REGGIE WHITE, et al.,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, et al.

Defendants

APPEARANCES:

FOR THE *WHITE* CLASS:
DEWEY & LEBOEUF LLP
By: Jeffrey L. Kessler, Esq.
1301 Avenue of the Americas
New York, N.Y. 10019-6092

FOR THE PLAYERS ASSOCIATION
NFL PLAYERS ASSOCIATION
By: Richard Berthelson, Esq.
2021 L Street, N.W.
Washington, D.C. 20036

FOR THE NFL MANAGEMENT COUNCIL
COVINGTON & BURLING
By: Gregg H. Levy, Esq.
Benjamin C. Block, Esq.
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
NFL MANAGEMENT COUNCIL
By: Dennis L. Curran, Esq.
280 Park Avenue
New York, N.Y. 10017

BEFORE SPECIAL MASTER
STEPHEN B. BURBANK

RE: MICHAEL VICK

OPINION

The NFL Management Council ("Management Council") initiated this proceeding on September 5, 2007, pursuant to Article XXII of the *White* Stipulation and Settlement Agreement, as amended ("SSA"), and Article XXVI of the Collective Bargaining Agreement, as amended ("CBA").[1] The Management Council seeks a declaration that enforcement in a Non-Injury Grievance under the CBA ("Grievance") of the contractual rights of the Atlanta Falcons ("Falcons") to recover certain amounts previously paid to Michael Vick would not violate Article XIV, Section 9(c) of the CBA ("Section 9(c)"). Class Counsel and the National Football League Players Association ("Class Counsel") responded by letter brief on September 26, arguing that the enforcement sought would violate Section 9(c), and seeking a declaration that the Falcons may not recover any amount that Section 9(c) protects from forfeiture under other legal or equitable theories advanced in the Grievance. The Management Council replied on October 1, and a hearing was held on October 4.

In December 2004 Mr. Vick and the Falcons concluded a renegotiated and extended Player Contract (the "2004 Player Contract") that included two "Roster, Reporting and Playing Bonus" addenda, one for 2005 (the "2005 Roster Bonus") and another for 2006 (the "2006 Roster Bonus"). Management Council Opening Letter Brief, Exh. 3.[2] Both provisions (1) were guaranteed for injury, (2) were subject to discretionary guarantees for skill ("Discretionary Skill Guarantees"),[3] (3) stated that the specified amounts would be earned as additional consideration for the execution of the long-term Player Contracts of which they were a part if Mr. Vick adhered to all provisions of those contracts and was on the Falcons' 80-man roster on the fifth day of the 2005 and 2006 League Years, respectively, and (4) contained clauses specifying grounds of default and providing that in the event of default, "upon demand by Club, Player shall forfeit and shall immediately return and refund to Club the amount of said bonus proportionate to the number of regular season games of Club during the term of this contract remaining at the time of Player's default."[4] *Id.* The prescribed grounds of default included failure or refusal to report to

---

[1] Because no aspect of this proceeding raises conflicts between the SSA (which controls in the event of conflict) and the CBA, references hereafter will be to the CBA.

[2] Both provisions were carried forward into Mr. Vick's February 28, 2005, and March 1, 2006, Player Contracts. The latter is referred to hereafter as the "2006 Player Contract."

[3] The Discretionary Skill Guarantees specified the terms for the Falcons' exercise of its right to guarantee part or all of the 2005 Roster Bonus and 2006 Roster Bonus, respectively, and in the event of exercise of that right, required Mr. Vick promptly to execute a new Player Contract "setting forth the terms and conditions of the Skill Guarantee" in prescribed language.

[4] The 2004 Player Contract also contained a "Signing, Playing, Workout and Reporting Bonus" (the "2004 Signing Bonus"), similarly carried forward into the 2006 Player Contract, with an identical default clause. Class Counsel does not challenge under Section 9(c) the

the Club without its written consent, and suspension by the NFL or Club for "Conduct Detrimental" or for violating any of the NFL's disciplinary policies or programs, including the NFL Personal Conduct policy.

The Falcons exercised the right to guarantee all of the 2005 Roster Bonus on February 26, 2005, prior to the date (March 6, 2005) on which the roster condition was satisfied, and the Falcons thereafter paid $22.5 million to Mr. Vick as required, namely, "$4,500,000 Within 10 days after being earned, $8,000,000 on October 15, 2005, and $10,000,000 on March 15, 2006." On March 1, 2006, the Falcons guaranteed $3,400,000 of the 2006 Roster Bonus, prior to the date (March 15, 2006) on which the roster condition was satisfied, and the Falcons thereafter paid $7 million to Mr. Vick on March 15, 2007, as required.

On August 24, 2007, the Commissioner of the National Football League ("Commissioner") suspended Mr. Vick indefinitely without pay, effective immediately. Citing Mr. Vick's guilty plea to a federal criminal charge of Conspiracy to Travel in Interstate Commerce in Aid of Unlawful Activities and to Sponsor a Dog in an Animal Fighting Venture and the conduct to which Mr. Vick admitted in the agreed Statement of Facts filed with the plea agreement, the Commissioner concluded that Mr. Vick had "engaged in conduct detrimental to the welfare of the NFL and ha[d] violated the League's Personal Conduct Policy." Management Council Opening Letter Brief, Exh. 5, at 2.

On August 27, 2007, the Falcons sent to Mr. Vick a "Demand for Repayment" of $19,970,000, a sum including "3,750,000 of the $7.5 million 'Signing Bonus' that was paid to [him] in 2004 and 2005; $13,500,000 of the $22.5 million 'Roster, Reporting and Playing Bonus' that was paid to [him] in 2005 and 2006; and $2,720,000 of the $7 million 'Roster, Reporting and Playing Bonus' that was paid to [him] in 2007." *Id.*, Exh.1, at 2; see *supra* note 4. Thereafter, on September 5, 2007, the Management Council initiated the Grievance on behalf of the Falcons, seeking (1) enforcement of the default provisions carried forward into the 2006 Player Contract, and (2) "any additional and/or alternative relief the Arbitrator may order under Article IX, section 8 of the CBA." *Id.,*, Exh. 2, at 4.[5]

Section 9(c) provides:

> (c) No forfeitures permitted (current and future contracts) for signing

---

forfeiture that the Falcons seek of amounts paid to Mr. Vick under the 2004 Signing Bonus that are allocable to years not yet performed.

[5] The additional and/or alternative relief sought "includ[ed], but [was] not limited to, restitution and/or the return of the full amounts of the previously paid bonuses (including amounts above and beyond the $19,970,000 requested in Paragraph C above) on the grounds of fraud and/or fraudulent inducement, under the Contract (including, but not limited to, Paragraphs 2 and 15 thereof) and the law of the State of Georgia." *Id.*

> bonus allocations for years already performed, or for other salary escalators or performance bonuses already earned.

In the *Ashley Lelie* proceeding I determined that an option bonus is an "other salary escalator[ ]" for purposes of Section 9(c), and that Mr. Lelie earned the option bonus in his 2002 Player Contract when the Denver Broncos ("Broncos") exercised it in 2003. I therefore concluded that, because the option bonus was "already earned" by the time Mr. Lelie did not report to the Broncos' mandatory minicamp or preseason training camp during the 2006 off-season, Section 9(c) prohibited its forfeiture. *See Lelie* Special Master slip op. at 5-6. On appeal by the Management Council, the Court, exercising *de novo* review, agreed with both of these conclusions. *See White v. NFL* (*In re Lelie*), slip op. at 8, 11-12.

The question here is whether amounts attributable to a roster bonus can be both an "other salary escalator[ ]" or "performance bonus" and "signing bonus allocations," even if not at the same time. The question arises because, at least for purposes of Art. XXIV of the CBA, although roster bonuses are treated as "incentive amounts," which are defined as "including but not limited to performance bonuses," under Art. XXIV, § 7(c); *see id.* Exh. B, a roster bonus that is subject to a right in the Club to guarantee for skill is treated as a "signing bonus" "when the Club subsequently exercises the right to guarantee such bonus." *Id.*, § 7(b)(iv)(15).[6] The answer to this question is important because it may determine whether Mr. Vick's roster bonuses are subject to the "already earned" test, in which event they are wholly immune from forfeiture, or the "years already performed" test, in which event amounts that are properly allocable to contract years not already performed are subject to forfeiture.

Class Counsel argues that in *Lelie* the Court necessarily decided that amounts attributable to an option bonus cannot constitute "signing bonus allocations" subject to the "years already performed" rather than the "already earned" test, and that this implicit decision extends to roster bonuses of the sort involved in this proceeding. I am, of course, bound by the Court's interpretations of the CBA, as I am by the federal law of issue preclusion. I do not agree, however, that the Court's *Lelie* decision is binding authority on (or preclusive of) the issue presented here.

As noted in my decision in *Lelie,* "neither side argue[d] that [the option bonus at issue there] should be treated as a 'signing bonus' or as a 'performance bonus.'" *Lelie* Special Master slip op. at 3. It is true that, in appealing my decision, the Management Council argued in the alternative that, if option bonuses were treated as covered by Section 9(c), the amounts attributable to them should be treated as "signing bonus allocations." *See* Class Counsel Letter

---

[6] This provision governs roster bonuses in Player Contracts "executed on or before September 28, 2005." If Mr. Vick's off-season roster bonuses had been contained in a Player Contract executed thereafter, amounts attributable to them would have been treated as a "signing bonus" only if "guaranteed for skill, injury and Salary Cap terminations, on a non-contingent basis for all of the guarantees." CBA Art. XXIV, § 7(b)(iv)(11).

Brief, Exh. 6. Yet, Class Counsel responded by arguing, among other things, that the "NFLMC's 'signing bonus allocation' argument also must be rejected for the additional reason that it was never raised before this appeal," and that "[i]t is axiomatic that the NFLMC may not now change its positions and raise this argument for the first time on appeal." Management Council Reply Letter Brief, Tab 2, at 24. In the circumstances,[7] I interpret the Court's silence in response to the late-proffered interpretation as signaling acceptance of Class Counsel's stage preclusion argument rather than rejection of that interpretation on the merits.[8] On that view, *Lelie* has no binding (or preclusive) effect on the issue in this proceeding. *See* Restatement (Second) of Judgments § 28 cmt. d (requiring that issue be "*properly raised* ...submitted for determination...and ... *determined*" to qualify as "actually litigated") (emphasis added); *id.*, cmt. f ("The party contending that an issue has been conclusively litigated and determined in a prior

---

[7] Under CBA Art. XXVI, in the event of an appeal, the Court reviews Special Master decisions (technically, recommendations) according to different standards of review. Although the applicable standard in *Lelie* was *de novo* with respect to the issue of CBA interpretation, the Court stated that "the court affirms Special Master Burbank's decision that Lelie's option bonus was a 'salary escalator ... already earned.'" *White v. NFL* (*In re Lelie)*, slip op. at 11. *See also id.* at 12 ("the decision of the Special Master is affirmed."); *id.* at 2 ("the court affirms the decision of the Special Master"). My decision in *Lelie* did not resolve the issue presented in this proceeding because it was not litigated in that proceeding. More important, the Court did not mention the possibility of treatment as "signing bonus allocations" in its statement of the parties' contentions or of what the "court must therefore determine." *Id.,* at 6.

[8] There is another reason not to interpret the Court's decision in *Lelie* as necessarily concluding that Lelie's option bonus could not be treated as triggering "signing bonus allocations," subject to the "years already performed" test, under Section 9(c). For, if the Court interpreted Section 9(c) as it is interpreted below – with the effect that amounts attributable to "other salary escalators" and "performance bonuses" become "signing bonus allocations" thereunder when they fall within the definition of a "signing bonus" under CBA Art. XXIV, § 7(b)(iv) -- the Court might nonetheless have concluded that forfeiture of Mr. Lelie's option bonus was foreclosed. Thus, for instance, the Court might have so concluded because that bonus was "already earned" before it was "paid, or guaranteed," the events that transmute consideration for option years into a "signing bonus" under Section 7(b)(iv)(3). I acknowledge Class Counsel's argument at the hearing that a Club's exercise of an option constitutes the relevant "guarantee" for this purpose. *But see id.*, § 7(b)(iv)(4) ("Any option buyout amount, when paid or guaranteed"). Even if that argument is correct, however, a decision against forfeiture might still be appropriate in the event of simultaneous occurrences. Finally, I note a question left open in my decision in *Lelie* – it was not necessary to reach it – to wit, whether the grant of an option, rather than its exercise, satisfies the "already earned" test, at least when a Player Contract also includes an option buyout. *See Lelie* Special Master slip op. at 5 n.5. The Court's conclusion that "Lelie's option bonus was ...'earned' upon exercise of the option," *White v. NFL* (*In re Lelie*), slip op. at 10, need not be read as rejecting this possibility, particularly because the Court reasoned that the "option bonus served as consideration for holding the option open." *Id.*

action has the burden of proving that contention.").

Lelie clearly *does* establish that the categories in Section 9(c) are not water-tight, with the result that amounts payable under a Player Contract may properly be characterized under more than one of its three categories. Thus, I acknowledged that my interpretation of "other salary escalators" as including option bonuses might, as the Management Council argued in resisting that interpretation, create redundancy (because the disjunctively enumerated "performance bonuses" would fall within the resulting definition of "other salary escalators"). *See Lelie* Special Master slip op. at 5. More important for present purposes, in concluding that "'salary escalators' includes bonuses," the Court agreed with my view that "a 'signing bonus allocation' is a type of 'salary escalator.'" *White v. NFL* (*In re Lelie*), slip op. at 8.

The Management Council argues that, to the extent the Falcons guaranteed Mr. Vick's roster bonuses for skill before he satisfied the roster conditions that enabled the amounts in question to be earned, those amounts became "signing bonus allocations" for purposes of Section 9(c), subject to the "years already performed" rather than the "already earned" test.[9] Class Counsel argues that, on the contrary, Mr. Vick's roster bonuses are not just "other salary escalators," but "performance bonuses," and that they are therefore subject to the "already earned" test under Section 9(c). Class Counsel also contends that the definitions of the term "signing bonus" that the Management Council invokes are expressly "[f]or purposes of determining Team Salary under [Art. XXIV]," *id.,* § 7(b)(iv), and are not applicable in the interpretation of Section 9(c).

Like many issues presented to me, this question of interpretation has no clearly correct answer, and I am left to try to ascertain a meaning of the language used in Section 9(c) that best gives effect to the contracting parties' intent. *See White v. NFL*, 899 F. Supp. 410, 414 (D.Minn. 1995). A number of considerations incline me to the view that the Management Council's interpretation should be preferred.

As the Court observed in *Lelie*, the "language of § 9(c) cannot be understood by looking at each word in isolation. ... Instead of focusing strictly on 'escalator,' as the NFLMC does, the court looks to the entire phrase 'other salary escalators.'" *White v. NFL* (*In re Lelie*), slip op. at 7. So here. Section 9(c) refers not to "signing bonus," but to "signing bonus allocations." I observed in *Lelie* that "the concept of 'signing bonus allocations' under section 9(c) must, at least in some cases (i.e., when the Player Contract makes no allocation) take its meaning exogenously, most likely from the scheme for proration in [Art. XXIV]. *See id.*, § 7(b)(i)." *Lelie* Special Master slip op. at 4; *see id.* at 6.[10] Indeed, when arguing that the Falcons are foreclosed from

---

[9] It is presumably this interpretation of Section 9(c) that led the Falcons not to seek forfeiture of the non-guaranteed portion of Mr. Vick's 2006 Roster Bonus.

[10] My observations about the strengths and weaknesses of interpreting Mr. Lelie's option bonus as triggering "signing bonus allocations" were precisely that -- observations undisciplined

seeking the greater amounts to which they would be entitled under the allocation rules in the default clauses of the 2006 Player Contract, Class Counsel relies on § 7(b)(i). *See* Class Counsel Letter Brief at 8 n.6. If the noun ("allocations") is to take its meaning from Section 7(b), it is not clear why the meaning of the noun-adjective ("signing bonus") should not also be found there. In fact, as the Management Council points out, the only other use of "signing bonus allocation[ ]" in the CBA contemplates "convert[ing] non-guaranteed compensation to a signing bonus allocation." CBA Art. XXXVIII-A, § 11.

The statement that Section 7(b)(iv)'s definitions of "signing bonus" are "[f]or purposes of determining Team Salary under the foregoing" does not, as counsel for the Management Council pointed out at the hearing, include the word "only." Compare Art. XXXVIII, § 7 ("For purposes of calculating Credited Seasons under this Article only"). Moreover, although the parties did not include a cross-reference in Section 9(c) akin to that in the 30% Rules, *see* CBA Art. XXIV, § 8(b), the use of the term "signing bonus allocations" instead of "signing bonus" may be thought the equivalent. *See also* CBA Art, XXIV, § 9(e) (using the term "Signing Bonus" for a purpose other than determining Team Salary); *infra* note 11. Finally in this aspect, the invocation of Section 7's proration rules is not the only example of Class Counsel's attempt to take the sweet without the bitter through selective reliance on CBA provisions. For, as pointed out above, Class Counsel places heavy reliance on the argument that Mr. Vick's roster bonuses are "performance bonuses" as that term is used in Section 7(c) and its exhibits.[11]

As a result of the artificial separation of "signing bonus" and "allocations" and the selective resort to other provisions of the CBA for the meaning of other terms used in Section 9(c), it appears that Class Counsel's concept of a "signing bonus" is uniquely independent of both other provisions of the CBA and Player Contracts,[12] and that it depends on an essentialist vision of what constitutes a "signing bonus" for forfeiture purposes. Although it is certainly possible that the parties intended the term "signing bonus allocations" to have a discrete

---

by the parties' arguments. *See Lelie* Special Master slip op. at 3-4. The flaw in my reasoning, it now appears, lay in imagining that possible interpretive differences between "signing bonus" and "signing bonus allocations" could be papered over by a call for precision.

[11] At the hearing, Class Counsel also relied on CBA Art. I, § 1, one of the "General Definitions" in which refers to "performance bonuses other than roster and reporting bonuses." *See id.*, § 1(aa).The same definition (of "Prior Year Salary"), however, includes "pro-rata portion of signing bonus." *See also* CBA Art. XIX, § 1(b)(I); Art. XX, § 2(e).

[12] This becomes clear when one considers Class Counsel's argument to the Court in *Lelie*, according to which specific description as a "signing bonus" in a Player Contract, even though dispositive for purposes of Section 7(b)(iv) of the CBA, would not be dispositive for purposes of Section 9(c). *See* Management Council Reply Letter Brief, Tab 2, at 24. In contrast, at the hearing Class Counsel placed emphasis on the language of Mr. Vick's roster bonuses, particularly that which defined when they would be "earned."

meaning, one part of which would come from Section 7(b) of the CBA and the other from a shared vision of a "true signing bonus," Class Counsel Letter Brief at 2 n.3, that is hardly an interpretation that harmonizes all of the terms of the CBA. *See* Reda v. Eastman Kodak Co., 233 A.D.2d 914, 915 (N.Y. App. Div. 1996). Nor do I think that it is an interpretation required by the purposes of Section 9(c).

If the *Lelie* proceeding and this proceeding have made anything clear, it is that, although the Management Council and Class Counsel agree that Section 9(c) was designed to constrain the power of Clubs to (extract and) enforce contractual forfeitures, they strongly disagree on its proper interpretation and hence on its scope of application.[13] Deprived of the materials that courts can use to interpret ambiguous statutes, *see* CBA Art. LV, § 19 ("Parol Evidence"), I am loath to accept an invitation to declare a winner on a basis that would set Section 9(c) adrift from the rest of the CBA, and that would, therefore, make it difficult to distinguish "between interpreting a [contract] and making it up as one goes along." Colegrove v. Battin, 413 U.S. 149, 182 (1973) (Marshall, J., dissenting). Particularly, when the parties' normative views about forfeitures are so far apart, it seems best to interpret Section 9(c) by harmonizing it to the extent possible with section 7(b).This should enable the parties negotiating Player Contracts to know with substantial certainty, *ex ante*, what amounts are subject to potential forfeiture and, derivatively, discipline expectations.[14]

The Management Council is entitled to a declaration that recovery in the Grievance, based on the default clauses in Mr. Vick's 2006 Player Contract, of the amounts that it seeks on behalf of the Falcons is not barred by Section 9(c).

---

[13] Written into the SSA and CBA directly from a term sheet, Section 9(c) has all the earmarks of language crafted with strategic ambiguity

[14] Although Section 9(c) is applicable to "current and future contracts," no interpretation of its language can have shaped Mr. Vick's expectations, because it was added to the CBA after the execution of the relevant Player Contracts.

Class Counsel's stated concern that formulating "signing bonus allocations" according to the terms of Section 7(b) would invite oppressive behavior by Clubs necessarily imagines that the desire to maximize forfeiture rights (i.e., by insisting that a bonus tied to player performance be called a "signing bonus") would dominate the economic incentives that, Section 9(c) to the side, have traditionally governed the structuring of player compensation. Moreover, if Section 9(c) is also interpreted to bar the forfeiture of amounts attributable to "other salary escalators" and "performance bonuses" that have been "already earned" before (or, perhaps, simultaneously with) the occurrence of a contingency that would convert them to "signing bonus allocations," *see supra* note 8, both the scope for oppressive behavior and the likelihood of frustrating reasonable expectations will be reduced. Finally, other amendments to the CBA in 2006 should have the same effect. *See supra* note 6.

From the perspective of the Management Council (and the Falcons), this declaration may render moot the claim for additional and/or alternative relief advanced in the Grievance. *See supra* text with note 5. Yet, the possibility that Class Counsel may appeal my decision and that the Court may reach a different conclusion about the proper interpretation of Section 9(c) suggests that it may be efficient to rule conditionally on Class Counsel's request for a declaration that the Falcons may not recover any amount that Section 9(c) protects from forfeiture under other legal or equitable theories advanced in the Grievance.[15] *Cf.* Fed. R. Civ. P. 50(c).

My decision in *Lelie* implies that reliance on circumstances constituting an alleged default to recover amounts that Section 9(c) protects from forfeiture is prohibited.

> It is clear from the structure of section 9 as a whole that a contractual provision vesting in a Club a right to recoup monies upon a subsequent breach of contract by a player constitutes a "forfeiture." Since, therefore, the circumstances prompting an attempt to recoup such monies – however compelling – are already subsumed under the concept of "forfeiture," the same circumstances cannot be adduced as grounds for a conclusion one way or the other whether the monies in question are "already earned."

Lelie Special Master slip op. at 6 (footnote omitted).

This view entails the conclusions, and I conditionally declare, that, by reason of Section 9(c), the Management Council may not rely in the Grievance (1) on any ground that would be an occasion of default in the roster bonus addenda, (2) as a predicate for relief involving repayment of protected amounts, (3) under any theory or relief, legal or equitable, (4) whether under state law or federal common law.

These conclusions proceed from the premises that state law inconsistent with the CBA is preempted, and that the federal common law an arbitrator may apply in the Grievance, whatever the source of the rules giving it content, must not be hostile to or inconsistent with the CBA. They leave open the question whether relief on some theory that did not require reliance on a ground that is an occasion of default in the roster bonus addenda, and that did not involve repayment of protected amounts, could be awarded consistently with Section 9(c). Rather than speculate on that subject, *see supra* note 15, I believe that it is preferable, particularly in a conditional ruling animated by a quest for efficiency, to leave it for another day. I am confident that the arbitrator would refer to the Special Master any request for relief plausibly deemed inconsistent with Section 9(c) in accordance with the foregoing ruling.

---

[15] The parties disagree whether the Management Council is confined to the theories of relief set forth in its September 5, 2007 letter initiating the Grievance, a matter that is for the arbitrator to resolve.

s/ Stephen B. Burbank
Stephen B. Burbank
October 9, 2007