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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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3 NATIONAL FOOTBALL LEAGUE
MANAGEMENT COUNCIL,

4 Plaintiff,

5 v.

15 Civ. 5916 (RMB)

6 NATIONAL FOOTBALL LEAGUE
7 PLAYERS ASSOCIATION,

8 Defendant.

9 -----x

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

12 Petitioner,

13 v.

15 Civ. 5982 (RMB)

14 NATIONAL FOOTBALL LEAGUE and
15 NATIONAL FOOTBALL LEAGUE
MANAGEMENT COUNCIL,

16 Respondents.

17 -----x

18
19 August 12, 2015
11:20 a.m.

20 Before:

21 HON. RICHARD M. BERMAN,

22 District Judge

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APPEARANCES

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STEPHEN DUBIN

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

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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

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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

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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.

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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

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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.

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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

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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

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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

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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

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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

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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

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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.

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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

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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.

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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 --

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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

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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

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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.

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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

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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,

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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

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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

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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.

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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

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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.

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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

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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

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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

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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

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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.

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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

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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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