

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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JONATHAN VILMA,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO. 12-CV-
	:	1283 c/w 12-CV-1718 and 12-
VERSUS	:	CV-1744
	:	
	:	SECTION: "C"
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ROGER GOODELL, ET AL,	:	DIVISION: (3)
	:	
Defendants.	:	JUDGE HELEN G. BERRIGAN
	:	
<u>THIS DOCUMENT REFERS TO 12-CV-1718:</u>	:	MAGISTRATE JUDGE
	:	DANIEL E. KNOWLES, III
JONATHAN VILMA,	:	
	:	
VERSUS	:	
	:	
THE NATIONAL FOOTBALL LEAGUE.	:	
	:	
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**PLAINTIFF’S SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT
OF EXPEDITED MOTION TO VACATE AN ARBITRATION AWARD AND MOTION
TO RECUSE FORMER COMMISSIONER PAUL TAGLIABUE**

NFL Commissioner Roger Goodell has now recognized that his own defective investigation, his near irrational defense of his own actions and the investigation he supervised, his public prejudgments of the Players’ guilt, his defense of the suspensions he imposed, his willingness to compromise a process that should have been fair but instead was tainted, and his own conduct generally have rendered him incapable of serving as a fair and impartial arbitrator in this matter. Unfortunately, Goodell has now perpetuated, and indeed exacerbated, the defective process by appointing a hearing officer who could not be more conflicted. To that end, Goodell appointed his predecessor, Paul Tagliabue, to serve as the arbitrator for the Second Appeal Hearing.

Mr. Tagliabue practices law at Covington & Burling, LLP, counsel for the NFL in all

bounty-related matters and counsel for Goodell in the related defamation lawsuit. And, if that were not bad enough to raise serious concerns about Tagliabue's ability to preside over his successor's investigation, Tagliabue remains one of the NFL's most highly compensated employees. Justice and the law require that any arbitration award issued by Tagliabue be vacated for the reasons previously briefed and for those stated herein.

In appointing Tagliabue, Goodell has shown beyond any doubt that he simply cannot be allowed to appoint the arbitrator to adjudicate this matter, and the time has come for the Court to appoint a person who can fairly and impartially resolve the instant dispute according to the standards demanded by federal law.¹

SUPPLEMENTAL FACTS²

By letter dated October 9, 2012, Goodell reissued his suspension of Vilma for the entire 2012 season. Goodell, as he did before, produced no witness to substantiate his accusations against Vilma, provided no notes or memos of witness interviews (although he produced at the second hearing for the first time conflicting Declarations from Gregg Williams and Michael Cerullo), produced no exculpatory information, and allowed Vilma to review about one per cent of the information the NFL gathered during the course of its supposed investigation. Vilma appealed Goodell's discipline by letter dated October 11, 2012.

By letter dated October 19, 2012, the NFL advised that Goodell had appointed Tagliabue as his replacement to serve as the arbitrator at Vilma's Second Appeal Hearing.

¹ The NFLPA is filing a Motion requesting Tagliabue to recuse himself from acting as arbitrator in this matter. Vilma is joining in that Motion in its entirety.

² The Supplemental Facts described herein are supported by the October 24, 2012 Declaration of Christopher R. Deubert, submitted herewith, and the Exhibits attached thereto.

Tagliabue's Conflicted Role

Tagliabue served as NFL Commissioner from 1989 until 2006, when he was replaced by Goodell. Prior to serving as Commissioner, Tagliabue practiced law at Covington & Burling from 1969 to 1989. Tagliabue served as the NFL's chief outside counsel while at Covington & Burling. Upon his departure from the NFL in 2006, Tagliabue returned to Covington & Burling, where he is currently Senior Of Counsel.

Covington & Burling is the NFL's chief outside counsel. The Firm now represents the NFL and Goodell in this matter and all matters related to the New Orleans Saints alleged Bounty Program.

Covington & Burling has represented the NFL and its employees, including Tagliabue during his time as Commissioner, *see, e.g., Sullivan v. Tagliabue*, 828 F.Supp. 114 (D.Mass. 1993) (suing NFL Commissioner personally along with NFL for alleged antitrust violations relating to NFL Club ownership), on a regular basis for more than fifty years, *see, e.g., American Football League v. National Football League*, 27 F.R.D. 264 (D.Md. 1961) (earliest reported decision in which Covington & Burling represented the NFL). During that time, Covington & Burling has represented the NFL in 63 matters resulting in reported decisions. Tagliabue is identified as counsel to the NFL in 13 of those cases during the 1970s and 1980s.

Covington & Burling's representation of the NFL is as active as ever. Since Tagliabue returned to the firm in 2006, Covington & Burling has represented the NFL in thirteen matters resulting in reported decisions. In 2010 alone, the NFL paid Covington & Burling \$3,831,250 in

legal fees, according to the NFL's 2010 Form 990, Return of Organization Exempt from Federal Income.³

Tagliabue also is still a paid employee of the NFL. The NFL's 2010 Form 990 reveals that Tagliabue was paid \$1,000,000 in base compensation by the NFL in 2010. Additionally, Tagliabue received \$7,583,000 in retirement and other deferred compensation in 2010.

In the instant matter as well as in the related defamation lawsuit, *Vilma v. Goodell*, 12-cv-1283 (E.D.La.), Tagliabue's longtime Covington & Burling colleague, Gregg Levy, is the NFL's and Goodell's chief outside counsel. Tagliabue now has been placed in the position of presiding over a matter in which one of his Firm's most important clients, the NFL, and one of his longtime colleagues have an undeniable interest. Moreover, the NFL may argue – and Covington & Burling – if Tagliabue rules in its favor that the arbitrator's findings in the hearing may have some consequence to Vilma's contention that Goodell acted with reckless disregard in publicly proclaiming Vilma's guilt of these serious acts (notwithstanding that those pronouncements preceded by months Vilma's opportunity to present his position and, indeed, before the time that Goodell now admits he even started to review the players' conduct in this matter).

By letter dated October 22, 2012, we requested additional information concerning Tagliabue's relationship with, and compensation from, the NFL. Specifically, we requested: (1) the amount of compensation paid by the NFL to Tagliabue, directly or indirectly, since he ended his tenure as NFL Commissioner in 2006; (2) the amount of legal fees paid by the NFL, directly and indirectly, to Covington & Burling since Tagliabue rejoined the Firm in 2006; (3) details regarding matters in which Covington & Burling has acted as counsel to the NFL and/or any

³ The NFL claims tax exempt status and therefore must file a Form 990 with the Internal Revenue Service each year. The 2010 Form 990 is the most recent filing available.

individuals associated with the NFL, including Commissioner Goodell, and any NFL Club, since Tagliabue rejoined the Firm in 2006; and (4) details regarding all matters in which the NFL has retained Tagliabue for any matter beginning in 2006. The NFL denied our requests by correspondence dated October 23, 2012 letter and refused to provide essentially any information regarding Tagliabue's relationship with the NFL.

By letter dated October 22, 2012, NFLPA Executive Director DeMaurice Smith also addressed the ethical rules of the District of Columbia Bar with regard to Tagliabue's involvement in this matter as arbitrator. Specifically, Smith explained that there is a non-waivable conflict between a Firm and its attorneys' obligations vigorously to represent a client and one of the Firm's attorney's obligations to act as an arbitrator in a dispute involving the Firm's client. *See* D.C. Bar Legal Ethics Comm., Op. 276 (1997). Smith requested Tagliabue to consider whether he could serve as the arbitrator in this matter. By letter dated October 23, 2012, the NFL rejected Smith's analysis.

ARGUMENT

I. TAGLIABUE IS NOT AN IMPARTIAL ARBITRATOR AND MUST BE DISQUALIFIED

The Labor Management Relations Act and the Federal Arbitration Act demand that arbitration proceedings be conducted as "a fair and full hearing." *Int'l Chemical Workers Union v. Columbian Chemicals Co.*, 331 F.3d 491, 496 (5th Cir. 2003). 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 v. Murphy Oil USA, Inc.*, 09-cv-7191, 2010 WL 3074322, at *3 (E.D. La. Aug. 3, 2010) (internal quotations and citation omitted). A court is empowered to vacate an arbitration decision where any of these requirements are violated. *Id.*, citing *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) (evident partiality sufficient for vacatur exists where "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]"); 9 U.S.C. § 10. The NFL has again violated the requirements of federal labor law.

A reasonable person would have to conclude that Tagliabue's relationships with the NFL and his law firm Covington & Burling's relationship with both the NFL and Goodell must compromise his responsibilities as an arbitrator in this matter and certainly undermine any confidence in his decision. *See Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968) (vacating award where business relationship between arbitrator and party was "repeated and significant," the party to the arbitration was one of the arbitrators "regular customers," and "the relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit"); *see also Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007) (finding arbitrator to be evidently partial where there was a potential business relationship between his company and one of the parties to the arbitration). Tagliabue has been working for, or closely with, both the NFL and the Firm for his entire professional career, spanning 43 years. The NFL still pays Tagliabue millions of dollars every year. The NFL also pays his law firm millions of dollars each year. Tagliabue's compensation from his law firm necessarily is based in part upon fees paid by the NFL. Tagliabue's law firm – and thus, as mandated by the Rules of Professional Conduct, Tagliabue – has a responsibility vigorously to defend the NFL's and Goodell's interests. Further, as a long-

time icon of the NFL, Tagliabue necessarily is inclined to protect the reputation and standing of the NFL.

A conflict of interest occurs where “the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” Model Rules of Prof'l Conduct R. 1.7(a)(2); *see also* D.C. Bar Legal Ethics Comm., Op. 276, *supra*. Tagliabue, because of his employment with Covington & Burling, must unwaveringly serve the best interests of the NFL. That ethical duty necessarily conflicts with Tagliabue's duty to serve as a fair and impartial arbitrator in this matter. Model Rule 1.7(a)(2) precludes satisfying both sets of obligations.

In sum, Tagliabue cannot serve as an impartial arbitrator without compromising Covington & Burling's and his representation of Goodell and the NFL. Any arbitration award short of a total affirmation of Goodell's punishment conflicts, ostensibly at least, with what is the NFL's best interests. Likewise, any arbitration award challenging or rejecting Goodell's conduct in this matter could jeopardize Goodell's position in the pending defamation case. If Tagliabue finds – as he should – that Goodell imposed discipline without basis, it follows that Goodell's comments concerning the purported Bounty Program were reckless or in disregard of the truth. Tagliabue thus would be in a position of issuing an award that exposes his client to liability for defamation.

Moreover, Covington & Burling's advocacy on behalf of the NFL and Goodell is imputed to, and necessarily disqualifies, Tagliabue. *See* Model Rules of Prof'l Conduct R. 1.10 (imputing a lawyer's conflict of interest to entire firm). In *Morris v. New York Football Giants, Inc.*, 575 N.Y.S.2d 1013, 1017 (N.Y.Sup.Ct. 1991), the Court considered that Tagliabue had provided “past advocacy of a position in opposition to plaintiffs' position.” Here, Covington & Burling – and thus, by implication, Tagliabue – has advocated, and is advocating, for a position in opposition to Vilma's position. As the *Morris* court concluded, such roles presented a non-waivable conflict of

interest between Tagliabue's professional responsibilities as an attorney and his duties as an arbitrator that precluded his ability to serve as the arbitrator. Using its inherent authority, the Court removed Tagliabue as arbitrator.

In *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067-68 (2d Cir. 1972), the Commissioner of the American Basketball Association was a partner in a law firm which was counsel to one of the parties in an arbitration proceeding. As a result of that relationship, the Commissioner was disqualified from serving as arbitrator. The Court of Appeals recognized that the Commissioner's disqualification was necessary to "insure a fair and impartial hearing." *Id.* at n.2. Tagliabue's law firm is the adversary of the Players in this arbitration. Tagliabue thus cannot serve as a fair and impartial arbitrator.⁴

Tagliabue's appointment appears to be a ploy by Goodell and the NFL to provide the appearance of impartiality at the Second Appeal Hearing while still ensuring that Goodell's misdirected and unsubstantiated punishments are affirmed. Such a result cannot be countenanced.

II. THE COURT IS EMPOWERED TO APPOINT A NEUTRAL ARBITRATOR

The Court has the authority to put an end to this charade and appoint a neutral arbitrator as soon as possible. There is no need to await the results of a fundamentally unfair arbitration before acting. Pre-award disqualification is justified when "the unmistakable partiality of the arbitrator will render the arbitration a mere prelude to subsequent litigation." *Aviall, Inc. v. Ryder Sys., Inc.*, 913 F.Supp. 826, 836 (S.D.N.Y. 1996), *aff'd*, 110 F.3d 892 (2d Cir. 1997); see also *Morris*, 575

⁴ Arbitrators have been disqualified for similar reasons in numerous other arbitrations. *See, e.g., Schmitz v. Zilveti*, 20 F.3d 1043, 1044 (9th Cir. 1994) (arbitrator's law firm represented parent company of a party, including within two years of the arbitration); *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir. 1995) (arbitrator was a high-ranking officer in a company that had a substantial ongoing business relationship with one of the parties); *Morelite Const. Corp. v. New York Dist. Council Carpenters Benefit Fund*, 748 F.2d 79, 81 (2d Cir. 1984) (arbitrator's father was General President of the union involved in the arbitrated dispute).

N.Y.S.2d 1013, 1017 (Court disqualified Commissioner from serving as arbitrator before arbitration commenced); *Erving*, 468 F.2d 1064, 1067-68 (same); *Third Nat'l Bank in Nashville v. WEDGE Group, Inc.*, 749 F.Supp. 851, 854-55 (M.D. Tenn. 1990) (Court granted defendants' motion to stay lawsuit pending arbitration and appointment of neutral arbitrator where "the proprietary and fiduciary relationship between [the arbitrator designated by the parties' agreement and one of the parties] would arguably taint an award in this dispute" even though the arbitrator's conflict was previously known by all parties to the dispute).

Requiring the parties to prepare for and participate in the Second Appeal Hearing would be a costly, time consuming, disruptive and futile exercise. Section 301 of the LMRA, 29 U.S.C. § 185, affords the Court wide latitude to resolve disputes in a manner that advances the goals of federal labor policy. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (noting that courts may be called upon to exercise "judicial inventiveness" in Section 301 cases). The just resolution is for the Court to exercise its authority and appoint a neutral arbitrator now or immediately following any arbitration award issued by Tagliabue.

III. GOODELL IS INCAPABLE OF APPOINTING A FAIR ARBITRATOR

Goodell, as explained in our prior pleadings in this litigation, publicly pronounced and prejudged Vilma's guilt before Vilma ever had a chance to defend himself. Goodell's reckless and defamatory comments continued throughout the spring, summer and into the fall. The CBA Appeals Panel rebuked Goodell's grab for jurisdiction beyond his authority and vacated his prior July 3, 2012 arbitration award. A stream of public pronouncements by witnesses, pivotal testimony, and challenges have undermined Goodell's baseless factual conclusions.

Rather than viewing the Appeals Panel remand as an opportunity to reach a fair and just resolution regarding the purported Bounty Program, Goodell dug in his heels and perpetuated a warped process clearly designed and destined to deprive the Players of industrial due process and

the other legal rights guaranteed by federal law.

Now, Goodell has appointed an unquestionably conflicted arbitrator with loyalties affixed to what may be in Goodell's personal best interests but not in the best interests of the principles of justice that should guide these proceedings. The Court is left with no option but to exercise its authority to appoint a fair and neutral arbitrator in order to reach a just resolution of the instant dispute.

IV. THE SECOND APPEAL HEARING IS STILL FUNDAMENTALLY UNFAIR

The Second Appeal Hearing lacks the fundamental fairness required by law. *See, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 299 (5th Cir. 2004) (requiring fundamentally fair hearing that “meets the minimal requirements of fairness – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. The parties must have an opportunity to be heard at a meaningful time and in a meaningful manner”); *Murphy Oil USA, Inc.*, 2009 WL 537222, at *3 (similar); *see also Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 850 (5th Cir. 1995) (proceedings lack fundamental fairness when arbitrator refuses to hear evidence “pertinent and material to the controversy”). Goodell and the NFL have failed to meet these standards.

It is clear that the arbitration procedures in the Second Appeal Hearing will not cure the defects and irregularities of the first: while the NFL produced more documents on October 24, 2012, there remain, by the NFL's own count, approximately 47,000 pages of documents upon which Goodell relied and which have not been produced,⁵ the NFL has made no disclosure of the NFL's record of witness interviews including notes, tape recordings or interview memos, no

⁵ Documents produced by the NFL on October 24, 2012, apparently consist of little more than New Orleans Saints PowerPoints and statistics kept by Williams and Cerullo.

disclosure of the transcripts from the coaches' and management's appeal hearings presided over by Goodell, no disclosure of any exculpatory materials, and will not permit Vilma to confront his chief accuser at the appeal hearing, Gregg Williams (although the rather absurd suggestion has been made that the NFL will proffer Williams through his attorney)⁶.

An arbitration award procured under such circumstances necessarily will violate the requirements of fairness that apply to all labor arbitration proceedings. *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”).

CONCLUSION

For the foregoing reasons, and for those previously briefed and/or otherwise addressed with this Honorable Court, Jonathan Vilma respectfully requests the Court to disqualify Paul Tagliabue from serving as the arbitrator, vacate any actions taken by Tagliabue in this matter, including the Arbitration Award once it is issued, and for such other relief as the Court deems just and proper.

⁶ Williams' attorney's proffer will trigger a waiver of his attorney-client privilege with regard to all related matters. *See In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982) (company's claim of privilege improper where company voluntarily produced certain privileged documents to the Securities and Exchange Commission, but refused to produce other related documents in response to a grand jury subpoena); *Edmund J. Flynn Co. v. LaVay*, 431 A.2d 543, 551 (D.C. Cir. 1981) (assertion of attorney-client privilege improper where party sought to waive the protection for a certain privileged memorandum while maintaining its objection to disclosure of the remaining related documents). Indeed Williams' attorney-client privilege may be deemed wholly waived. *Nguyen v. Excel Corp.*, 197 F.3d 200, 208 (5th Cir. 1999) (by selectively disclosing portions of privileged confidential communications, corporation waived attorney-client privilege and its counsel could be deposed by plaintiffs).

Dated: October 24, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2012, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send notice of electronic filing to all counsel of record.

/s/ Peter R. Ginsberg