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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 NATIONAL FOOTBALL LEAGUE  
4 MANAGEMENT COUNCIL,

5 Plaintiff,

6 v.

15 Civ. 5916 (RMB)

7 NATIONAL FOOTBALL LEAGUE  
8 PLAYERS ASSOCIATION,

9 Defendant.

10 NATIONAL FOOTBALL PLAYERS  
11 LEAGUE PLAYERS ASSOCIATION, on  
12 its own behalf and on behalf  
13 of TOM BRADY,

14 Petitioner,

15 v.

15 Civ. 5982 (RMB)

16 NATIONAL FOOTBALL LEAGUE and  
17 NATIONAL FOOTBALL LEAGUE  
18 MANAGEMENT COUNCIL,

19 Respondents.

20 August 12, 2015  
21 11:20 a.m.

22 Before:

23 HON. RICHARD M. BERMAN,

24 District Judge  
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## APPEARANCES

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WINSTON & STRAWN, LLP (NY)  
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BY: JEFFREY L. KESSLER  
DAVID GREENSPAN

YEE & DUBIN  
Attorneys for Tom Brady

BY: DONALD YEE  
STEPHEN DUBIN

ALSO PRESENT:     ROGER GOODELL  
                          JEFFREY PASH  
                          GREGG LEVY  
                          ADOLPHO BIRCH  
                          TOM DePASO  
                          HEATHER McPHEE  
                          DeMAURICE SMITH

F8C5nflC

1 (Case called)

2 THE COURT: So, I had an opportunity to meet the  
3 parties briefly and the reason you all were not and why we  
4 didn't do it in the courtroom is that was in the nature of  
5 settlement talk and that's always confidential and off the  
6 record -- one of the few things that is.

7 So, let me give you a little background and I will  
8 outline where I think we are headed today and how we are going  
9 to get there.

10 First of all, I thank everybody for coming. I do know  
11 everybody now at counsel table, but it might be helpful if we  
12 just took a quick minute, if you would introduce yourselves.  
13 We will start with Mr. Nash.

14 MR. NASH: Yes, your Honor. Daniel Nash here on  
15 behalf of the National Football League Management Council. I  
16 can introduce the others for you.

17 THE COURT: Or they can.

18 MS. EISENSTEIN: Your Honor, Stacey Eisenstein on  
19 behalf of the National Football League Management Council.

20 MR. BIRCH: Hi, your Honor. Adolpho Birch with  
21 National Football League.

22 THE COURT: Hi.

23 MR. LEVY: Your Honor, Gregg Levy of Covington &  
24 Burling, legal advisor to the Commissioner.

25 MR. GOODELL: Your Honor, Roger Goodell, NFL

F8C5nflC

1 Commissioner.

2 THE COURT: Good to see you all.

3 MR. PASH: Good morning, your Honor. Jeffrey Pash,  
4 NFL general counsel.

5 MR. KESSLER: Good morning, your Honor. Jeffrey  
6 Kessler of Winston & Strawn for the NFLPA and Mr. Brady.

7 MR. GREENSPAN: Good morning, your Honor. David  
8 Greenspan for the NFLPA and Mr. Brady.

9 MR. BRADY: Good morning, your Honor; Tom Brady.

10 MR. YEE: Good morning, your Honor. Donald Yee, Yee &  
11 Dubin, LLP, for Tom Brady.

12 MR. DUBIN: Good morning, your Honor. Stephen Dubin  
13 for Tom Brady.

14 MR. SMITH: Good morning, your Honor. DeMaurice  
15 Smith, NFL Players Association.

16 THE COURT: Good morning to all of you and thanks for  
17 coming.

18 Probably everybody is already aware but it might be  
19 useful for me just to say that, for those who may not be  
20 familiar that the case that we have here, this is of course a  
21 civil case and it is a type of case that most every federal  
22 district judge is familiar with. We get a lot of appeals or  
23 cases that come following an arbitration as this one does. So,  
24 the case before me entails a review of a 20-page, July 28, 2015  
25 decision or award called final decision on Article 46. Article

F8C5nflC

1 46 refers to a provision of the parties' collective bargaining  
2 agreement appeal of Tom Brady. That decision is authored by  
3 NFL Commissioner Roger Goodell.

4 So, the NFL is here, or the council, and maybe at some  
5 point somebody will just explain, as I understand now, the  
6 distinction between the council and the NFL. The council has  
7 requested me, the Court, to confirm this decision or award  
8 which, as probably everybody knows, imposes upon Mr. Brady a  
9 four-game suspension during the upcoming professional football  
10 season, and the reason for that, as set forth in Mr. Goodell's  
11 report, is what he has determined has been conduct detrimental  
12 to the integrity of professional football; that conduct  
13 sometimes categorized as awareness and/or a general awareness  
14 and/or involvement somehow in deflating footballs during the  
15 first half of the AFC championship game against the Colts on  
16 January 18, 2015. And also in that report is the finding by  
17 Mr. Goodell that Mr. Brady did not cooperate in subsequent  
18 investigation.

19 Mr. Brady and the NFL players' Association oppose the  
20 application to confirm that award and deny that Mr. Brady  
21 engaged in football deflation regarding the January 18, 2015  
22 game. They also deny, in large measure, that he was  
23 uncooperative with the NFL and they, in turn, have asked this  
24 Court to vacate the Goodell decision or award on various  
25 grounds.

F8C5nflC

1           So, these cases -- you probably all know this  
2 already -- they do not go to trial. Rather, they are generally  
3 resolved by the Court, which would be me, in the form of a  
4 written decision if they cannot otherwise be settled by the  
5 parties. And if there is no settlement, the Court's decision  
6 can be appealed to the United States Court of Appeals for the  
7 Second Circuit. And just so everybody is aware, the average  
8 life of a civil case such as this one including the appeal, I  
9 would guess, is probably around two years. Counsel may  
10 disagree but it is not two months, that's for sure. And I  
11 think it is fair to say that nobody here today wants to wait  
12 that long.

13           So, that is sort of the litigation track or the  
14 litigation aspect of this case. In addition to that, most  
15 cases in federal court also proceed on a parallel track of  
16 resolution if it is possible to reach resolution including the  
17 terms of such resolution by agreement of the parties. That's  
18 commonly known as settlement. You probably also know that the  
19 vast majority of civil cases in federal court are settled and  
20 the reasons people settle are numerous. Some of the most  
21 common are these: One is that time is important and time is  
22 sometimes of the essence so they want a dispute resolved within  
23 a certain timeframe, and they think that litigation will exceed  
24 that timeframe. Generally, it does. They may want to get back  
25 to business, in this case the business of football as opposed

F8C5nflC

1 to sitting in a courtroom -- albeit a federal courtroom which  
2 is usually pretty comfortable. They sometimes want to avoid  
3 poisoning the well, particularly where the parties are in a  
4 continuous professional relationship which does not end when  
5 the case is over. This is also referred to sometimes as the  
6 importance of ongoing, good relationships.

7           Sometimes the issue that leads to settlement is  
8 financial costs associated with the litigation and other  
9 reasons for settlement are to avoid adverse publicity, to avoid  
10 the unintended consequences of litigation, and then people also  
11 generally settle where there are strengths and weaknesses to  
12 their case. So, it is a rare situation where somebody is a  
13 hundred percent right and somebody is a hundred percent wrong.  
14 I think there are varying strengths and weaknesses to both  
15 sides here although I caution that I have not made any legal  
16 determination even in my own mind as to who would prevail in  
17 the confirmation/vacatur litigation.

18           So, we are, today, proceeding on both tracks, that is  
19 to say litigation and settlement. I have read and received the  
20 very fine submissions by counsel for both sides. I have done  
21 some preliminary research into the issues but, as I say, I have  
22 not made up my mind as to which side should prevail legally.  
23 So, I hope you will understand that nothing that I say or  
24 anything that I do say should not be taken as an indication of  
25 my ultimate legal decision.

F8C5nflC

1 I am also of a completely open mind with respect to  
2 settlement and in that regard I will be looking, at least in  
3 the first instance and primarily, to the parties for ideas as  
4 to how that may be accomplished assuming that is a possibility.  
5 Sometimes it is not.

6 Before taking the next step I would like to -- counsel  
7 and I have had this conversation earlier and I would like them  
8 to indicate for the record, as has been done before, that each  
9 of them, that is to say Mr. Kessler and Mr. Nash and their  
10 clients are okay, so to speak, with my personal involvement,  
11 along with our outstanding Magistrate Judge J. Francis. He's  
12 been assigned to this case and has been working on this case as  
13 well in both the settlement phase as well as the litigation  
14 phase of the case. Sometimes people have a concern about that  
15 so, starting with Mr. Kessler, is that okay with you that I act  
16 in both roles?

17 MR. KESSLER: Yes, your Honor. We welcome the Court's  
18 participation in both roles.

19 THE COURT: And Mr. Nash, is that okay?

20 MR. NASH: Yes, your Honor; as do we.

21 THE COURT: I appreciate that.

22 So, as I said, the written submissions are  
23 outstanding. We will need to talk a little bit later about  
24 whether there need to be more written submissions. If you feel  
25 there should be there can be. I'm not sure that it is



F8C5nflC

1 necessary but certainly if that's the way you each feel, you  
2 may want to talk among yourselves later and tell me if there is  
3 something more that you want to present to me. It is a pretty  
4 full record that I have but it is up to you.

5           Everybody is of a view that this case should be or, if  
6 it can be, resolved expeditiously so what I thought I would do  
7 now, and if counsel are not entirely, perhaps, prepared for  
8 that although I think at a moment's notice they can be, is to  
9 speak orally about their case succinctly and briefly, and also  
10 without prejudice to if you wanted a more formal oral argument  
11 in a week or two weeks down the road. And I also will have  
12 some questions that I would like to ask of you that would both  
13 help me in being able to discuss settlement and also being able  
14 to resolve the case.

15           And I know everybody knows this but judges, very  
16 often, ask questions sort of as devil's advocates. That  
17 doesn't mean that I think that one side or the other has the  
18 stronger case so, please, take that into account when we have  
19 this discussion.

20           Thereafter, when we finish this process maybe, I don't  
21 know, 15, 20 minutes or so, and particularly because Mr. Brady  
22 and Mr. Goodell are here, we are going to take another stab at  
23 seeing if there is a basis for a mutual resolution of this  
24 case. Those settlement conversations, as I said before, are  
25 always confidential and are not public, and I would ask

F8C5nflC

1 everybody to respect that they are really not supposed to be  
2 discussed. It would be very unusual if they were discussed  
3 publicly after today's Court session.

4 So, let me start with Mr. Nash and then Mr. Kessler,  
5 if you wish to be heard, or if you just would be interested in  
6 answering a couple of the questions that I have.

7 MR. NASH: Thank you, your Honor.

8 I am most interested in answering --

9 THE COURT: It is a technical matter. There is an  
10 overflow room, Mr. Nash, that they may be better able to hear  
11 you if you use the podium. Would that be okay with you?

12 MR. NASH: Of course. Of course. Thank you, your  
13 Honor. I will be brief.

14 As I said, I am most interested in answering your  
15 questions. Let me answer first the question that you had  
16 before as to the distinction between the NFL Management Council  
17 and the NFL Football League. The NFL Management Council is the  
18 multi-employer bargaining representative of all 32 NFL teams.  
19 It is the organization within the National Football League  
20 responsible for negotiating with the NFL Players' Association  
21 which is the exclusive representative of all NFL players a  
22 collective bargaining agreement, and it is an important point  
23 because we are here today, your Honor, in an action under the  
24 federal labor law, specifically the Labor Management Relations  
25 Act, and we are here for what we believe is the enforcement of

F8C5nflC

1 our collective bargaining agreement, a collective bargaining  
2 agreement under which the parties have agreed, including most  
3 recently in 2011 where there was a hard-fought negotiation and  
4 a new collective bargaining agreement in 2011 that continued  
5 what has been in place in the NFL for decades, and that is that  
6 the responsibility for the protection of the integrity of the  
7 game of football resides with the NFL Commissioner, in this  
8 case Mr. Roger Goodell.

9 The NFL Commissioner has always had, under the  
10 collective bargaining agreement, both the authority and in fact  
11 the responsibility to take actions to protect the integrity of  
12 the game and that authority, under the collective bargaining  
13 agreement, specifically includes the ability to discipline  
14 players as well as other individuals within the NFL  
15 specifically including by imposing suspensions and even broader  
16 than that.

17 The NFL collective bargaining agreement also has  
18 placed with the NFL Commissioner the responsibility not only to  
19 make judgments as to what constitutes matters that affect the  
20 integrity of the game, that constitute conduct detrimental and  
21 to impose discipline for it, but also to hear all appeals.  
22 That may be an unusual feature in collective bargaining  
23 agreements but it is not an unusual feature in professional  
24 sports and, as many people may be aware, there is a reason for  
25 that, particularly when we are talking about the kind of matter

F8C5nflC

1 that we are here today, matters where the integrity of the  
2 competition on the playing field has been called into question.  
3 It has always been the case and it is, continues to be under  
4 the collective bargaining agreement, that the parties agree  
5 that the judgment that matters as to protecting the game, the  
6 responsibility is within the NFL Commissioner and that  
7 includes, as I said, hearing all appeals and issuing a decision  
8 that, under the collective bargaining agreement and under  
9 federal labor law, is final and binding on the parties.

10 We are here today because Commissioner Goodell, as you  
11 point out, issued such a decision with respect to Tom Brady of  
12 the New England Patriots. We have asked the Court to confirm  
13 that decision under labor law, under long-established federal  
14 labor law principles including in the statute itself, including  
15 in the Labor Management Relations Act where Congress declared  
16 that it is the policy of the labor laws in the country that  
17 final adjustments of labor disputes of this type should be  
18 resolved internally through arbitration and that the Courts  
19 should confirm those processes. And that is why we are here.

20 THE COURT: Essentially defer to the arbitrator.

21 MR. NASH: Absolutely. Absolutely, your Honor.

22 There is no question, and I don't think there can be a  
23 reasonable dispute, that the collective bargaining agreement  
24 was followed completely with respect to this matter regarding  
25 Tom Brady. I know that there are disagreements about what the

F8C5nflC

1 underlying facts are. There are disagreements about levels of  
2 culpability and whether it should be a fine or whether it  
3 should be a four-game suspension. Naturally, in cases like  
4 this, sports fans debate these things all the time but there  
5 can't be a dispute, there cannot be a dispute that Mr. Brady  
6 was afforded every right that he has under the NFL collective  
7 bargaining agreement that his union agreed to. That, again,  
8 includes the agreement that it would be the NFL Commissioner  
9 who has responsibility to make these judgments. He does have a  
10 right to a hearing. He has a right to certain discovery. It  
11 is very clearly spelled out in the NFL collective bargaining  
12 agreement and there is no claim, I don't believe, or no  
13 reasonable claim I should say, that Mr. Brady was not afforded  
14 all of those rights. We had a lengthy hearing, he had the  
15 opportunity to be represented by all of the counsel who he is  
16 ably represented by here today including from the NFL Players'  
17 Association as well as his personal lawyer. He had the  
18 opportunity to testify and provide his views to the NFL  
19 Commissioner and the Commissioner had the opportunity to assess  
20 all of that.

21 THE COURT: So, could I interrupt?

22 MR. NASH: Of course.

23 THE COURT: Within that context, let's turn for a  
24 minute to what is called the Wells report. This is the report  
25 which is largely the basis, I think it is fair to say, for

F8C5nflC

1 Mr. Goodell's determination and decision.

2 So, that Wells report refers to Ted Wells, one of the  
3 most prominent litigators in New York, and he and his firm were  
4 retained by the council, I guess it was, to do an investigation  
5 and they in fact did an investigation, some 139 pages or so,  
6 plus exhibits. So, there is one issue that's been raised and  
7 that is that their investigation and their role has been  
8 characterized as independent and that, there is some question  
9 in my mind not to suggest that they would not be anything but  
10 above board but I remember that, you know, I worked at a big  
11 firm at one time and with respect to our clients we were  
12 anything but independent, we were fierce in support of our  
13 clients and in all matters. And, in fact, I think Mr. Wells  
14 testified at the hearing that he was retained to support the  
15 decision of Mr. Goodell in this matter.

16 So, what is meant by that? Ted Wells and Paul Weiss,  
17 in this matter, are independent?

18 MR. NASH: Yes, your Honor.

19 I don't know that it is accurate to say that he was  
20 retained to defend the decision. I think what the record shows  
21 is that Mr. Wells and his colleagues at Paul Weiss were  
22 retained to get the facts. This was a very serious allegation  
23 following the AFC Championship game. Mr. Wells testified and  
24 his report clearly states that his charge was not to reach any  
25 predetermined conclusion, it was simply to get to the facts.

F8C5nflC

1 As an example, one of the things that he testified to and one  
2 of the things that is in his report is that there has been a  
3 lot of discussion about whether or not the Patriots' footballs  
4 were actually deflated. There was considerable expert  
5 testimony at the hearing before Commissioner Goodell.

6 THE COURT: So, there were two roles there, first,  
7 they did the report, Paul Weiss did, and then later,  
8 particularly at the hearing before Mr. Goodell, they appeared  
9 as counsel, did they not?

10 MR. NASH: I was the lead counsel and I was the sole  
11 counsel arguing in support of the discipline that was imposed.  
12 Mr. Reisner, Mr. Wells' partner, appeared to assist in the  
13 questioning of witnesses in terms of getting out the facts.  
14 And Mr. Wells including -- we made, at the request of the  
15 players' association, Mr. Wells available to testify and to be  
16 cross-examined about his report.

17 And so, I don't think there is anything in the record  
18 that either Mr. Wells or Mr. Reisner were there to support the  
19 particular decision by -- Mr. Wells' testified that *The*  
20 *Commissioner's decision, that's not my decision. My decision*  
21 *was to -- what my role,* Mr. Wells testified to and it is clear  
22 from his report, *is to get to the facts.*

23 THE COURT: So, turning to there is a specific  
24 intention that the work product, so to speak, or the interview  
25 notes, for example, that were collected by Paul Weiss in doing

F8C5nflC

1 their investigation, that was not made available to Mr. Brady's  
2 counsel and that is something that, in some instances or many  
3 instances -- I don't know, I have to make that determination,  
4 ultimately, but why were those notes not equally available to  
5 Mr. Kessler?

6 MR. NASH: Well, when you say they were equally  
7 available one of the things that gets overlooked is that the  
8 only -- the only witness at the hearing where that might have  
9 been relevant was Mr. Brady and Mr. Brady was accompanied by  
10 counsel during the interview with Mr. Wells and certainly had  
11 notes from that interview. But more to the point, your Honor,  
12 those were privileged documents and under the collective  
13 bargaining agreement --

14 THE COURT: Privileged? Attorney-client privilege?

15 MR. NASH: Yes, they were work product, simply.

16 THE COURT: So who is the client and who is the  
17 attorney?

18 MR. NASH: There is no question, your Honor, that Paul  
19 Weiss and Mr. Wells were retained by the NFL.

20 THE COURT: Right.

21 MR. NASH: Nor is there any requirement in the  
22 collective bargaining agreement that it be done any  
23 differently. Under the collective bargaining agreement the  
24 Commissioner, including people who work directly for the NFL,  
25 often conducted investigations and get to the facts.



F8C5nflC

1 THE COURT: Are they ever required to turn over their  
2 investigatory notes?

3 MR. NASH: We have one ruling on this from Judge Jones  
4 in the Ray Rice case and under the collective bargaining  
5 agreement there is a specific provision entitled Discovery, it  
6 is in Article 46, and it specifies what the player is entitled  
7 to. As Judge Jones ruled, the player is entitled to all of the  
8 exhibits that are going to be used at the hearing.

9 In this case Mr. Brady and the Players' Association  
10 were provided with far more. They were provided with the  
11 entire Wells report including the documents that were reviewed  
12 such as the notes of the measurements of the footballs, the  
13 expert analysis, the interviews that were performed by the  
14 non-lawyer security people on the day of the game including the  
15 interviews of Mr. McNally and Mr. Jastremski. They were  
16 provided everything under the collective bargaining agreement  
17 and more and so this argument about either the Wells notes or  
18 the so-called independence of Mr. Wells is, in our view, a  
19 complete red herring. It sounds like a good argument to make  
20 in the media but under the collective bargaining agreement it  
21 is not an argument that has any legal significance but, more  
22 importantly, it ignores the clear record in this case.

23 Mr. Wells is a person of unquestioned integrity. He  
24 testified at the hearing that he would not have accepted the  
25 assignment if his charge was anything other than to find the

F8C5nflC

1 facts. And at no time was there, there is no evidence that  
2 there was any influence or pre-determination as to how he  
3 should investigate the matter and what conclusions he should  
4 draw.

5 I was going to use the expert as an example.  
6 Mr. Wells testified about the fact that there was questions  
7 raised about whether natural environmental causes may have  
8 resulted in the deflation of the football. He retained an  
9 expert and, as he testified at the hearing, your Honor, he said  
10 to the expert: Consider yourself a Court-appointed expert. I  
11 don't -- just find out whatever the facts are. If you can find  
12 that it was natural causes, that's what I want to know. But,  
13 he did even more than that and I think this further proves his  
14 independence, he hired a second expert, the chair of the  
15 physics department at Princeton to oversee what the first  
16 expert was doing and told him make sure that they're getting it  
17 right, we just want the facts.

18 So, I understand that there are these arguments about  
19 so-called independence and the Paul Weiss firm but, your Honor,  
20 I submit that they have no legal significance in view of the  
21 Commissioner's decision.

22 THE COURT: Let's talk about the findings, some of the  
23 findings that Wells made.

24 By no means are these all of them, but one of the  
25 findings that he makes is that there is less direct evidence

F8C5nflC

1 linking Brady to tampering activities than either McNally or  
2 Jastremski. It says that on page 17, right?

3 MR. NASH: Yes.

4 THE COURT: So, my question is, is there any direct  
5 evidence linking Mr. Brady to tampering?

6 MR. NASH: Your Honor, there is considerable evidence  
7 and depending how you want to --

8 THE COURT: So, let me narrow it down a little bit  
9 because I know what the papers say, but so we are actually  
10 speaking about a finding that at the AFC Championship game on  
11 January 18th, footballs which had been inspected by the  
12 referees went into the game, were at half time determined to be  
13 less than the league required, 12.5 to 13.5 pounds per square  
14 inch. So, that's the deflation that we are talking about.

15 MR. NASH: Yes.

16 THE COURT: It is pretty specific, it is pretty  
17 narrow. I think that's essentially the finding that  
18 Mr. Goodell relates to; what happened in that period, right?  
19 After the officials had inspected the balls and they were then  
20 determined fine, where they certainly were sent out onto the  
21 field at the appropriate pounds per square inch, but at  
22 halftime it was determined that they were not.

23 MR. NASH: Correct.

24 THE COURT: And the allegation is, if I remember  
25 correctly, that Mr. Brady was intercepted and somebody from the

F8C5nflC

1 Colts caught the ball and determined, I guess in some fashion,  
2 that this ball was unusual or underinflated, turned it over to  
3 16 people up the line and they inspected it and they found that  
4 that ball, and others, were deflated. That's the whole story  
5 because, in fact, at the halftime after they made that  
6 determination, they reinflated the balls and the game resumed  
7 and, ironically or not, it turns out that Mr. Brady did better  
8 with the higher inflated balls than with the underinflated  
9 balls.

10 So, you might say that he got no competitive advantage  
11 in one sense, from the underinflation, right? Because the  
12 statistics are, I think this is from the Wells report, he says  
13 specifically in the first half Mr. Brady completed 11 of 21  
14 passes for 95 yards and one touchdown, and in the second half  
15 he completed 12 of 14 passes for 131 yards and two touchdowns.

16 But, anyway that is right, that is the offense we are  
17 talking about what happened, or Mr. Goodell is saying that in  
18 that interim period Mr. McNally, perhaps with the involvement  
19 of Mr. Jastremski, came up and in fact deflated those  
20 footballs, in fact Mr. McNally did it in a bathroom in the  
21 approximate span of a minute and 30 seconds or so. That's what  
22 he found.

23 So, going back though to Mr. Brady, I am trying to  
24 figure out what is the direct evidence that implicates  
25 Mr. Brady in that deflation in that bathroom, presumably, if

F8C5nflC

1 that's what happened, in the first half of that January 18th  
2 game.

3 MR. NASH: Maybe the most direct evidence is what  
4 Mr. Brady said at his appeal hearing to the Commissioner, and  
5 that is he agreed that neither Mr. McNally nor Mr. Jastremski  
6 would have deflated the footballs without his -- if they didn't  
7 think he wanted them to do it.

8 THE COURT: Okay. So, is that it?

9 MR. NASH: No. Not at all. Not at all.

10 THE COURT: Because it would be hard to imagine a  
11 quarterback thinking that the balls that he uses in a game, any  
12 quarterback, could be inflated or deflated without his  
13 involvement, right? Most people would think that, right,  
14 because he is the one who throws the ball, right, and under  
15 league rules has the opportunity to be involved in the  
16 preparation and selection of the game balls.

17 MR. NASH: Well, under a rule that Mr. Brady himself  
18 lobbied for.

19 THE COURT: Fair enough; but apparently I have  
20 learned -- I didn't know this before but learned in reading  
21 your fine papers, both sides -- that quarterbacks are very  
22 interested in preparation and selection of game balls. Some  
23 quarterbacks seem to like them inflated more, others seem to  
24 like them inflated less, but it is not an unusual thing for a  
25 league quarterback to be involved and be very interested in the

F8C5nflC

1 ball that gets used or the balls that get used in that game.

2 Fair to say.

3 So, anyway, back to the direct evidence that links  
4 Mr. Brady to that specific episode, presumably which took place  
5 in the men's room or in the bathroom.

6 MR. NASH: If you are asking, your Honor, is there a  
7 text or an e-mail in which Mr. Brady specifically instructs  
8 somebody to put a needle in a football after the game official  
9 has checked it? No, there is not such direct evidence. There  
10 is considerable evidence documented in the Wells report and  
11 relied upon by the Commissioner in his decision that Mr. Brady  
12 clearly knew about this. It starts with the texts that we were  
13 able to recover between Mr. McNally and Mr. Jastremski which  
14 clearly indicate Mr. Brady's knowledge and encouragement of  
15 this activity. There is the considerable activity following  
16 the AFC Championship game where Mr. Brady repeatedly, in the  
17 days ensuing, had texts and phone communications with them;  
18 unprecedented. Unprecedented.

19 THE COURT: Unprecedented in that he hadn't had text  
20 and phone conversations with these same individuals  
21 historically?

22 MR. NASH: Yes, that is correct.

23 And then the statement that you read from the Wells  
24 report about there being less direct evidence, one of the  
25 things that gets ignored about the Wells report and it is

F8C5nflC

1 certainly true and the Commissioner's decision explains this is  
2 the fact that there may not be a specific smoking gun with the  
3 clear instruction does not mean that there is not evidence of  
4 culpability here. There is, and you know, your Honor, very  
5 well I am sure, that conclusions certainly can be reached by  
6 evidence like this.

7 It gets ignored that the Wells report also noted that  
8 Mr. Brady's explanations for both his communications with  
9 Mr. Jastremski and following the championship game were not  
10 really credible. Ultimately what we are talking about here,  
11 your Honor, is we understand that they have their version of  
12 the facts. They say, okay, you don't have a smoking gun, you  
13 don't have direct evidence therefore you can't make any finding  
14 that Mr. Brady was involved. But, your Honor, the Commissioner  
15 disagreed.

16 THE COURT: Yes, no.

17 MR. NASH: There was a hearing in which he listened to  
18 Mr. Brady and on top of all of this, your Honor, in terms of  
19 maybe it is not direct evidence but let's be clear, Mr. Brady  
20 was asked for text messages, not just with Mr. Jastremski and  
21 Mr. McNally but with others about this subject, and those text  
22 messages were not produced, the phone was destroyed and, your  
23 Honor, I would submit that a fact-finder, in this case  
24 Mr. Goodell as the hearing officer, it is clearly reasonable to  
25 infer that that is further evidence of culpability.

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1 THE COURT: No, I get it. I understand. I do.

2 There is another finding by Mr. Wells I wanted to ask  
3 about. He says, *Based on the evidence, we -- meaning Wells and*  
4 *Paul Weiss -- have concluded that it is more probable than*  
5 *not -- that's another phrase for what we call preponderance of*  
6 *the evidence -- it is more probable than not that Tom Brady was*  
7 *at least generally aware of the inappropriate activities of*  
8 *McNally and Jastremski involving the release of air from*  
9 *Patriot game balls. I think he is referring to that same game,*  
10 *right, the January 18th game.*

11 My question is if you know -- he said it so you may  
12 not know, but -- I am not sure I understand what in the world  
13 that means, that phrase. So, it says: *At least generally*  
14 *aware of the inappropriate activities of Mr. McNally and*  
15 *Jastremski involving the release of air from Patriot game*  
16 *balls. So, I don't know what that is. You know, did he know*  
17 *that McNally took the balls unaccompanied into a bathroom? Did*  
18 *he know that in the bathroom, if in fact it happened, McNally*  
19 *deflated the balls? Did he know that McNally then went on to*  
20 *the field with the balls? I mean, I don't know what to make of*  
21 *that finding, of that conclusion that Tom Brady was at least*  
22 *generally aware of the inappropriate activities of McNally and*  
23 *Jastremski involving the release of air from the Patriot game*  
24 *balls.*

25 I don't know if you do either. It is his quote so we



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1 are just trying to figure out what is he saying.

2 MR. NASH: He is saying that by the evidence Mr. Brady  
3 knew that these individuals were involved in deflating the  
4 footballs.

5 THE COURT: He didn't say that. He said -- he didn't  
6 say that he knew, he said that it's at least -- he was at least  
7 generally aware of the inappropriate activities.

8 MR. NASH: Generally aware is knew, I believe, your  
9 Honor.

10 THE COURT: I think I got the quote right. Maybe he  
11 said knew some other -- he said at least generally aware. This  
12 is at page 122. Yes. Page 122 of his report he said: Based  
13 on the evidence, we also have concluded that it is more  
14 probable than not that Tom Brady was at least generally aware  
15 of the inappropriate activities of McNally and Jastremski  
16 involving the release of air from Patriots game balls. He  
17 didn't say knew, at least not there. Middle of the page 122 of  
18 the Wells report.

19 MR. NASH: I believe he also said, and either at page  
20 17 or 19, that Mr. Brady consented to or approved of these  
21 activities as well.

22 The other point I would make, your Honor, is that I  
23 understand we are parsing this one phrase from the Wells  
24 report, but when the Wells report is read in its entirety  
25 including the conclusions that the explanations from Mr. Brady

F8C5nflC

1 were not worthy of belief --

2 THE COURT: He said that, there is no question. He  
3 said that.

4 MR. NASH: -- and that Mr. Brady's failure to  
5 cooperate and Mr. Wells even testified to that, it leads to an  
6 inference of his involvement.

7 Now, we can parse the Wells report but --

8 THE COURT: Well, that's the basic investigation and  
9 the basic document. I know that Mr. Goodell had a hearing and  
10 is not just bound by the Wells report but it was pretty  
11 fundamental here. Maybe he did say something stronger than  
12 that but it seems to me that that's pretty much what he  
13 concluded about Mr. Brady.

14 MR. NASH: And you are right, your Honor, we had an  
15 extensive hearing.

16 THE COURT: Yes.

17 MR. NASH: And what we are, I believe in this case  
18 here to review, are the conclusions and the assessment by the  
19 NFL Commissioner of not only the Wells report but of his  
20 assessment of Mr. Brady's credibility based on listening to him  
21 at the appeal hearing. And as the Commissioner concluded in  
22 his decision, he is convinced -- he is firmly convinced of  
23 Mr. Brady's -- and, your Honor, I would -- back to the  
24 fundamental point in our papers. The discussion that we are  
25 now having about the specific evidence involved highlights that

F8C5nflC

1 under the labor laws the judgment to be made, the assessment of  
2 that evidence, resides under the collective bargaining  
3 agreement. Commissioner Goodell and the players' association  
4 had the opportunity for a lengthy hearing, they had the  
5 opportunity to convince him otherwise. He said he was open to  
6 it. And in fact it went the other way, as it turns out. We  
7 learned at the hearing that Mr. Brady had actually destroyed  
8 his phone on the day of the Wells interview.

9 Now, your Honor, I think it would, given the standard  
10 of review, I would argue that that is an absolutely reasonable  
11 conclusion for the Commissioner to draw based on that evidence  
12 in terms of Mr. Brady's involvement but certainly under the  
13 legal standard of review, you cannot possibly say that the  
14 conclusion made in the Commissioner's decision doesn't have a  
15 basis.

16 THE COURT: I'm not saying that.

17 By the way, after he made that statement that I quoted  
18 at 122 he drops the footnote where he says: *We -- meaning Paul*  
19 *Weiss -- were not asked by the NFL to investigate the potential*  
20 *competitive impact of the deflation of Patriots game balls and*  
21 *therefore do not make any findings or reach any conclusions on*  
22 *that issue.*

23 So, I am interested in your opinion about whether that  
24 matters or not. In other words, you are saying that --  
25 Mr. Goodell is saying that the actions of McNally and

F8C5nflC

1 Jastremski and Tom Brady were conduct detrimental to  
2 professional football, as it were. Does it make any difference  
3 if they were unsuccessful in that conduct? In this case it  
4 looks like somebody deflated the balls but it didn't help  
5 Mr. Brady any -- does that matter or is that just an  
6 interesting --

7 MR. NASH: I understand that is something that's been  
8 bandied about but what matters is what the Commissioner's  
9 thought on that is on his judgment. I would submit, your  
10 Honor, this is clearly -- not only is it reasonable but it is  
11 entitled to deference. Whether or not a conspiracy to evade  
12 the rules in a game like the AFC Championship game helped or  
13 hurt in terms of whether it involves the integrity of the  
14 game --

15 THE COURT: Well, wait a minute. Conspiracy. That is  
16 sort of an interesting idea here. In Mr. Goodell's decision he  
17 uses the word "scheme."

18 MR. NASH: Yes.

19 THE COURT: So I take it that's what you mean by  
20 conspiracy?

21 MR. NASH: That's the wrong word. I apologize.

22 THE COURT: No, no, that's okay, but he uses it by the  
23 way, if I remember correctly, eight, 10 times.

24 MR. NASH: Yes.

25 THE COURT: So that scheme or conspiracy would be

F8C5nflC

1 among, I guess, Mr. Brady, Mr. McNally and Mr. Jastremski.

2 Now, when we talk about scheme in other cases or  
3 conspiracies in federal court it is a pretty high bar; that you  
4 have to show, among other things, that conspirators intended to  
5 be in that conspiracy and intended the outcome of the  
6 conspiracy, if it is an unlawful one, to occur. And, like I  
7 say, Mr. Goodell says "scheme." Is there any meeting of the  
8 conspirators before that game? Is there any written, one to  
9 the other, *Let's get together and have a scheme in the January*  
10 *18 game to lower the pressure of the balls after the officials*  
11 *look at them?* I mean, what are the indicia of that scheme or  
12 conspiracy? What is the evidence of the scheme or conspiracy  
13 specifically related to the one game which is the subject of  
14 the award and of the Wells report, that one time period of the  
15 first half of the game against the Colts.

16 MR. NASH: Well, I think it starts with the texts  
17 prior to the game between Mr. McNally and Mr. Jastremski in  
18 which they discuss the inducements from Mr. Brady for  
19 Mr. Brady's knowledge of it. There is clear indication in the  
20 texts that he knew about it and --

21 THE COURT: That he knew that on January 18 they were  
22 going to deflate the balls after the officials approved them?

23 MR. NASH: No, not for that specific game but there  
24 are --

25 THE COURT: Ah, but that's the only game that we are

F8C5nflC

1 talking about.

2 MR. NASH: Well, your Honor, there is a pattern of  
3 evidence in the texts that starts with the -- that starts with  
4 Mr. McNally calling himself the deflater and asking for needles  
5 and saying if he doesn't get the inducements that he wants from  
6 Mr. Brady he is going to blow up the ball.

7 THE COURT: Right.

8 MR. NASH: Or he is going to go to ESPN. There is the  
9 one text that says I haven't gone to ESPN yet.

10 So, again, we can argue here about how to interpret  
11 those texts, right?

12 THE COURT: That's fair. That's fair enough, but I  
13 have a narrower point. So, the point I am trying to make is  
14 about this deflategate. I'm not sure where the "gate" comes  
15 from.

16 What I am trying to say is that the Wells report and  
17 the award relates only to one game. Whether it ever happened  
18 before, who knows. It is certainly not defined in either of  
19 those documents. It just relates to the first half of the AFC  
20 Championship game on January 18. And so, whether, you know,  
21 somebody was upset about, you know, the pressure of the balls  
22 in the Jets game in 2014, there is no finding in this case that  
23 there was anything improper done by Mr. Brady in that game.  
24 So, I am trying to figure out what is the evidence of the  
25 scheme or the conspiracy that covers the January 18, 2015 game

F8C5nflC

1 and I am having trouble finding it.

2 MR. NASH: Well I think, your Honor, you have to start  
3 with the evidence that it occurred. And we understand that  
4 they want to dispute that and we had a hearing over that. So,  
5 there is the evidence that the balls were deflated. There is  
6 the evidence that Mr. McNally went into the bathroom completely  
7 breaking all protocol. The head official said it never  
8 happened before, he is not supposed to do that.

9 THE COURT: Right.

10 MR. NASH: So, the relevance of the evidence earlier  
11 about Mr. Brady's knowledge of this certainly bears, I think it  
12 was certainly reasonable to consider, especially in light of  
13 the denials, especially when fundamentally, your Honor, the  
14 question at the appeal hearing is one of credibility. It is  
15 certainly reasonable to consider that these things were  
16 happening before.

17 THE COURT: Okay.

18 MR. NASH: I think it's -- and again, for purposes of  
19 the legal standard it is certainly not unreasonable.

20 THE COURT: Right. I get it. I get it.

21 I have one more question and then I have some  
22 questions for Mr. Kessler, too.

23 MR. NASH: Sure.

24 THE COURT: So, going back to your point and it is a  
25 correct one, you are absolutely right, that usually when a case

F8C5nflC

1 comes to District Court from an arbitration there is a  
2 fundamental principle that there is deference to the arbitrator  
3 but there is also, as you know as you pointed out, Ray Rice,  
4 Adrian Peterson, other cases as well in which the Courts  
5 determine or somebody determines that we should not go along  
6 with the decision of the arbitrator and as far as I can see,  
7 most of those situations have in common this issue and  
8 Mr. Brady has raised this too, of notice. And you know from  
9 the papers that that is what they're contending so that that's  
10 the rule that, the law of the shop as it were, the rule in  
11 labor environments that work rules must clearly and  
12 unambiguously establish the scope of the prohibited conduct as  
13 well as the consequences of violations in order to be  
14 enforceable. Everybody agrees with that principle too, I think  
15 as well.

16 So, along comes Mr. Kessler and he is arguing that the  
17 league policies that relate to the player, the 2014, they do  
18 get notice in situations why there are uniform and equipment  
19 violations but he says that in those contexts or first offenses  
20 they result in fine. Now, there is another provision in that  
21 same document at page 20 which says, suggests that it could  
22 also be suspension but there is a quote that says there that  
23 first offenses result in fines. I don't know if that is an  
24 ambiguity or what.

25 Then he goes on to say, Mr. Kessler does, argue --



F8C5nflC

1 this is all argument -- that the league policy on integrity of  
2 the game and enforcement of competitive rules and the reason we  
3 are interested in this is because the Wells/Paul Weiss  
4 report -- the investigation -- was explicitly based on that,  
5 that is to say on the league policy on integrity of the game  
6 and enforcement of competitive rules. He says, and it seems  
7 like it is so, that those rules only apply to chief executives,  
8 club presidents, general managers and head coaches but not to  
9 players.

10 So, the last -- and then I will give you a rest. The  
11 last point I want to ask is where and how does Mr. Goodell  
12 satisfy -- or not he but where is the notice afforded to  
13 Mr. Brady both of the offense -- in not the football context  
14 but where -- the offense, where does he have notice of the  
15 offense and where does he get notice of, let's say, a four-game  
16 suspension that might ensue from that offense?

17 MR. NASH: Yes, and obviously we are familiar with all  
18 of those arguments that the players' association has made here  
19 because they made those very same arguments in the appeal  
20 hearing below. As the Commissioner explained in his award, the  
21 answer to all of those arguments is in the collective  
22 bargaining agreement and they all critically depend on the  
23 players' association's view of the facts or their  
24 interpretation of the collective bargaining agreement or their  
25 interpretation of the relevant documents. But, the

F8C5nflC

1 Commissioner carefully explained that Mr. Brady's discipline  
2 was based on both the collective bargaining agreement and his  
3 player contract under which he has acknowledged and agreed that  
4 he is subject to discipline including suspensions. And Judge  
5 Jones -- you mentioned the Ray Rice case -- Judge Jones'  
6 decision strongly affirms the breadth of that authority but it  
7 is all in the CBA.

8 Now, they simply just misstate the facts or they  
9 disagree with the facts but the Commissioner addresses each of  
10 these in the award itself.

11 By the way, the Ray Rice case was not an arbitration  
12 deference case. The Judge Jones ruled, we can never challenge  
13 it. The final decision from the Adrian Peterson case was a  
14 much different issue but I want to address it and I do want to  
15 address the point you made about the law of the shop because I  
16 think that's their -- that's the argument that they really base  
17 their entire case on and the reason they do that is because  
18 they can't base it on the CBA. They can't point to a CBA  
19 provision -- the provision that I just read about notice, that  
20 specific phrase is not in the collective bargaining agreement.  
21 There is plenty of notice as the Commissioner interpreted the  
22 CPA and as he assessed the facts including evaluating a player  
23 of Mr. Brady's experience as to whether he knew that an  
24 effort -- this is not a mere, in his judgment, the  
25 Commissioner's judgment a mere equipment violation, whether

F8C5nflC

1 participating in an effort that once the officials certify the  
2 balls to then have them changed, whether that affects the  
3 integrity of the game.

4 Now, we understand they may disagree but, under the  
5 collective bargaining agreement, clearly that is within the  
6 Commissioner's authority.

7 THE COURT: Right.

8 MR. NASH: So they rely on the law of the shop and the  
9 reason they rely on the law of the shop is because there is  
10 nothing in the CBA they can point to. But, your Honor, the law  
11 of the shop principle that they rely on is a principle of  
12 deference to arbitration, it is not an argument in favor of  
13 court review of arbitration. It emanates from the Supreme  
14 Court's decision in *WR Grace* decades ago in which the Court  
15 explained that when disputes like this are resolved, Courts  
16 must defer to the arbitrator because it is the arbitrator's  
17 knowledge of the industry or knowledge of the collective  
18 bargaining agreement and interpretation.

19 Now, we understand that the Court in the Peterson case  
20 reached a different conclusion about how to interpret past  
21 precedent and that is now on appeal in the Eighth Circuit. As  
22 we have pointed out, your Honor, in the Second Circuit the law  
23 could not be clearer. The question of how to interpret the  
24 so-called law of the shop is for the arbitrator.

25 THE COURT: I get it. Thanks. That's very helpful.

F8C5nflC

1 MR. NASH: Thank you.

2 THE COURT: And again, I am asking these questions  
3 just to help me. I don't mean to put anybody on the spot but  
4 these are questions that will help me both in talking  
5 settlement and also in resolving the case legally.

6 MR. NASH: Thank you very much, your Honor.

7 THE COURT: Okay.

8 Mr. Kessler? Mr. Kessler, I know that -- well, I  
9 don't know but I suppose that you might be anxious to respond  
10 to Mr. Nash and I would say don't, because we will spoil our  
11 settlement conferences if you do. But, I do have some  
12 questions for you.

13 MR. KESSLER: Certainly, your Honor. I am happy to do  
14 whatever you like.

15 THE COURT: You say now but we will see.

16 So, here is the big question, obviously, and we have  
17 alluded to it in discussion before so here we have  
18 Mr. Jastremski and Mr. McNally. They work right for the  
19 Patriots, right?

20 MR. KESSLER: Yes.

21 THE COURT: And Mr. McNally is a locker room attendant  
22 and Mr. Jastremski, I guess among his duties, his principle  
23 responsibilities are of preparing the game balls, right?

24 MR. KESSLER: Yes.

25 THE COURT: You may disagree or not but certainly if

F8C5nflC

1 you read the Wells report and if you read Mr. Goodell's  
2 decision they, and certainly more than Mr. Brady in terms of  
3 evidence, but it looks like in a game in this AFC Championship  
4 game that we are talking about, that they or one of them  
5 deflated the game balls -- that the suggestion, clearly, is  
6 that that was Mr. McNally.

7           Why would or would either of them ever do that without  
8 Mr. Brady's consent and/or awareness? I mean, is it  
9 conceivable that those Patriots officials -- I mean Mr. Brady,  
10 of course, is the quarterback and he is the one who is going to  
11 be throwing those balls. He, as other quarterbacks, has a keen  
12 interest in how they feel and, you know, what pressure per  
13 square inch to what degree they are inflated. Why would or  
14 would either of those two people do that without his knowledge  
15 and consent?

16           MR. KESSLER: Well, to start, your Honor -- and I will  
17 answer your question -- I just want to make it clear we do not  
18 believe that there is real evidence that there was such  
19 deflation but I understand that's what the Wells report  
20 concluded. So, my answer is going to be based on the premise  
21 that that is what the Wells report concluded, not that the fact  
22 that such deflation occurred.

23           THE COURT: Okay.

24           MR. KESSLER: Assuming such deflation occurred it is  
25 conceivable that Mr. McNally, if he did do such deflation,

F8C5nflC

1 thought it was something that would be good for his  
2 quarterback. Okay? That makes a certain logical sense. He  
3 wouldn't do something he thought was bad for his quarterback.  
4 But it is a long leap from there to get to Mr. Brady asked him  
5 to do it or supervised him in doing it or directed him in doing  
6 it.

7 It is very interesting. We cross-examined Mr. Wells,  
8 who I have great respect for, on this very issue. It is quoted  
9 in the brief we just filed. We asked him: In all your  
10 examination of all of the witnesses, of all the documents, did  
11 you find anything beyond this general awareness finding such as  
12 that Mr. Brady directed it in some way? And Mr. Wells was very  
13 clear, open and honest, and the answer was no.

14 After all of this money, after all of this  
15 investigation, after all of these witnesses he couldn't get  
16 beyond saying the quote that your Honor read that at least he  
17 was generally aware that something may have happened. That's  
18 very different from inducement, encouragement, participation,  
19 direction. None of that is in the Wells report.

20 Now, why does that matter? And this is very, very  
21 important, your Honor: Mr. Nash and the NFL conflate the  
22 Commissioner's role as arbitrator with the role of imposing  
23 discipline. They are not the same and here is why: As the  
24 arbitrator, the Commissioner is sitting to review the  
25 discipline already in place and simply rule that that

F8C5nflC

1 discipline can be sustained or not sustained. He has no  
2 authority to come up with a new grounds of discipline. He has  
3 no authority to make new findings of discipline as the  
4 arbitrator. This was the direct holding by Judge Doty in the  
5 Peterson case when Mr. Henderson, sitting as the arbitrator  
6 tried to say, well, the discipline wasn't imposed on these  
7 grounds but it could have been imposed on these grounds so I  
8 will sustain it.

9 THE COURT: I got it.

10 MR. KESSLER: And Judge Doty said that exceeds your  
11 authority as arbitrator.

12 Now, so I am now circling back to generally aware  
13 because --

14 THE COURT: Let me ask, did you ask Mr. Wells what he  
15 meant by generally aware? Did anybody ask that question?

16 MR. KESSLER: We didn't ask it precisely that way.  
17 Your Honor can certainly read the transcript. We asked him  
18 more the reverse, that there was no finding of participation,  
19 directness, other things.

20 But what we do know, and this is very important, so  
21 what is the actual discipline? The actual discipline is  
22 Exhibit 10, your Honor will find, which is the letter from  
23 Mr. Vincent imposing the discipline.

24 THE COURT: Right.

25 MR. KESSLER: And what Mr. Vincent did, number one, he

F8C5nflC

1 testified the sole factual basis was the Wells report.  
2 Mr. Vincent, under oath, said I did no other fact  
3 investigation. So, this is it. And this is what he says:  
4 With respect to your particular involvement -- that's  
5 Mr. Brady -- the report established that there is substantial  
6 and credible evidence to conclude that you were at least  
7 generally aware of the actions of the Patriots employees  
8 involved in the deflation of the footballs and that it was  
9 unlikely that their actions were done without your knowledge.  
10 That is it.

11 THE COURT: I got it.

12 MR. KESSLER: Why is that significant?

13 THE COURT: So people will be stunned that we have  
14 gone off the question that I am asking --

15 MR. KESSLER: I'm sorry.

16 THE COURT: That's all right.

17 So, here is the bottom line: So, you're saying that  
18 it's more than -- well, what are you saying? No, no, I don't  
19 want to ask that question because we don't have enough time.

20 MR. KESSLER: What would you like me to say, your  
21 Honor?

22 THE COURT: I want you to tell me if Mr. Brady and you  
23 are saying that these two folks, Mr. Jastremski and  
24 Mr. McNally, were freelancing if and when they deflated those  
25 footballs.



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1 MR. KESSLER: That is our position, your Honor.

2 And the reason I was saying that is significant is  
3 because even the NFL in its brief -- and this is very  
4 important -- does not try to contend that any player had  
5 notice, you could be disciplined for being generally aware of  
6 somebody else's inappropriate conduct. There has never been a  
7 punishment in the history of the NFL for that, there is no  
8 notice for that. The NFL does not make a claim that there was  
9 any notice of that. Even looking at the conduct detrimental  
10 language they cite in the paragraph 15 of the player contract,  
11 it says you can be suspended or fined for conduct detrimental  
12 that you engaged in. In other words not that you were aware of  
13 what somebody else did. And because there is no defense of  
14 that, because it is only generally aware, just on that one  
15 ground this can't survive notice under the Peterson decision.

16 The significance of Peterson -- and then I would like  
17 to stop because I'm sure your Honor has other questions -- but,  
18 the significance of Peterson and this is unlike the other  
19 cases, it is conclusive here. Mr. Nash alluded to the fact  
20 that it is on appeal to the Eighth Circuit but, as your Honor  
21 knows in the Second Circuit and in the Eighth Circuit, I think  
22 in every circuit, a decision that establishes the same parties  
23 has issue preclusive effect during an appeal. They did not  
24 seek a stay of the Peterson decision. In fact, they could have  
25 sought a stay of the Peterson decision, they did not.

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1           So, right now, at the time of Brady, Commissioner  
2 Goodell was legally precluded from denying that he had to apply  
3 this notice and the NFL is legally precluded from doing so and  
4 yet *Peterson* is not even discussed by Commissioner Goodell as  
5 in his decision except in a footnote saying that had to do with  
6 domestic violence and I don't have to discuss that. That, your  
7 Honor, is a clear violation of the essence of the CBA, the law  
8 of the shop, and it is manifest disregard of the law which the  
9 Second Circuit still applies.

10           THE COURT: Well, Mr. Goodell in his award clearly  
11 talks about notice. It may not be the notice that you're  
12 talking about but he clearly establishes that or contends that  
13 Mr. Brady had notice both of the conduct and of the penalty.  
14 But anyway, all right. Let's move on.

15           Why did Mr. Brady not cooperate with the Wells  
16 investigation in the respect of providing texts and e-mails to  
17 them?

18           MR. KESSLER: Well, this is a very complicated  
19 subject, your Honor, so you will forgive me for addressing it a  
20 little bit at length.

21           The first point to note is that Ted Wells testified in  
22 this hearing very clearly that he never gave Mr. Brady any  
23 notice that if he did not provide the electronic communications  
24 that were requested from his private e-mails and texts that  
25 there was going to be any type of disciplinary consequence.

F8C5nflC

1 So, at least from Mr. Wells nothing was communicated and  
2 Mr. Brady testified under oath here that if Mr. Wells had said  
3 to him or the league had said to him or anyone had said to him  
4 if you don't turn over your e-mails that there is going to be  
5 some punishment for that, he would have done so. So, that's  
6 the first thing.

7 THE COURT: Well, wait a minute.

8 MR. KESSLER: The second -- I'm sorry.

9 THE COURT: I did cooperate in other respects, right,  
10 he was interviewed.

11 MR. KESSLER: Yes.

12 THE COURT: He answered questions.

13 MR. KESSLER: Yes.

14 THE COURT: So how did he, Mr. Brady, draw the line?  
15 *Well, I'm going to cooperate with respect to all of these other*  
16 *matters but when it comes to e-mails and texts that's where I*  
17 *draw the line.*

18 MR. KESSLER: Well, the line was actually drawn by the  
19 advice he received from his agent lawyers, not the union, who  
20 were --

21 THE COURT: Wait a minute. That expression is used a  
22 lot in the papers. I don't know what that means. Agents are  
23 sometimes also lawyers but they don't act usually as lawyers,  
24 they act as agents.

25 MR. KESSLER: Yes. In this particular matter the

F8C5nflC

1 union was not involved in counseling Mr. Brady about his  
2 interview with Ted Wells or the request from Ted Wells and so  
3 Mr. Yee, who is his agent who is also an attorney, concluded  
4 with Mr. Brady that they would also represent him in the  
5 matter. So, while you're right agents do not always act as  
6 lawyers, there is nothing to prohibit them from acting as  
7 lawyers and I believe they were acting as both his counsel with  
8 Mr. Wells and happened to be his agents in terms of that.

9 So, they advised him that because there was no policy  
10 properly invoked the only policy that was invoked, remember,  
11 was the competitive integrity policy which everyone agrees,  
12 including Troy Vincent, is never given to players. On its face  
13 it says it doesn't apply to players, so the no proper policy  
14 was invoked. Nothing was cited that they gave advice that they  
15 thought because of his celebrity, because of the extremely high  
16 likelihood of leaks of personal information that even -- and  
17 this is not a knock at Mr. Wells, but giving it to anybody  
18 because of his celebrity how this gets out, I will give your  
19 Honor just a little example, that the concern was not really  
20 frivolous. Even in this matter we have now put into the public  
21 record all the e-mails that were responsive, you know, whatever  
22 they were. And lo and behold, there are e-mails about  
23 Mr. Brady's personal issues about a pool cover that appeared  
24 on, like, national television --

25 THE COURT: I get it.

F8C5nflC

1 MR. KESSLER: So, that was the concern; that given his  
2 celebrity and his personal life, that just turning over  
3 personal e-mails was going to raise privacy issues.

4 And so, you could --

5 THE COURT: So a lawyer could have said let's go  
6 through these; these are nonresponsive, these have to do with  
7 your swimming pool, we won't give them that, but why not give  
8 them the ones that related to inflation or deflation of  
9 footballs or his relationship to Mr. McNally and/or  
10 Mr. Jastremski? You do that all the time.

11 MR. KESSLER: Your Honor, you're right. You're right,  
12 it could have been done a different way. Okay? And I think  
13 right now Mr. Brady has concluded that it should have been done  
14 a different way because in this proceeding he did everything  
15 that Mr. Wells asked for. He searched for the search terms on  
16 his computer, he had a forensics person do that and turned over  
17 all the e-mails and there was nothing incriminating so this was  
18 all provided to Commissioner Goodell.

19 With respect to the texts there has been a huge issue  
20 made by the NFL about the destruction of the phone.

21 THE COURT: Right.

22 MR. KESSLER: I want to mention that.

23 THE COURT: Yes, I was going to ask you about that.

24 MR. KESSLER: This is the most overblown issue in the  
25 history of my 40 years -- almost 40 years -- of litigating

F8C5nflC

1 cases. Why do I say that? First of all, what the NFL doesn't  
2 deny is that what Mr. Wells had asked for was any text to three  
3 people, that was all; he want Mr. McNally, he wanted  
4 Mr. Jastremski and he wanted Schoenberg.

5 THE COURT: Schoenfeld.

6 MR. KESSLER: Right, the boss in terms of that.

7 Well, they got the phones of all three of those people  
8 and recovered all the texts with Mr. Brady. How do I know  
9 that? Because we produced the phone records from the phone,  
10 the one that is no longer in existence, which shows every text.  
11 And so, you can match up in the Wells report what were the  
12 texts that the Wells report used versus all the texts that  
13 existed. Only three were not used by the Wells report but we  
14 have stated that's because they must have had nothing in them  
15 because Ted Wells had those three also. And the NFL, by the  
16 way, has never come back and said, oh no, we don't have those  
17 three because they do have those three.

18 So, the point here is they have every single text.  
19 The phone was discarded at a later date. Why? Because again,  
20 because of his celebrity. This is not my life, your Honor; it  
21 is certainly not your life. Okay? When you are Tom Brady,  
22 okay, you get --

23 THE COURT: By the way, I take exception to that.

24 MR. KESSLER: I'm sorry, maybe you do this. Maybe it  
25 is possible. Okay? I at least don't change telephones all

F8C5nflC

1 that often and I don't worry about anyone looking at my  
2 pictures of my wife -- they have been lovely pictures, by the  
3 way, I want to say that on the record, but there is not a great  
4 demand of that or my pool cover because I don't have a pool.  
5 So, therefore, that wouldn't come in. But, when you are Tom  
6 Brady who lives in that fish bowl what you do is that, one, you  
7 get phones and, as he testified, phone companies give him  
8 phones for free, okay, because they want Tom Brady to carry  
9 phones. So, he gets phones all the time and whenever he gets  
10 rid of -- what he does when he is done, he gives it to his  
11 assistant who is told, *Get rid of the phone*. He doesn't even  
12 know when it was gotten rid of, exactly the circumstances.

13 You know, there is this big statement, oh, it was done  
14 the day of the interview. Nobody knows that. Mr. Brady didn't  
15 testify to that. What happened is he said his normal practice  
16 is to get rid of it when there is a new number and they said,  
17 oh, you started a new phone number around that day but we don't  
18 know what actually happened with the phone. Nobody knows. And  
19 what is very important, Mr. Brady testified he didn't destroy  
20 the phone because there was something on it he was concerned  
21 about and they don't contend that there was because they had  
22 all those texts.

23 The most Mr. Nash can say is, well, maybe they were  
24 texts to somebody Mr. Wells didn't ask for that would be  
25 incriminating. Well maybe. Maybe if my grandmother had wheels

F8C5nflC

1 she would be a trolley car.

2 THE COURT: No.

3 MR. KESSLER: He can't base discipline on anything  
4 something Mr. Wells never asked for that might exist somewhere  
5 and there is no evidence of it. But what there is is  
6 Mr. Brady, under oath, saying there would be no such e-mails  
7 because he didn't know anything about this.

8 Again, I apologize. I know I strayed very far from  
9 your question.

10 THE COURT: Yes, you did.

11 MR. KESSLER: But I think it is important to put this  
12 all in context.

13 THE COURT: Even you understand why there would be so  
14 much discussion about a phone which covered a period which they  
15 are most concerned with which is the period of roughly November  
16 2014 into March 2015, when this includes the time that is the  
17 lead up time period to the game and includes the investigation  
18 period after the game. You can understand why people would,  
19 rightly or wrongly, draw the conclusion about, well, if we had  
20 the phone, we can get to the bottom of this.

21 MR. KESSLER: I understand, your Honor, how this issue  
22 out of context can be distorted and played or misunderstood  
23 very well and I also understand, your Honor, I want to say  
24 this, that if the league were to have concluded, as they did in  
25 the case with Mr. Favre, for example, that because he refused



F8C5nflC

1 to turn over his e-mails there should have been a fine, okay,  
2 imposed which was what was imposed on Mr. Favre when he would  
3 not cooperate in his investigation, of \$50,000. If that is  
4 what had happened here we wouldn't be here. Okay? The problem  
5 is it is more that the award seizes upon that to try to somehow  
6 prop up the fact that there is no evidence or basis, legal  
7 basis, for anything else that the Commissioner found.

8 THE COURT: Okay. I got it.

9 MR. KESSLER: Thank you, your Honor.

10 Just to answer your other questions?

11 THE COURT: I don't remember what it was.

12 MR. KESSLER: The ones to Mr. Nash.

13 We do think it would be beneficial and we have been  
14 working on one more submission that the order allowed, and the  
15 reason is the first time we have actually seen the NFL's  
16 position in writing was in the brief that they filed last week  
17 and so they've cited some new cases and other things that we  
18 haven't had an opportunity to respond to yet. So, we are just  
19 going to file an opposition brief, as your order provides, at  
20 that time.

21 THE COURT: I forget the date that we set for that.

22 MR. KESSLER: You set it for this Friday, your Honor.

23 THE COURT: And, Mr. Nash, you are welcome to do the  
24 same thing, if you wish to.

25 MR. NASH: Yes. Thank you.

F8C5nflC

1 MR. KESSLER: And then you had set the 19th for oral  
2 argument and I would hope, your Honor, by then you would have  
3 read all of these different briefs and we can focus our next  
4 argument on whatever questions you have coming out of the  
5 briefs at that time, if that makes sense to you.

6 THE COURT: So, I would say I am pretty good, but.

7 MR. KESSLER: Okay.

8 THE COURT: Well, wait. So, you are talking about  
9 filing on the 20th and then you want me to be ready to go --  
10 no.

11 THE DEPUTY CLERK: No; the 14th, Judge.

12 THE COURT: The 14th to the 19th.

13 MR. KESSLER: The briefs are due the 14th and the  
14 argument is scheduled for the 19th, according to your order.

15 THE COURT: So, do I have to read them on Saturday and  
16 Sunday? Is that what you are saying? All right. We will  
17 talk.

18 MR. KESSLER: We appreciate that we are putting a lot  
19 of demands on the Court's schedule.

20 THE COURT: We will try and meet that schedule.

21 So, this was very helpful.

22 MR. KESSLER: Thank you.

23 THE COURT: So, what we are going to do now is talk a  
24 little bit about resolution, if that's agreeable, still, to  
25 both sides. So, here is the question: Do you want to have a

F8C5nflC

1 lunch break or should we proceed right to do that?

2 MR. NASH: We would be willing to proceed.

3 THE COURT: So, we will adjourn today's conference, it  
4 has been very helpful, and I will start with Mr. Nash and  
5 Mr. Goodell, you are all welcome.

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