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PRELIMINARY STATEMENT

This action seeks to vacate a suspension expected in late October 2012, and to put a halt to the ongoing and fundamentally unfair treatment of Jonathan Vilma by NFL Commissioner Roger Goodell. Following an Appeals Panel ruling that Goodell had overstepped his authority in imposing punishment on Vilma, Goodell engaged in a farcical review, imposed the same punishment as previously imposed, and continued his abuse of the process.

Goodell's manifest bias and partiality is palpable, reflected in his many judgmental, accusatory and unsupported public accusations against Vilma and manifested in a procedure he has invoked which rips at the heart of any notion of fundamental fairness and due process in order to punish Vilma for acts he did not commit. For a multitude of reasons, including that Goodell prejudged the allegations against Vilma, publicly declared Vilma's culpability for eight months – and consistently – before Vilma could exercise his right to refute the allegations in the manner required by the NFL-NFLPA CBA, and, as a reflection of his prejudgment of the allegations, invoked a process that is inimical to the NFL-NFLPA CBA and literally to every fundamental concept of due process, Goodell's Arbitration Award must be vacated pursuant to the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"), and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. Quite simply, Vilma's punishment, and the process used to impose that punishment, conflicts with the very essence of the NFL-NFLPA CBA, and constitutes precisely the type of abuse that federal law does not permit. Goodell, who again has ignored a request to recuse himself from the process, cannot conceivably issue an Arbitration Award that will not be defective and requires vacatur.

STATEMENT OF FACTS¹

A. Background

Goodell and the NFL, at Goodell's direction, have accused, and punished, New Orleans Saints executives, coaches and defensive players for conducting a bounty program during the 2009, 2010 and 2011 seasons ("Bounty Program"). The Bounty Program allegedly involved taking aim at and targeting specific opposing players and offering monetary incentives for injuring those players.

After punishing the Saints and its executives, Goodell turned his sights on Saints players and former players. On May 2, 2012, Goodell suspended Vilma without pay for the entire 2012 regular season, and conditioned reinstatement upon Goodell's unilateral discretion. In addition, Goodell prohibited Vilma from receiving necessary and perhaps legally-mandated rehabilitative treatment following a serious knee injury during the 2011 season.²

B. Goodell's Prejudgment and Bias

Even before having investigated Vilma's purported involvement in the Bounty Program, Goodell proclaimed Vilma's culpability. (*See, e.g.*, NFLPA Ex. J at 12-15.)³ On March 2, 2012, almost three weeks *before* punishing Saints management and coaches, and, by Goodell's own recent statements, many months before he supposedly had decided to punish Vilma, Goodell stated in a March 2 press release ("March 2 Press Release") (Doc. No. 23-4) that Saints defensive players had contributed cash and received cash payments for purposely injuring pre-designated

¹ The facts herein are for the most part a summary of those alleged in Vilma's Amended Complaint (Doc. No. 26), Vilma's Amended Post-Hearing Memorandum (Doc. No. 95-2), October 15, 2012 Declaration of Peter R. Ginsberg in support of Vilma's Motion to Vacate an Arbitration Award and evidence entered at the July 26, 2012 hearing in this matter (Doc. No. 79-1).

² Goodell's suspension barred Vilma from having any contact with the Club. Louisiana's Workers' Compensation law requires an employer to cover the expense of and coordinate treatment for employment-related injuries and to be sure an employee is receiving proper treatment. LSA-R.S. 23:1203. Vilma suffered a serious knee injury during the 2011 season and required complicated treatment and care during the time Goodell suspended him. By cutting off communication between Vilma and the Saints, Goodell made the Saints' compliance with the law impossible and deprived Vilma of his rights.

³ References to "NFLPA Ex. ___" refer to the Exhibits filed in support of the NFLPA's Application to Vacate Arbitration Award (12-cv-1744, Doc. No. 1).

opposing players. Therein started a multi-month campaign by Goodell, acting in a manner neither contemplated nor countenanced by the NFL-NFLPA CBA, to single out Vilma as the leader of the Bounty Program. Indeed, if there were any question whether Goodell was singling out Vilma, Peter King, commonly known as a go-to source for NFL leaks, ran a March 12, 2012 cover story in *Sports Illustrated* bearing Vilma's photograph and the banner headline: "Special Report – Bounty Culture: The Saints' Pay-to-Injure Program Rattles the NFL."

Also on March 2, 2012, Goodell, in a "report" theoretically directed to the 32 NFL Member Clubs but simultaneously released to the media, repeated his accusation that Saints defensive players "pledged significant amounts" of money towards the Bounty Program and "targeted particular players" for injury. (NFLPA Ex. C.) In that same report, months before Vilma could exercise any right to provide evidence or defend himself, Goodell told the world at large that Vilma had promised "\$10,000 in cash to any player who knocked [opposing quarterback Brett] Favre out of the game." *Id.* During that same period of time, Goodell publicly pronounced that Vilma placed \$10,000 in cash on a table during a team meeting in making the alleged offer concerning Favre. (*Id.*)

On October 9, 2012, Goodell stated that only sometime after March 21, 2012, after he imposed punishment on the Saints, coaches and management personnel, did he begin to consider what role, if any, Vilma and other players had in the Bounty Program and what, if any, discipline would be imposed on the players. (Ginsberg Ex. L.)⁴ Despite Goodell's admission that, as of March 21, he had not yet considered Vilma's purported involvement in the Bounty Program, and three and one half months before Vilma had even the theoretical opportunity to challenge any punishment that he faced, Goodell on that day proclaimed Vilma's culpability for "embrac[ing]

⁴ References to "Ginsberg Ex. ___" refer to the Exhibits attached to the October 15, 2012 Declaration of Peter R. Ginsberg, submitted herewith.

this program so enthusiastically and participat[ing] with what appears to have been a deliberate lack of concern for the well-being of their fellow players...” and for “willingly and willfully target[ing] ... opponents and engag[ing] in unsafe and prohibited conduct intended to injure players.” (“March 21 Press Release”) (Hearing Ex. 2).⁵ Goodell went on to proclaim his unwavering and oft-repeated conclusion that “defensive captain Jonathan Vilma offer[ed] \$10,000 to any player who knocked Brett Favre out of the NFC Championship Game in 2010.” *Id.*; NFLPA Ex. D (“March 21 Club Memorandum”).

Goodell’s public allegations and proclamations of culpability continued throughout the spring. For example, on April 24, 2012, during an interview with Rich Eisen of the NFL Network, Goodell repeated his conclusion that there was dispositive “evidence” that Vilma, among other Saints and former Saints, had “embraced” the Bounty Program.

On May 2, 2012, Goodell issued his original discipline against Vilma and other players purportedly involved in the Bounty Program. Goodell suspended Vilma without pay for the entire 2012 season. (NFLPA Ex. J at 35). Rather than notifying Vilma of the punishment, Goodell used his funnel to the public airways, ESPN, to broadcast the news to Vilma. (Hearing Tr. 26:10-12.)⁶ Rather than proceeding within the confines of the NFL-NFLPA CBA while the players exercised their appeal rights, Goodell, now the “neutral arbitrator” who would preside over the adjudication of the punishment he had imposed, again made clear that he had already decided upon Vilma’s guilt. In a May 2, 2012 Press Release, Goodell made no pretense about having an open mind or about waiting to hear Vilma’s side of the story (“May 2 Press Release”) (Hearing Ex. 3). Instead, Goodell declared that: (a) Vilma “assisted Coach [Gregg] Williams in establishing and founding the [Bounty] program”; (b) Vilma “offered a specific bounty – \$10,000 in cash – to any player

⁵ References to “Hearing Ex. ___” refer to the Exhibits submitted during the July 26, 2012 Hearing (Doc. No. 79-1).

⁶ References to “Hearing Tr. ___” refer to the transcript from the July 26, 2012 Hearing.

who knocked Arizona quarterback Kurt Warner out of the 2009 Divisional Playoff Game and later pledged the same amount to anyone who knocked Minnesota quarterback Brett Favre out of the 2009 NFC Championship Game”;⁷ (c) “Saints players of their own accord pledged significant amounts of their own money toward bounties”; (d) Vilma “contributed a particularly large sum of money toward the [Bounty] program; specifically contributed to a bounty on an opposing player; demonstrated a clear intent to participate in a program that potentially injured opposing players; [and] sought rewards for doing so”; and (e) Vilma “willingly and enthusiastically embraced the bounty program... [and] put the vast majority of the money into this program.” *Id.*

Goodell, to no one’s surprise, affirmed the suspensions by letters dated July 3, 2012. (NFLPA Ex. A.)

On September 7, 2012, an Appeals Panel unanimously vacated Goodell’s punishment because he infringed upon the System Arbitrator’s exclusive jurisdiction to preside over pay-for-performance conduct. (Ginsberg Ex. A.) The Appeals Panel held that “the Commissioner would have exclusive jurisdiction to impose penalties for the players’ agreement to seek to injure opposing players,” if any, but not for “an agreement to receive (or fund) payments from the pool . . . (whether for licit or illicit behavior).” (*Id.* at 3.) The Panel concluded: “[t]o the extent that any portion of the discipline previously imposed was ascribed to the undisclosed compensation aspects of the program, any re-imposed discipline should be adjusted accordingly.” (*Id.* at 4.)

Upon review, and over the renewed objection that he could not act as the neutral arbitrator in this matter, Goodell, on October 9, 2012, reimposed the same suspension for Vilma, ignoring his own earlier determination that the one-year suspension reflected a combination of the pay-for-

⁷ For clarity, the Warner and Favre allegations concern a divisional playoff game for the 2009 season against the Arizona Cardinals, played on January 16, 2010, and the NFC Championship game for the 2009 season, played on January 24, 2010.

performance allegations (which Goodell could no longer consider) and the \$10,000 bounty allegations, and obviously rejecting in its entirety Vilma's lengthy explanations and answers to the charges provided to Goodell on September 17, 2012. (*See* Ginsberg Ex. F.)

C. The NFL's Abuse of Process

Throughout this matter, the NFL has shown disdain for the tenets of fundamental fairness and industrial due process which must form the backbone of any labor arbitration.⁸

The NFL's Refusal to Produce Evidence

Goodell claims he has reviewed "approximately 18,000 documents totaling more than 50,000 pages" and claims to have conducted extensive witness interviews during the course of their investigation into the alleged Bounty Program. (Doc. No. 23-4.) Goodell has produced approximately 200 pages of paper and has not produced a single note or memorandum reflecting a single witness interview.

Long before the defective arbitration process started, Vilma attempted to open communications with Goodell to share information about the so-called Bounty Program. On March 14, 2012, Vilma's counsel offered to meet about the accusations against Vilma if Goodell in fact was considering disciplining Vilma. Vilma's counsel confirmed the offer in a letter dated March 21, 2012. (Hearing Ex. 5.) Goodell never responded to Vilma's offer to meet.

By email dated March 30, 2012, NFL Senior Vice President Adolpho Birch requested to interview Vilma. In response, Vilma, by letter dated April 2, 2012 (Hearing Ex. 6), agreed to

⁸ During an August 10, 2012 hearing in this matter, the Court made certain findings about the NFL's process:

I think the proceedings were neither transparent nor fair. I think I made that clear the other day. I think the refusal to identify the accusers, much less have them at the hearing to be cross-examined, to look at biases, flaws in their testimony, and 18,000 documents that were apparently relied upon by Mr. Goodell, less than 200 were actually provided to [Vilma], many of them were redacted... I think you were thwarted at every time by Mr. Goodell's refusal to provide you meaningful access to witnesses and to documents.

(Hearing Tr. 8:14-25.)

meet. In order to assure that Vilma was prepared and understood Goodell's concerns, Vilma requested the NFL to provide him with the materials the NFL had gathered "which the NFL contend[ed] provided a basis to investigate Vilma." Vilma promised to provide the NFL with complete "detail[] [of] Vilma's knowledge regarding [the Bounty Program] allegations." *Id.*

By letter dated April 5, 2012, the NFL refused to provide Vilma with any information or other supposed evidence, claiming "[w]e see no basis upon which it would be appropriate to make any of the material available, and we decline to do so." (Hearing Ex. 8.) The answer was a precursor to a statement the NFL's outside counsel made that requesting to review evidence was a "red herring," since the players knew "what happened." (NFLPA Ex. L at 6.) In the April 5 correspondence, the NFL also refused to meet with Vilma's counsel.

Vilma continued to ask to review the supposed "evidence," and the NFL continued to refuse to provide any. Denied all evidence prior to imposition of the suspension and rebuffed in his efforts to meet with Goodell for a full and fair exchange of information, Vilma made yet another effort to understand the basis of the allegations against him. By letter dated May 7, 2012, days after Vilma learned that he was facing a one-year suspension and would need Goodell's permission ever to play football again, Vilma again requested "all evidence gathered during the course of the NFL's investigation that supports, corroborates or relates in any way to . . . Vilma's alleged participation in a purported [B]ounty [P]rogram." (Hearing Exs. 7, 9.) Vilma also filed a timely appeal of the suspension. (*Id.*)

By letter dated May 23, 2012, the NFL again refused to provide Vilma with any information or other supposed evidence. (Hearing Ex. 11.)

By letter to Goodell dated June 15, 2012, in anticipation of the appeal hearing before Goodell, Vilma identified fundamental flaws in the process invoked to suspend him, requested the NFL to produce all of the evidence gathered during its investigation, to make available for

examination at the Appeal Hearing specified witnesses and also challenged Goodell's jurisdiction to preside over the proposed punishment.⁹ (Hearing Ex. 11.) .

The NFL's Insufficient Production of Documents

Article 46, § 2(f)(ii) of the CBA provides, as a mandatory procedural requirement for hearings conducted to determine whether actions constitute conduct detrimental, as follows:

Discovery. In appeals under Section 1(a), the parties shall exchange copies of any exhibits upon which they intend to rely no later than three (3) calendar days prior to the hearing. Failure to timely provide any intended exhibit shall preclude its introduction at the hearing.

On June 15, 2012, less than 72 hours before the hearing, the NFL for the first time provided any documents. Rather than the universe of 50,000 documents Goodell had reviewed, it produced 182 pages of documents. (NFLPA Ex. Q.) The NFL did not produce a single note taken during any witness interviews, a memo relating to a single witness interview or identify the source of any of the documents produced. The NFL also failed to produce original or unredacted copies of documents but, instead, retyped and otherwise altered documents that it obtained during the investigation and that it supposedly intended to use to satisfy its burden of proof at the Appeal Hearing. The NFL also refused to disclose the source of the supposed information or the date on which the documents were created.

The Appeal Hearing was held on June 18, 2012, with Goodell serving as the hearing officer. The NFL did not make available for examination a single witness with first-hand knowledge of the underlying facts. As further indication that Goodell could not and would not be a fair and neutral arbitrator, the Appeal Hearing from the very beginning was controlled by NFL

⁹ Regarding witnesses, Goodell essentially had exerted absolute control over Williams, conditioning his reentry into the NFL entirely on Goodell's approval and Williams' cooperation with him, had refused to provide access to former Saints assistant coach Mike Cerullo, and, with regard to Saints head coach Sean Payton, assistant coach Joe Vitt and general manager Mickey Loomis, barred them from having any contact with the Saints or any person associated with the NFL during the suspensions.

General Counsel Jeff Pash notwithstanding the fact that the NFL was the adverse party to Vilma and the other players. (*See* NFLPA Ex. T at 4.)

At the outset of the Appeal Hearing, Vilma moved Goodell to rescind the suspension and dismiss the proceedings. Goodell refused. (*Id.* at 15.) In light of Goodell being unable to act as a fair and neutral arbitrator, the NFL's failure to produce requested evidence, failure to produce unaltered evidence, failure to produce witnesses, and other procedural and jurisdictional infirmities, Vilma could not substantively participate in the Appeal Hearing.

By decision dated July 3, 2012, Goodell affirmed his suspension of Vilma.

On September 7, 2012, an Appeals Panel constituted pursuant to the NFL-NFLPA CBA vacated the NFL's suspension of Vilma, Scott Fujita, Will Smith and Anthony Hargrove. (Ginsberg Exs. A, B.) Although the process started over, the NFL continued its abuse of the process.

By letter dated September 11, 2012, Vilma requested all evidence the NFL contends supports any discipline to be imposed on Vilma and reaffirmed his position that Goodell could not serve as the arbitrator in any appeal as a result of his partiality. (*See* Ginsberg Ex. D.) By letter dated September 13, 2012, Vilma again requested all evidence relating to the NFL's allegations. (*See* Ginsberg Ex. E.) The NFL ignored Vilma's September 11 and 13 letters.

On September 17, 2012, Vilma met with Goodell at the NFL's offices. (*See* Ginsberg Ex. F.) Present at the meeting in addition to Goodell were Pash, Birch, Mary Jo White, White's colleague, NFL Security Officer Jeff Miller, Vilma, and Vilma's counsel. The NFL had not advised Vilma that White, or anyone other than Goodell, Pash and Birch, would be present.

The September 17 meeting lasted approximately three hours. For about 30 - 40 minutes, Vilma's counsel identified flaws in the "evidence" that Goodell had claimed justified punishing Vilma. The bulk of the meeting consisted of White cross-examining Vilma. Among other things,

Vilma testified under cross-examination that he never participated in any program designed to injure opposing players and never placed a bounty on an opposing player. He also testified that he never offered a reward or encouraged a teammate in any manner to injure an opposing player.

On October 9, 2012, Goodell imposed the same discipline against Vilma as he had imposed before the Appeals Board told him he had overstepped his jurisdiction and authority: a suspension for the entire 2012 season. On that same day, the NFL posted on the NFL website 73 pages of PowerPoint slides and photographs supposedly relating to the Bounty Program punishments. (*See* Ginsberg Exs. M, N.) Goodell had not provided to Vilma 31 pages of those documents at any time until essentially simultaneously posting them on the website. Several of the documents concern a past Saints game against the Carolina Panthers and, despite never having produced these documents or asked Vilma about them, Goodell substantively relied on the new documents in issuing his newest discipline. (*See* Ginsberg Ex. L at 2-3.)

Vilma appealed Goodell's discipline by letter dated October 11, 2012. (Ginsberg Ex. O.) In the October 11, 2012 appeal letter, Vilma requested Goodell to recuse himself from serving as the arbitrator. Vilma also requested the NFL to produce, *inter alia*, all documents or materials upon which the NFL has relied or intends to rely in adjudicating discipline and all potentially exculpatory documents and commit to making available for examination certain witnesses with knowledge of the underlying facts, including former Saints defensive coordinator Gregg Williams and former Saints defensive assistant coach Mike Cerullo. In the October 11 letter, Vilma also requested access to certain originals of handwritten notes and documents. As Vilma informed the NFL, there are serious questions about the authenticity, manner and timing of creation, and possible alteration, of certain documents. (*Id.*)

Because of the nature and timing of this matter, Vilma requested the NFL to respond by the end of business on October 11. (*Id.*) The NFL has not provided a response.

D. The NFL's Mischaracterization of Evidence

The NFL finally produced, less than seventy-two hours before the First Appeal Hearing, "evidence" Goodell had publicly proclaimed supported his conclusions about Vilma and his colleagues and former colleagues. The falsity of the "evidence," and fabrication or alteration of its content, is readily apparent.

Exhibit Number 10

The NFL produced a one-page exhibit that it claimed offered irrefutable proof of a Bounty Program and Vilma's participation in the Bounty Program. Vilma has since learned that the document was purportedly authored by Cerullo, a disgruntled former Saints coach.¹⁰

Exhibit 10 (NFLPA Ex. Q at 86) is entitled "Minnie Game," has the caption "\$ \$ QB [illegible] Out," and bears the names of several people with words such as "\$10,000 QB." One of those captions is "Vitt -- \$5,000 ... QB out pool," *Id.*, referring to Saints assistant coach Joe Vitt. The NFL has now been forced to admit that Vitt did not put any money into or participate in a Bounty Program. (Hearing Tr. 60:2-6.)

One of the notations on the list is "QB Grant -- \$10,000." Former Saints defensive player Charles Grant was on injured reserve for the game in question, as NFL records surely show, and did not attend the pre-game meeting before the Vikings playoff game, to which Exhibit 10 supposedly relates (Hearing Tr. 59:13-18). Another notation on the list is "QB Pool Ornstein -- \$10,000." Michael Ornstein, an associate of Saints head coach Sean Payton, has publicly and vehemently denied that he ever contributed \$10,000 or any amount of money to a Bounty Program and has denied the existence of a Bounty Program. The others identified on Exhibit 10 also have denied ever contributing any amount of money to a Bounty Program and denied the existence of a

¹⁰ The NFL did not produce a non-transcribed version of the document and reveal its purported creator (Cerullo) until September 17, 2012, following the vacatur of Goodell's first arbitration award.

Bounty Program, including Roman Harper, Darren Sharper, Randall Gay, Fujita, Smith, and Vilma. (Hearing Tr. 79-95, 137-61.) No one identified on Exhibit 10 has ever said that a Bounty Program ever existed.

Authenticity Issues

There are serious questions about the authenticity of certain of the documents produced. Since the inception of this case, NFL players, staff and persons with knowledge of the matter have warned Vilma and his counsel that Cerullo altered certain documents and created others once he knew his days with the Saints were numbered. (Ginsberg Decl. ¶ 32.)

Vilma requested the NFL to produce the original handwritten document containing the “Minnny Game” notes, as well as other handwritten documents, so that the materials can be thoroughly analyzed. (Ginsberg Ex. O.) The NFL has not made the documents available.

NFL Claims About Vitt

The NFL identified Vitt publicly as having corroborated and labeled him as a financial contributor to the Bounty Program. Vitt, who attended all pre-game defensive team meetings, adamantly denied that a Bounty Program existed, denied that Vilma ever offered \$10,000 for an injury to Warner or Favre, or any amount of money for an injury to any player. (Hearing Tr. 119:5-18; 125:18-20.) The NFL has provided no notes of interviews with Vitt.

The Hargrove Declaration

In the May 2 Press Release, Goodell claimed that “[Anthony] Hargrove submitted a signed declaration to the league that established not only the existence of the [Bounty] program at the Saints, but also that he knew about and participated in it.” (Hearing Ex. 3.) Goodell’s characterization of the Hargrove Declaration is grossly inaccurate. The Hargrove Declaration does not admit or establish the existence of an alleged Bounty Program. In fact, the Hargrove Declaration details Hargrove’s explicit denials of an alleged Bounty Program, and Hargrove has

stated under oath that, in March 2010, he “repeatedly denied knowledge of any bounty or bounty program.” (*See* NFLPA Ex. W.)

Hargrove Video

The NFL produced on the eve of the First Appeal Hearing “evidence” which depicted a portion of the Saints-Vikings playoff game. The video shows Vitt informing the defensive players that Favre had been injured and was being replaced by a new quarterback. The NFL contends that Hargrove then could be heard saying, “[g]ive me my money.” (NFLPA Ex. A at 7.) The person heard on the video unequivocally is not Hargrove, nor is it any other player whom the NFL has accused of participating in a Bounty Program. The NFL never even attempted to interview the participants in the videotaped conversation.

The Ornstein Emails

In the March 21 Press Release, Goodell identified an email message from Ornstein as a crucial piece of evidence establishing the existence of a Bounty Program. Goodell claimed that “prior to the Saints’ opening game in 2011, Coach Payton received an email from a close associate [Ornstein] that stated in part ‘PS Greg Williams put me down for \$5000 on Rogers (sic).’”

Ornstein, who was never a Saints employee, told the NFL that the email was part of a “running joke,” that he never provided any money for a bounty, that, as far as he knows, there was never a Bounty Program, and that he has no knowledge about anyone with the Saints ever funding a bounty of any kind on any opposing player. (Hearing Tr. 59:21-60:6.)

The NFL produced for the First Appeal Hearing a 2009 email from Ornstein to Williams. The email, which communicated a promise from Ornstein to send money to Williams, was included among the “evidence” produced by the NFL. In fact, Ornstein communicated directly to Goodell that the email concerned Ornstein’s contributions to a charitable organization run by Williams. Goodell has provided no information about Ornstein’s denials or any notes of

interviews with Ornstein.

NFL officials also claimed publicly that Ornstein provided evidence that Vilma offered \$10,000 for the injury of Favre. Ornstein was at the pre-game meeting before the 2009 NFC Championship game where the NFL alleges that Vilma's offer was made. Ornstein has stated publicly what he also says he told the NFL investigators: "I never corroborated \$10,000. The only thing that I told them was that we had the [pregame] meeting, we jumped around, we screamed around, and I never saw [Vilma offer] one dime. And I never heard him say it. Did I say to the league that I saw Jonathan Vilma offer \$10,000? Absolutely not." Ornstein also has publicly said that Vilma did not offer \$10,000 for an injury to Warner or any amount of money as an incentive to injure any other player.

Cerullo Statements

Cerullo was an assistant coach with the Saints from 2007 through the 2010 season. The Saints terminated Cerullo following various incidents, including disappearing from the Club during the 2009 Season and during the week leading up to the Super Bowl in 2010, providing pretextual excuses that were shown to be inaccurate. (Hearing Tr. 57:20-58:22.) Cerullo pledged revenge against the Saints, and particularly against Vitt, following his termination. (*Id.*)

Goodell and the NFL relied principally upon Cerullo's statements during its investigation and the NFL interviewed Cerullo multiple times. Goodell and the NFL have never disclosed notes of any of their interviews with Cerullo.

The Williams Declaration and Cerullo Declaration

During a meeting with Goodell on September 17, 2012, the NFL for the first time provided Declarations from Cerullo and Williams. (*See* Ginsberg Exs. G, H.)

The Cerullo Declaration, dated May 22, 2012, repeats allegations relating to a bounty Vilma supposedly placed on Warner and Favre. Cerullo also swears that he "personally collected

the money that Mr. Vilma left on a table at the front of the room [before the Cardinals game] and subsequently gave it to Mr. Williams for safekeeping.” (Ginsberg Ex. G at ¶ 13.)

The Williams Declaration, executed on September 14, 2012, contradicts the Cerullo Declaration. Despite Cerullo’s allegation that Williams was present when Vilma supposedly offered a bounty to award an injury to Warner, Williams makes no allegations relating to Warner and does not support Cerullo’s – or Goodell’s – claim that Vilma offered any incentive to encourage anyone to injure Warner. Concerning Cerullo’s claim that Cerullo gave to Williams Vilma’s alleged \$10,000 bounty on Warner, Williams swears that no one gave him any money to hold. (Ginsberg Ex. H ¶ 12.)¹¹

Jimmy Kennedy

On October 9, 2012, Goodell sent a memo to NFL Clubs attempting to justify his most recent discipline of Vilma and the other players. (“October 9 Memo.”) (*See* Ginsberg Ex. P.) Goodell claims that Brad Childress, former Vikings head coach, informed the NFL that Kennedy, a former Viking, “had told [Childress] that the Saints defensive unit had offered a \$10,000 bounty on Mr. Favre” and that Kennedy “identified Anthony Hargrove... as the source of his information.” Goodell also claims that the NFL interviewed Kennedy as part of its investigation.

Kennedy vehemently denies all of Goodell’s accusations, including that he told anyone that the Saints had a bounty on Favre, that he had any conversation with Hargrove, or that the NFL ever interviewed him about the allegations. (*See* Ginsberg Decl. ¶¶ 45-47, Ex. Q.)

Saints Defensive Players

Each of the other Saints and former Saints players whom Goodell has punished has

¹¹ Cerullo swears he gave the \$10,000 to Williams before the Warner game. Williams swears he never had or was given the \$10,000, and makes no mention of any money at the Warner pre-game meeting. Vilma swears he never had \$10,000. Nearly a dozen players swear Vilma never had \$10,000. Yet, Goodell concluded that Vilma had the \$10,000 before both the Warner and Favre games.

vehemently and unequivocally denied the existence of a Bounty Program and that any player offered a monetary incentive to injure an opposing player. Moreover, there is not a single Saints or former Saints player who witnessed Vilma offer \$10,000 for an injury to Warner or Favre, or any amount of money for an injury to any player. (Hearing Tr. 93, 125, 141, 146-47, 150, 160.)

E. The NFL's Refusal to Consider Evidence

Throughout this process, the NFL, while mischaracterizing evidence to fit its predetermined narrative, at the same time has wholly ignored exculpatory evidence provided by Vilma.

Statistical Information Contradicting the Bounty Allegations

Vilma has provided to Goodell statistical evidence calling into question the conclusion that the Saints ever had a program designed to incite opposing players' injuries. For example, as Vilma informed Goodell, the four players whom Goodell alleges were the leaders and participants of the Bounty Program combined received a total of nine penalties resulting in fines during the three years in which Goodell claims the Bounty Program existed. Vilma only received two fines during those three years, one for roughing the passer in 2009 and once for grabbing a facemask in 2010. The statistics place the four players on the low end of players fined for on-field conduct. Vilma also provided to Goodell an analysis of official NFL injury reports for the 2009, 2010 and 2011 seasons prepared by American Enterprise Institute economists. (*See* Ginsberg Exs. I, J.) The statistics show that during these seasons the Saints injured fewer opponents than 31 of the 32 NFL Clubs. (*Id.*)

Goodell has ignored such objective information.

Vilma Withdrew No Cash

Vilma has never, either in January 2010 or at any time since joining the Saints, had a bank account in New Orleans or anywhere within the State of Louisiana. By letter dated September 28,

2012, Vilma's counsel explained that it would have been virtually impossible for Vilma to have possessed \$10,000 in cash and offered the bounties on Warner and Favre, in part because Vilma's ATM card, which is the only method by which he could withdraw cash, has a \$500 per day limit on withdrawals. (Ginsberg Ex. K.)

Goodell and the NFL ignored the September 28 letter and did not ask to review the supporting documents.

ARGUMENT

The Court should vacate an arbitration decision where: (1) there is "a reasonable impression of partiality," *United Steel Workers AFL-CIO v. Murphy Oil USA, Inc.*, 09-cv-7191, 2010 WL 3074322, at *3 (E.D. La. Aug. 3, 2010), quoting *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987); *Householder Group v. Caughran*, 354 F. App'x 848, 852 (5th Cir. Nov. 20, 2009) (whether "a reasonable person would have to conclude that [the arbitrator] was partial to one party"); *Dealer Computer Servs., Inc. v. Michael Motor Co., Inc.*, 761 F.Supp. 2d 459, 465 (S.D. Tex. 2010) (arbitrator conduct that creates "a reasonable impression of bias" rises to the level of evident partiality where it "creates a strong impression that [the arbitrator] ha[s] already decided the disputed issues in the [] [a]rbitration before it beg[ins]"); (2) there is not "a fair and full hearing," *Int'l Chemical Workers Union v. Columbian Chemicals Co.*, 331 F.3d 491, 496 (5th Cir. 2003); (3) the arbitration award is "arbitrary and capricious," *Braham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 383 (5th Cir. 2004); (4) the arbitration award fails to draw its essence from the collective bargaining agreement, *Teamsters Local No. 5 v. Formosa Plastics Corp.*, 363 F.3d 368, 371 (5th Cir. 2004); or (5) the arbitrator "exceeds his authority," *Houston Lighting & Power Co. v. Int'l Brotherhood of Electrical Workers, Local Union No. 66*, 71 F.3d 178, 182 (5th Cir. 1995) (citation omitted). See 29 U.S.C. § 185; see also 9 U.S.C. § 10(a)(1-4). (court empowered to vacate an arbitration decision where, *inter alia*, "there was evident partiality .

. . . in the arbitrator[.]” or “the arbitrator[.] exceeded [his] powers”). Simply put, an arbitrator “does not sit to dispense his own brand of industrial justice.” *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Here, Goodell’s bias and partiality has compromised the integrity of the entire process, making a fair adjudication impossible and undermining the most fundamental notions of fairness and due process.

I. GOODELL IS NOT AN IMPARTIAL ARBITRATOR

A. Goodell’s Bias and Partiality Undermines the Suspensions

The Court should vacate an arbitration award under the LMRA when there is “a reasonable impression of partiality.” *United Steel Workers AFL-CIO*, 2010 WL 3074322, at *3, quoting *Bernstein*, 813 F.2d at 732. The Court also should vacate an arbitration award, pursuant to the FAA, 9 U.S.C. § 10(a)(2), “where there was evident partiality . . . in the arbitrator[.]” Goodell’s partiality is demonstrated in several material ways.

Goodell was the investigator, prosecutor, judge, jury, appellate court and ultimate decision-maker in this process. The CBA empowers Goodell to fill the role of arbitrator. Art. 46. Concomitant with that responsibility, however, is the responsibility to satisfy the CBA’s mandate that Goodell fulfill his role as arbitrator in a fair and neutral manner. In contravention of that responsibility, Goodell publicly prejudged the outcome of the Appeal Hearing and allowed his bias to compromise basic notions of due process.

Goodell denied Vilma all but a small percentage of the 50,000 pages of information, including 18,000 documents, the NFL supposedly gathered in its investigation. (Doc. No. 23-4.) The CBA required the NFL to produce to Vilma, “all exhibits upon which [it] intend[ed] to rely.” Art. 46 Section 2(ii). It is not conceivable that Goodell ignored over 99 per cent of the information he reviewed when rendering his decisions. Goodell denied Vilma the right to examine the supposed witnesses upon whom the NFL relied and refused to produce any notes or

memoranda reflecting witness interviews. Documents used by the NFL appear to be altered and created after the relevant events, and the NFL refused Vilma access to the originals, preventing a forensic review of the documents. Goodell refused to produce any exculpatory evidence.

The commissioner of a professional sports league is not exempt from the requirement that he or she be impartial when serving as an arbitrator, and courts vacate arbitration awards when a commissioner falls short of the required standard of impartiality in considering a particular matter. *See, e.g., Morris v. New York Football Giants, Inc.*, 575 N.Y.S.2d 1013, 1017 (N.Y.Sup.Ct. 1991) (removing NFL Commissioner as arbitrator where plaintiffs demonstrated “evidence of lack of neutrality and ‘evident partiality’ and bias on the part of the Commissioner with respect to this specific matter”); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067, 1068 n.2 (2d Cir. 1972) (rejecting claim that court “had no power to direct the substitution of a neutral arbitrator for the disqualified Commissioner” and noting that “[t]his ruling in favor of a neutral arbitrator was, of course, designed to insure a fair and impartial hearing”).

The NFLPA accepted a certain amount of partiality when it agreed to allow Goodell to preside over conduct detrimental matters. *See NFLPA v. NFL*, 598 F.Supp. 971 (D. Minn. 2008). However, an arbitrator who publicly and unwaveringly prejudges a conflict thereby leaves himself or herself no room for deliberation or constructive contemplation. This consequence compromises fundamental due process safeguards and “proves that the arbitrator’s partiality prejudicially affected the award,” *Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 551 (8th Cir. 2007).

Goodell was not and cannot be an impartial arbitrator. Neither the bargain the NFLPA struck with the NFL nor the LMRA and FAA permit the consequences Vilma now faces.

B. Goodell Should Be Disqualified and the Court Should Appoint an Impartial Arbitrator

In the event the Court vacates the Arbitration Award, the Court can and should remand the action to a neutral arbitrator. Such exercise of authority is proper when an arbitrator holds a bias

that affects his ability to rule neutrally. *Major League Baseball Players Ass'n*, 532 U.S. at 512 (Stevens, J., dissenting) (internal quotations and citation omitted) (arbitrator's decision resting on factual errors or misinterpreting parties' agreement should be remedied "by vacating the award and remanding for further proceedings"); *Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto., Aerospace and Agric. Implement Workers, UAW*, 97 F.3d 155 (6th Cir. 1996) (remanding matter to new arbitrator where prior arbitrator "had indicated his feelings on the issue"); *Hart v. Overseas Nat'l Airways Inc.*, 541 F.2d 386, 393-94 (3d Cir. 1976) (remand to a new arbitrator proper if there is "a defect in the proceedings or bias on the part of the referee"); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067-68 (2d Cir. 1972) (affirming district court's decision to substitute a neutral arbitrator for the Commissioner "to insure a fair and impartial hearing"); *Third Nat'l Bank in Nashville v. WEDGE Group, Inc.*, 749 F.Supp. 851, 854-55 (M.D. Tenn. 1990) (neutral substitute appropriate when "the proprietary and fiduciary relationship between [the original arbitrator and one of the parties] would arguably taint an award in this dispute," even when the arbitrator's conflict was previously known by all parties to the dispute); *Morris*, 575 N.Y.S.2d at 1017 (NFL Commissioner removed by the court, pursuant to its "inherent" authority to do so, due to Commissioner's "interest in the outcome of the dispute" and his "past advocacy of a position in opposition to plaintiffs' position").¹²

As a matter of law, the NFL-NFLPA CBA necessarily contemplates that a fair and impartial individual will serve as the hearing officer on any appeal pursuant to Article 46. Goodell

¹² Similarly, in *Grand Rapids Die Casting Corp. v. Local Union No. 159*, 684 F.2d 413, 417 (6th Cir. 1982), the appeals court directed the district court to remand the matter to a different arbitrator because "the previous arbitrator ... [had] compromise[d] the appearance of impartiality to which the parties are entitled"; see also *Stroehmann Bakeries, Inc. v. Local 776*, 969 F.2d 1436, 1446 (3d Cir. 1992) (affirming remand for a *de novo* hearing before a new arbitrator where original arbitrator makes disparaging comments about a party and pronounces his intended decision "even though he had previously made it clear that he had not fully considered the evidence"); *Deaton Truck Line, Inc. v. Local Union 612*, 314 F.2d 418 (5th Cir. 1962) (affirming authority of district court to appoint arbitrator in action brought pursuant to LMRA); FAA, 9 U.S.C. § 5.

is anything but a fair and impartial arbitrator, so much so that he has allowed his partiality to dictate procedures that are fundamentally defective.

II. THE SECOND APPEAL HEARING, LIKE ALL PROCEDURES IN THIS MATTER BEFORE IT, IS FUNDAMENTALLY UNFAIR AND VIOLATES VILMA'S INDUSTRIAL DUE PROCESS

The LMRA and FAA demand “a fair and full hearing.” *Int’l Chemical Workers Union*, 331 F.3d at 496. A fundamentally fair hearing is one that provides “adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.” *United Steel Workers AFL-CIO*, 2010 WL 3074322, at *3 (internal quotations and citation omitted).

Goodell’s bias and prejudice has caused, and been matched by, a fundamentally-flawed process.

With regard to both the First and Second Appeal Hearings and process, Goodell refused to present a neutral and fair arbitrator at the Appeal Hearings, failed to produce over 99 per cent of the documents gathered during the NFL’s investigation as required by the CBA and industrial due process, failed to produce exculpatory evidence requested by Vilma, refused to produce any notes or memoranda from witness interviews, failed to present the purported sources of information or any witnesses with first-hand information for testimony and cross-examination, made others hesitant to testify by publicly proclaiming people like Vitt and Saints general manager Mickey Loomis as liars because they contradicted Goodell’s preconceived conclusions, made others, like Payton and Williams, unavailable by the conditions of their suspensions, made the entire Saints defense believe that each one of them stood to be punished by Goodell, refused to produce original documents for forensic evaluation, and fundamentally mischaracterized evidence.¹³

Vilma could not and cannot defend himself against the NFL’s accusations without

¹³ As shown at the July 26, 2012 hearing in this matter, having judicial oversight, and being outside of the confines of the NFL’s offices, made witnesses more comfortable in coming forward.

knowing the scope of the supposed evidence upon which the NFL's accusations are based and having access to exculpatory evidence.

The deprivation of access to a crucial witness is a well-recognized basis upon which to overturn employee discipline. *See, e.g., Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) (vacating arbitration award where “[a witness] was identified several times throughout the testimony” and “the documentary evidence did not adequately address such [witness’s] testimony”). Cerullo’s and Williams’ declarations contradict each other and undermine Goodell’s reliance on them in imposing the discipline. Furthermore, Cerullo would have been forced to admit his history of untruthfulness and his vendetta against the Saints if produced for testimony. Williams would have been forced to explain, if he were under oath, his long and sordid history in the NFL as the architect of pay-for-performance programs and the perpetrator of other activities that are best saved for cross-examination. Their absence fundamentally compromises the entire process. Further, it was improper for Goodell to have relied on their statements as a basis for Vilma’s discipline given their absence. *See, e.g., Boise Cascade Corp.*, 114 Lab. Arb. Rep. (BNA) 1379, 1384 (2000) (Crider, Arb.) (industrial due process calls for an employee to be “given the opportunity to face and cross-examine his accusers at the arbitration table; [p]rocedural due process requires the arbitrator disallow the affidavits of witnesses who, without any real showing of good cause, fail to appear and testify at the arbitration”); *see also Chevron-Phillips Chem. Co.*, 120 Lab. Arb. Rep. (BNA) 1065 (2005) (Neas, Arb.) (reinstating employee because he was denied the opportunity to confront his accusers); *Marion Power Shovel Div.*, 82 Lab. Arb. Rep. (BNA) 1014, 1016 (1984) (Kates, Arb.) (“[I]t is improper for the Company to rely upon the written statement of an employee without presenting his personal testimony, if his presence is requested by the Union and if the party relying upon his written statement has the power to have him appear at the hearing”).

Perhaps most fundamentally, Vilma has not and could not receive a fair hearing as long as Goodell presides. The supposedly fair and neutral arbitrator at the Appeal Hearings has prejudged the evidence, publicly proclaimed his conclusions in advance of the Appeal Hearings, and so vehemently endorsed the allegations against Vilma publicly and in advance of the Appeal Hearings that he could not possibly have acted in a fair and neutral manner. The NFL did not and cannot provide, and Vilma did not and will not receive, and, with Goodell (or even a hand-picked surrogate) as the arbitrator could not possibly receive, “a fair and full hearing.”

III. THE ARBITRATION PROCESS HAS FAILED TO DRAW ITS ESSENCE FROM THE COLLECTIVE BARGAINING AGREEMENT

The LMRA empowers the Court to vacate an arbitration award that fails to draw its essence from the collective bargaining agreement. *Teamsters Local No. 5 v. Formosa Plastics Corp.*, 363 F.3d 368, 371 (5th Cir. 2004). The NFL-NFLPA CBA contemplates a fair and just process. Goodell has provided Vilma with anything but due process, making a mockery of the dispute resolution process bargained for by the parties to the NFL-NFLPA CBA. Both substantively and procedurally, Vilma’s suspension fails to draw its essence from the NFL-NFLPA CBA.

In related ways, Goodell’s actions have violated other LMRA provisions designed to safeguard the dispute resolution system.

The LMRA, for example, empowers a court to vacate an arbitration award when the arbitrator “exceeds his authority.” *Houston Lighting & Power Co. v. International Brotherhood of Electrical Workers, Local Union No. 66*, 71 F.3d 178, 182 (5th Cir. 1995) (citation omitted). An arbitrator exceeds his authority by ignoring the “clear and unequivocal” language and intention of the collective bargaining agreement. *Id.* at 184. The CBA, as explained above, contemplates that a fair and neutral arbitrator preside over an appeal hearing.

The LMRA also empowers a court to vacate an arbitration award that is “arbitrary and

capricious.” *Braham*, 376 F.3d at 383. An arbitration award is “arbitrary and capricious when it is so palpably faulty that no judge, or a group of judges, could ever conceivably have made such a ruling.” *Berk-Cohen Associates, L.L.C.*, 264 F.Supp.2d 448, 453 (E.D. La. 2003) (citations omitted). No system of American justice permits a person to be punished without having had the opportunity to substantively review, investigate and question the evidence and the sources of such evidence against him or her, and then to be judged by a person who previously had publicly prejudged the merits of the allegations. *See also* FAA, 9 U.S.C. § 10(a)(3),

Goodell was arbitrary and capricious by allowing the NFL: to fail to produce or present nearly all of the evidence gathered during the course of the investigation; to refuse to produce for cross-examination the persons who supposedly provided information to the NFL, thus preventing any possibility of assessing the credibility of the evidence; to undermine Vilma’s right to effective assistance of counsel by denying counsel the ability to review relevant evidence and confront and examine the witnesses or sources of the alleged evidence; and, to alter evidence and deny Vilma the right to examine the unaltered evidence presented against him.

CONCLUSION

For the foregoing reasons, and for those previously briefed and/or otherwise addressed with this Honorable Court, Vilma respectfully requests the Court to vacate the Arbitration Award, and for such other relief as the Court deems just and proper.

Dated: New York, New York
October 15, 2012

Respectfully submitted,

PETER R. GINSBERG LAW, LLC

By: s/ Peter R. Ginsberg
Peter R. Ginsberg, *pro hac vice*
12 East 49th Street, 30th Floor
New York, NY 10017
(646) 374-0030
pginsberg@prglaw.com
Attorneys for Plaintiff

Dated: New Orleans, Louisiana
October 15, 2012

WILLIAMS LAW GROUP, LLC

By: s/ Conrad S. P. Williams, III
Conrad S.P. Williams, III (14499)
J. Christopher Zainey, Jr. (32022)
909 Poydras Street, Suite 1625
New Orleans, LA 70112
(985) 876-7595
duke@williamslawgroup.org
chris@williamslawgroup.org
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2012, a copy of the foregoing was served via the CM/ECF system upon the following known counsel for the National Football League:

Gregg H. Levy
Benjamin C. Block
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue NW
Washington, D.C. 20004
(202) 662-5292

Gladstone N. Jones, III
Lynn E. Swanson
JONES, SWANSON, HUDDALL
& GARRISON, LLC
Pan American Life Center
601 Poydras Street, Suite 2655
New Orleans, LA 70130-6004
(504) 523-2500

s/ Peter R. Ginsberg _____

Peter R. Ginsberg