the very first case that Mr. Kessler opened  
9 his argument with, that arbitration is a creature of contract.  
10 We agree, it is, and the contract is to be respected. And in  
11 this case the contract has very clear rules about discovery.  
12 There's nothing wrong with that. There are Supreme Court  
13 cases, I think Justice Scalia talked about this, that one of  
14 the reasons that arbitration is favored, one of the reasons  
15 there is so much deference to arbitration is the process is not  
16 federal court litigation. You don't get the kind of discovery  
17 that you get in the court. That's one of the reasons that  
18 parties use it. As Judge Jones found, under this CBA, the  
19 agreement is you're not entitled to make these kinds of broad  
20 requests. In fact, as we pointed out in our papers, they got  
21 substantially more discovery than what the contract even  
22 provides. So I think that that argument, your Honor, obviously  
23 has no merit whatsoever.

24 As for the -- one other thing about the notes, the  
25 other thing I was kind of curious about, they make a great deal

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1 about the fact that Mr. Reisner cross-examined Mr. Brady, and  
2 it was unfair because he had I guess notes of Mr. Brady's  
3 interview, so that was somehow unfair, attorney notes. Your  
4 Honor, that happens in court all the time. We didn't have  
5 Mr. Brady's attorney's notes. But they know what happened at  
6 the hearing, they didn't need Mr. Reisner's notes of his  
7 interview with Mr. Brady for the purpose of cross-examination.

8 THE COURT: Maybe he had interview notes of other  
9 people, Mr. Reisner did, that he was using to cross-examine  
10 Mr. Brady.

11 MR. NASH: But lawyers, your Honor --

12 THE COURT: Not of Mr. Brady's interview.

13 MR. NASH: But that's the only witness that they  
14 complained about that somehow didn't have the interview notes.

15 THE COURT: I don't think that's what they're saying.  
16 Maybe I'm wrong.

17 MR. NASH: I'm not saying that -- let me --

18 THE COURT: I thought they didn't get the interview --

19 MR. NASH: They did not get any of the privileged  
20 interview notes, that is correct. My point is, though, even if  
21 they had some sort of right to it, they would have to show some  
22 sort of prejudice, and what they're complaining about is well,  
23 he got to cross-examine Mr. Brady.

24 THE COURT: So the prejudice is that one side had the  
25 notes and he was able to examine with them and the other side

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1 didn't. Isn't that prejudice?

2 MR. NASH: No, your Honor.

3 THE COURT: It depends what's in the notes.

4 MR. NASH: Attorney notes are -- I don't see how  
5 that -- they know full well what Mr. Brady testified or said to  
6 Mr. Wells in this interview.

7 THE COURT: I think there are cases that talk about  
8 interview notes.

9 MR. NASH: But again, your Honor, the real answer here  
10 is -- the real answer here, and it's in the Supreme Court  
11 cases, it's in the Second Circuit cases, it's in cases in this  
12 Court, arbitration is not civil or criminal.

13 THE COURT: I get that. We know that. But still  
14 there are certain due process requirements, and I think there  
15 are interview note cases, actually.

16 MR. NASH: That may be so, your Honor, I would agree  
17 with that. I think many of them find attorney notes are  
18 privileged, but that's a whole other issue.

19 But again, in the context of arbitration -- in the  
20 context of arbitration it is what the contract provides for.  
21 And when you talk about a fundamentally fair hearing, there's  
22 no question that Mr. Brady got everything and more that is  
23 required in the CBA.

24 The only -- the last point I cover is this bias issue,  
25 your Honor. Your Honor, that's an effort to rewrite the

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1 agreement. Mr. Goodell was not a witness. The fact that he  
2 imposed the initial discipline based on the Wells Report and  
3 therefore he's somehow bound to the Wells Report and that makes  
4 him not a neutral fact finder, that's what the CBA provides.  
5 And this is clear in the case law, it's clear in the Bettman  
6 case that they cited that they can't seek to rewrite the  
7 collective bargaining agreement by making this kind of bias  
8 challenge.

9 In fact, they made it before. We litigated it in the  
10 Williams case, and after the Williams case rejected this  
11 argument, and it's been rejected in other cases that we cite,  
12 we entered the same agreement in 2011. We understand they may  
13 want to change that, they don't want the Commissioner to be the  
14 hearing officer, but that is the agreement, and under the law,  
15 it's entitled to be respected.

16 THE COURT: Thank you very much.

17 MR. NASH: Thank you, your Honor.

18 MR. KESSLER: Your Honor, I will be brief and go in  
19 reverse order. I will start first with fundamental fairness.  
20 I direct the Court's attention --

21 THE COURT: I will anticipate that you get the order  
22 right, I'm not so sure that you will do it briefly.

23 MR. KESSLER: I will direct your Honor's attention to  
24 the case of Home Indemnity Company v. Affiliated Food  
25 Distributors. You may be familiar with this case. Very, very

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1 clear, Southern District of New York, 1997, and it stated as  
2 follows: There is an affirmative duty of arbitrators to ensure  
3 that relevant documentary evidence in the hands of one party is  
4 fully and timely made available to the other party before the  
5 hearing is closed, and the failure to do so is a violation of  
6 Section 1083 of the Federal Arbitration Act. And that is a  
7 decision for the Court, it's not Mr. Goodell's decision.

8 THE COURT: I'm familiar with that case.

9 MR. KESSLER: Number two, with respect to Mr. Pash,  
10 just to be clear, it wasn't just a press release that said he  
11 was the co-author, the Wells Report said he was the co-author.  
12 It repeated the NFL's announcement. And this is when the  
13 report was issued, after he's edited it, and Mr. Nash says I  
14 should show prejudice by what Mr. Pash would say? I don't know  
15 what he would say. That's why it was fundamentally unfair, and  
16 we were entitled to it. That's all I will say about  
17 fundamental fairness. I think it's clear we have that issue.

18 Evident partiality. There is no response to the fact,  
19 and no Court in my view has ever sustained an arbitrator's  
20 ability to determine his own conduct. It is exactly the same  
21 as in Rice. In Rice there was a different issue, it's what the  
22 player told him and whether it was double discipline. Here,  
23 it's whether he unlawfully delegated his authority.

24 And again, I agree if there was a frivolous argument,  
25 we couldn't come in and say we want the arbitrator to be the

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1 witness, we had a basis here because why, and we cited this in  
2 our brief, the Commissioner announced to the world, again, his  
3 decision, I am asking Mr. Vincent to make this determination,  
4 and I will review it as the arbitrator. He made that  
5 announcement. We cite that originally in our petition. Having  
6 done that, he called into question what was the delegation.  
7 And then in his opinion he writes: Well, I spoke to  
8 Mr. Vincent, here's what I did, here are the facts. He can't  
9 decide that as an arbitrator. No court, I would submit, would  
10 hold that past the evident partiality test.

11       Going back to fair and consistent treatment, Mr. Nash  
12 complains and says well, I handed up a new exhibit to your  
13 Honor, as if that's new evidence. What that exhibit is is it  
14 takes the Wells Report information, nothing else, because  
15 that's the basis for the discipline, and simply, your Honor,  
16 does the math. It simply says here's what they said was the  
17 expected level with the environmental factors, and here's the  
18 actual measurements according to the Wells Report, and it's one  
19 or two-tenths PSI. The only thing that the Wells Report didn't  
20 do, for obvious reasons, is say gee, it's only one or  
21 two-tenths of PSI.

22       Our argument is not that your Honor should find some  
23 new facts, what we are saying is because of no procedures --  
24 and, you know, he doesn't deny there were no procedures, he  
25 can't -- because there were no procedures you couldn't be fair

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1 and consistent in disciplining Mr. Brady versus any other  
2 players in the NFL. So they need a system. And your Honor, if  
3 you do nothing more than say NFL, if you really think this is  
4 important to competitive integrity of the game, put in the  
5 system, that would probably help fairness and consistency. It  
6 would make them comply with the CBA.

7 That gets me, your Honor, to the notice point which I  
8 will end with. The first thing I want to say is so Mr. Nash  
9 said there's no support for the Peterson ruling that  
10 Mr. Goodell as the arbitrator or Mr. Henderson as the  
11 arbitrator is limited to what he can decide. Well, the  
12 support, your Honor, is in Peterson itself, and Peterson cites  
13 a number of the cases which make it clear as follows: When two  
14 parties submit an issue to arbitration, it confers authority  
15 upon the arbitrator to decide, underscore, that issue, not some  
16 other issue.

17 Here the NFL did not appeal, so it submitted no issue.  
18 The union appealed for Mr. Brady. We submitted one issue. The  
19 one issue we submitted was is this discipline imposed by  
20 Mr. Vincent proper or not proper under the CBA? End of issue.  
21 That is why Judge Doty said Mr. Henderson could not go back and  
22 find another basis for the discipline.

23 And by the way, there is Supreme Court authority for  
24 this as well that we cited in our brief which makes it very  
25 clear that you have to look at what is the issue. The only

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1 issue here was our appeal. It's not like they cross appealed  
2 and said oh, we have some new -- because, by the way, the CBA  
3 doesn't provide cross appeal, it just says the player and the  
4 union may appeal the discipline. That's their problem.

5 So that brings us back to generally aware. And your  
6 Honor said: Well, what is there new that will do this? Number  
7 one, I want to say your Honor is spot on. It's got to be about  
8 the AFC championship game. In fact, it is not at all clear  
9 that Mr. Wells' finding is even about that game. I think your  
10 Honor is correct. How do I know that? Because in the very  
11 paragraph of Wells where he says generally aware, he cites back  
12 to the Jets game, which had nothing to do with this at all.

13 And again, Mr. Nash said: What is new? Well, the  
14 only thing he could cite new was Mr. Brady's repeated denials,  
15 which Mr. Wells heard. So what he is saying is the  
16 Commissioner disbelieved Mr. Brady even more than Mr. Wells  
17 disbelieved Mr. Brady. That can't be a basis for jumping from  
18 generally aware across the room to some other scheme or  
19 participation. Just doesn't fit.

20 And with respect to the cooperation piece of this,  
21 remember, Mr. Wells testified he already drew an adverse  
22 inference against Mr. Brady that because of not turning over  
23 that there was some adverse materials there, and even with that  
24 inference he only could get to generally aware and not even  
25 necessarily the AFC championship game. So there was nothing

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1 new there. The Commissioner also drew an adverse inference.  
2 He's saying the Commissioner drew an even stronger adverse  
3 inference. That doesn't get you past generally aware with  
4 regard to this.

5 And I want to say your Honor's memory was correct. If  
6 you look at the transcript on pages 114 to 115, I won't read it  
7 now, Mr. Brady was very clear that after the Jet game he said  
8 let's go with 12.5, that's in the rule, and his direction was  
9 show the rule to referee. How could that be evidence of  
10 illegally? But in the NFL world, if you do that, it means you  
11 broke the law. It just doesn't make sense.

12 THE COURT: Do you have that there? Is that the  
13 transcript?

14 MR. KESSLER: Yes, I have the transcript. I will read  
15 it. Here said the following, page 114, line 7. By the way,  
16 this is Mr. Reisner from Paul Weiss asking the questions, it's  
17 not my questions.

18 "Q. Now you have said publicly that you like footballs to be  
19 inflated to at least 12.5 PSI, correct?

20 "A. I said that after the championship game.

21 "Q. And so how long have you known that 12.5 is your preferred  
22 level of inflation?

23 "A. After the Jets game.

24 "Q. And how did you come to learn that 12.5 is your preferred  
25 level of inflation?

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1 "A. We basically just picked a number at that point. I guess  
2 historically we have always set the pressure at -- before  
3 George Jastremski took over, it had been historically set at  
4 like 12.7 or 12.8. That's what I learned after the fact. And  
5 I think, based on that Jets game, I said why don't we just set  
6 them at 12.5, bring this letter to the ref, and I didn't think  
7 about it after that.

8 "Q. You said you just picked a number. Did you pick the  
9 number 12.5 for any particular reason?

10 "A. Ball pressure has been so inconsequential, I haven't even  
11 thought about that. I think at the end of the day the only  
12 time I thought about it was after the Jets game and then after  
13 this was brought up after the championship game. It was never  
14 something that has been on my radar, registered. I never said  
15 PSI. I don't think I even knew what that meant until after the  
16 championship game. It was never something that even crossed my  
17 mind.

18 "How did you come to pick 12.5 as the number?

19 "Well, we looked in the rule book."

20 And later there's testimony when he says show it to  
21 the referee. So this is the opposite of the basis of an  
22 inference.

23 Finally, your Honor, two last things. I will ask my  
24 colleague, if you don't mind, to give you the 18 cases where  
25 the courts decide that an award should be set aside in this

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1 district either for violation of the essence of the CBA,  
2 fundamental unfairness, evident partiality, because they're not  
3 all in our briefs. And this will illustrate it's the Court's  
4 decision. It doesn't matter that Mr. Goodell said: Well, I  
5 considered that and I rejected it. Under the FFA and LMRA it  
6 comes back to the Court.

7 If you could hand those up.

8 And finally I urge your Honor to look at the league  
9 policies, because Mr. Nash said well, it's up to the NFL to  
10 decide if it's a fine or not. These are NFL policies. These  
11 are not Jeff Kessler's policies. These are not Tom Brady's  
12 policies. And when you look at this, the only notice you can  
13 get is that it says first time offenses, fine.

14 And he said -- your Honor asked questions: Why is  
15 this like steroids? I agree with you, that analogy doesn't  
16 make sense, at least to me, but here's one that the NFL made.  
17 They put equipment violations next to uniform violations and  
18 receivers putting Stickum on their gloves during a game for  
19 purposes, they wrote, of effecting getting a competitive  
20 advantage and affecting the integrity of the game. That's the  
21 most analogous conduct. And what does it say? First time  
22 offenses is a fine.

23 Your Honor, unless you have any other questions, I  
24 think I'm finished.

25 THE COURT: I don't. I do have one -- if somebody  
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1 could furnish me, unless there's an objection, I have reports  
2 of but not the actual letter that Vincent sent I guess to  
3 Mr. Kraft, because he also sent him a disciplinary notice. I  
4 want to make sure I have the entire contents of that letter.  
5 Could somebody make that available for me?

6 MR. KESSLER: Yes.

7 THE COURT: Maybe today. So this is very helpful, and  
8 so it's now almost 12:20. Why don't the lawyers and I  
9 reconvene in say 15 or 20 minutes, is that fair? Let's say 20  
10 minutes.

11 MR. KESSLER: Which date?

12 THE COURT: I am saying we'll adjourn, if you could  
13 come back in 20 minutes and I will briefly talk to each lawyer.

14 MR. KESSLER: So in 20 minutes from now, your Honor?

15 THE COURT: If that's okay.

16 Okay, this is very helpful. Thank you very much.

17 I just note that I have the letter already.

18 MR. KESSLER: I just handed it up.

19 THE COURT: It's dated May 11, 2015, to Robert Kraft,  
20 and I also have Mr. Kessler's list of authorities. I guess  
21 we'll make these Court exhibits to today's oral argument.

22 Thanks.

23 o0o

24

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