15-2801(L)

15-2805, 15-3228 (Con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,
Plaintiff-Counter-Defendant-Appellant,
and
NATIONAL FOOTBALL LEAGUE,
Defendant-Appellant,
and
MICHELLE MCGUIRK,
Appellant,
v.
NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,
on its own behalf and on behalf of Tom Brady,
Defendant-Counter-Claimant-Appellee,
and
TOM BRADY,
Counter-Claimant-Appellee.

On Appeal from the United States District Court for the
Southern District of New York, Nos. 15-5916, 15-5982

REPLY BRIEF FOR APPELLANTS NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL AND NATIONAL FOOTBALL LEAGUE

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INTRODUCTION

Appellees' response brief only confirms the errors in the district court's decision—which disregarded the deferential standard of review for labor arbitration awards and refused to enforce the Commissioner's eminently reasonable decision, despite its firm grounding in the parties' collective bargaining agreement (CBA). Appellees' principal defense invokes the NFL's Uniform Policy and its purported specification of fines for first-time offenders. But that argument suffers multiple flaws, not the least of which is that Appellees themselves told the Commissioner that the policy was inapplicable (since footballs are not part of the uniform or equipment worn by players). Nor does the policy limit discipline to fines (indeed, it expressly informs players that suspensions may be imposed in addition to fines). More broadly, Appellees' wishful effort to analogize the conduct here to the misuse of "stickum" ignores both the serious nature of the misconduct and the substantial discretion conferred on the Commissioner by the CBA to determine and to discipline conduct detrimental to the game.

Appellees' remaining arguments fare no better and underscore that the district court's decision is an impermissible collateral attack on the Commissioner's factual findings and contractual interpretations. For example, Appellees claim a lack of "notice" only by refusing to accept the Commissioner's finding that Brady did not just have "general awareness" of, but *actually participated in*, the ball-tampering

scheme. They assail the Commissioner's discovery ruling by distorting what the CBA's discovery provision actually says. And they simply ignore the Commissioner's repeated and well-supported findings that the NFL General Counsel was not substantively involved in the Wells investigation.

Appellees' alternative arguments for affirmance, which not even the district court embraced, are weaker still. If accepted, they would provide a roadmap for demanding the Commissioner's recusal in every player discipline proceeding despite the parties' express agreement that the Commissioner makes "conduct detrimental" determinations and has the sole discretion to serve as the arbitrator in appeals involving game-related "conduct detrimental." And therein lies the fundamental shortcoming of Appellees' submission. Every party attacking a labor arbitrator's decision—whether labor or management—is dissatisfied with the result in its particular case. That is a given. But the scope of judicial review is purposefully narrow—among the most deferential standards in the law—and requires only that the arbitrator derive his authority from, and ground his decision in, the CBA. Here, the CBA grants the Commissioner the authority to make conduct detrimental decisions, to arbitrate disputes, and to suspend players found in violation. There is simply no basis in the CBA, or the legion of judicial decisions emphasizing the narrowness of judicial review, to disturb the Commissioner's sound exercise of that undoubted authority.

ARGUMENT

I. The Commissioner's Arbitration Award Must Be Enforced.

Under the Labor Management Relations Act (LMRA), the federal judiciary is required to enforce a labor arbitration award so long as it is plausibly based in the parties' CBA. Here, the Commissioner's decision was based on not just a plausible interpretation of the CBA, but on an eminently reasonable one. Article 46 of the CBA grants the Commissioner authority to discipline players for conduct detrimental to the integrity of, or public confidence in, the game of professional football. Brady's participation in a scheme to deflate game balls after they had been checked by game officials, his refusal to cooperate fully with the ensuing investigation, and his deliberate destruction of highly relevant evidence clearly qualify as "conduct detrimental." And the CBA, including the required player contract that Brady signed, expressly authorizes the Commissioner to issue suspensions for conduct detrimental. That should be the end of the matter.

Appellees' principal response is to focus not on the CBA's "conduct detrimental" provision, under which Brady was actually suspended, but on the League's "Uniform Policy," which Appellees contend prohibits the Commissioner from employing his conduct detrimental authority in these circumstances. That is an abrupt and revealing change of position. Appellees expressly told the Commissioner during arbitration that the Uniform Policy was inapplicable, and for

good reason. The policy *is* inapplicable—it has no application to game balls—and it expressly authorizes suspensions. But most important, the Uniform Policy in no way forecloses resort to the Commissioner's "conduct detrimental" authority in any circumstances, much less in circumstances involving evidence destruction and obstruction. Appellees' remaining arguments ignore the Commissioner's factual findings and fly in the face of the LMRA's deferential standard of review.

A. The Commissioner Acted Well Within His Authority Under the CBA When He Applied the Conduct Detrimental Provision to Suspend Brady for His Misconduct.

Federal courts do not sit to second-guess an arbitrator's reasoned conclusions. Instead, the judiciary must enforce an arbitrator's award if it "draws its essence from the collective bargaining agreement"—*i.e.*, if it "is plausibly grounded in the parties' agreement." *Wackenhut Corp. v. Amalgamated Local 515*, 126 F.3d 29, 31-32 (2d Cir. 1997); *Saint Mary Home v. SEIU, Dist. 1199*, 116 F.3d 41, 44 (2d Cir. 1997); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). This standard is "among the narrowest known to the law." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91 (1978) (per curiam). As this Court has explained, a labor arbitration award must be upheld if the arbitrator "offer[s] even a barely colorable justification for the outcome reached." *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978).

This extremely deferential standard governs this Court's review and should have governed the proceedings below. The Commissioner's decision is not just firmly grounded in the CBA, but eminently reasonable. Article 46 of the parties' CBA grants the Commissioner broad authority to impose discipline for conduct "detrimental to the integrity of, or public confidence in, the game of professional football." JA345. The collectively-bargained standard contract that every player signs reiterates that authority, expressly stating that if the Commissioner finds conduct detrimental he has authority "to suspend [the] Player for a period certain or indefinitely." JA354. In this case, the Commissioner exercised his authority to conclude that efforts to tamper with game balls in a League Championship game and then to destroy evidence in order to avoid responsibility posed a threat to the integrity of the game and the public's confidence in the League's on-field product. And the Commissioner found as a matter of fact that Brady had participated in a scheme to tamper with the game balls through conduct that deliberately skirted official testing protocol, and that he had destroyed relevant evidence to obstruct an investigation into the wrongdoing. If that sequence of dishonest conduct does not qualify as "conduct detrimental," it is hard to imagine what would.

Appellees do not dispute that the Commissioner has the "authority to deem ball tampering 'conduct detrimental.'" Appellees' Br. 39. They instead claim that the League's Policies for Players somehow foreclosed the Commissioner from

invoking that authority and issuing a suspension for Brady's misconduct. Taking their cue from the district court, Appellees insist that because the conduct at issue involved game balls, the Commissioner was constrained to impose only a fine under the player policy for "Uniform/Equipment Violations." And they repeatedly fault the Commissioner for "not even *acknowledg*[*ing*]" the Uniform Policy in his final decision. Appellees' Br. 38.

But Appellees fail to mention a fatal flaw in their argument: The Commissioner did not address the Uniform Policy in his decision because *both* parties took the position that the policy was inapplicable. Indeed, in proceedings before the Commissioner, Appellees affirmatively stated that the policy does *not* cover Brady's conduct because balls are not part of the uniform or equipment worn by players. Specifically, in his opening statement, Appellees' counsel said that they "don't believe [the uniform] policy applies … because there is nothing here about the balls." JA955-56. No one disagreed—for the understandable reason that, as explained below, the policy plainly does not apply to game balls.[1]

That dooms Appellees' principal defense of the district court's decision. To be sure, at the time, Appellees were contending that Brady's conduct did not violate

[1] Reflecting their view that the Uniform Policy was inapplicable, Appellees did not ask NFL Vice President Troy Vincent about the policy during the hearing, despite his testimony that his responsibilities include "uniform violations." JA1006.

any League policy. But Appellees cannot argue before the arbitrator that the Uniform Policy is inapplicable, and then turn around and argue, in a collateral attack in federal court, that it is not merely applicable, but that it trumps the collectively bargained "conduct detrimental" provision. It is settled law that "permitting a party to oppose confirmation of an award based on a claim that it did not raise before the arbitrator would … offend the general principle that a party 'cannot remain silent, raising no objection during the course of the arbitration proceedings, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first.'" *See, e.g.*, *N.Y. Hotel & Motel Trades Council v. Hotel St. George*, 988 F. Supp. 770, 778 (S.D.N.Y. 1997) (Mukasey, J.) (quoting *York Research Corp. v. Landgarten*, 927 F.2d 119, 122 (2d Cir. 1991)).

Of course, this is not a case of merely "remain[ing] silent," but a whiplash-inducing change of position. Appellees affirmatively told the Commissioner that the Uniform Policy that they now say trumps the Commissioner's collectively-bargained conduct detrimental authority *does not apply at all*. Having argued that the Uniform Policy was not even applicable, it takes considerable chutzpah to attack the Commissioner for declining to explain why he agreed with them (and everyone else) on that issue—and even greater temerity to argue that Brady lacked "fair notice" that his discipline was not governed by a policy that Appellees' own lawyers deemed inapplicable.

Appellees' initial decision to argue that the Uniform Policy was inapplicable—as opposed to not merely applicable, but exclusively so—was prudent. Even a quick glance at the policy reveals that it concerns players wearing the wrong color shoes or failing to tuck in their jerseys, not schemes to deflate footballs before championship games. The policy is addressed to players because it concerns (as its name suggests) a player's *uniform* and the *equipment* on a player's body. The policy's detailed descriptions of violations discuss jerseys, helmets, shoulder pads, and stockings, along with many other "piece[s] of equipment worn by a player." JA393. But as Appellees themselves emphasized before the Commissioner, the policy says "nothing … about the balls." JA956. Indeed, in the policy's visual depiction of a player with a compliant uniform and equipment, the player is not holding a ball. JA392. And in its long list of "Uniform and Equipment Rules," the policy does not discuss footballs at all. JA393-94.[2]

Equally important, the Uniform Policy does not even support Appellees' argument. Appellees stress in bold and repeated strokes that the Player Policies say that "first offenses will result in fines." *E.g.*, Appellees' Br. 39, 45. But that language

[2] It should go without saying that the League does not "accept" Appellees' argument that the Uniform Policy applies to Brady's conduct. Appellees' Br. 5. The League's opening brief explained why Brady's conduct far exceeded the violations covered by the Uniform Policy and emphasized that the interpretive choice between potentially applicable contract provisions rests exclusively with the Commissioner. *See* Appellants' Br. 45.

does not mean what Appellees think it does. It is not a guarantee of leniency, and it never says that first offenses will result *only* in fines. Instead, it underscores that the policies are taken seriously; even first offenses will result in discipline, not warnings.

Indeed, the Uniform Policy expressly *provides for suspensions*. In language that Appellees conspicuously fail to mention, both the policy and its fine schedule state that the designated fines "are minimums" and that "[o]ther forms of discipline, *including* higher fines and *suspension* may also be imposed, based on the circumstances of the particular violation." JA389 (emphasis added); *see also* JA370. This is not "counsel's interpretive gloss." Appellees' Br. 45. It is the plain text of the very policy on which Appellees now rely. Thus, far from "unambiguous[ly]" favoring Appellees' position, Appellees' Br. 39, the Player Policies (if they apply here at all) unambiguously refute any suggestion that Brady lacked notice of the possibility that his conduct could result in suspension.

In all events, even if (contrary to what Appellees told the Commissioner) the Uniform Policy were applicable, and even if (contrary to its plain text) the policy limited penalties to fines, it would still not help Appellees because Brady was indisputably *not* disciplined for violating the Uniform Policy, but was instead disciplined for "conduct detrimental." Thus, to prevail, Appellees need to show that the policy forecloses the Commissioner's reliance on his Article 46 authority. Nothing in the Uniform Policy purports to do so. To the contrary, the very first page

of the Player Policies in which the Uniform Policy appears expressly reminds players that "[t]he Commissioner may impose … suspension … for conduct detrimental to the integrity of or public confidence in the NFL or the game of professional football," and that "[r]epeated and/or flagrant violations may entail higher fines, ejection, and/or suspension." JA370. Under these circumstances, determination of whether the Uniform Policy precludes reliance on Article 46 is both a decision for the Commissioner and one plainly grounded in the CBA.[3]

Indeed, an arbitrator exercises the heartland of his discretion under the LMRA when he resolves "disputes regarding the application of a contract." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001). When parties agree to arbitrate their labor disputes, "it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Misco*, 484 U.S. at 37-38. And "[b]ecause the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator." *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork,*

[3] Given that both parties took the position that the Uniform Policy did not apply and that the policy itself reiterates the Commissioner's conduct detrimental authority, it is no surprise that the Commissioner's written decision did not expressly refer to the Uniform Policy. "It is axiomatic that arbitrators need not disclose [a] rationale for their award" where that rationale is obvious. *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2d Cir. 1991).

Linoleum & Plastic Workers of Am., 461 U.S. 757, 765 (1983). So long as the arbitrator's interpretation does not depart entirely from the parties' agreement, a federal court must uphold the decision, even if the "'court is convinced he committed serious error.'" *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000) (quoting *Misco*, 484 U.S. at 38).

Here, the Commissioner's decision to apply Article 46 was not error at all; it was a core exercise of his interpretive authority. Even if the mere deflation of game balls fell within the Uniform Policy and even if that policy somehow preempted reliance on Article 46 authority for the deflation scheme, Brady was not disciplined *solely* because game balls were deflated below the permissible limit. In factual findings that Appellees disavow any intention of challenging, *see* Appellees' Br. 39, the Commissioner concluded that Brady had participated in a scheme to interfere with the officials' ability to enforce rules going to the integrity of the game, refused to cooperate fully with the investigation into that scheme, and then affirmatively obstructed the investigation by intentionally destroying highly relevant evidence. The Commissioner was entitled to conclude that, unlike wearing the wrong color shoes or failing to tuck in one's jersey, Brady's unique and aggregate misconduct

posed a threat to the integrity of and public confidence in the game. *See, e.g.*, *Crouch v. NASCAR, Inc.*, 845 F.2d 397, 403 (2d Cir. 1988).[4]

In sum, the district court's reliance on the Uniform Policy to vacate the Commissioner's decision was plainly erroneous. In fact, it underscores the wisdom of the LMRA's exceedingly deferential standard of review. In its haste to displace the Commissioner's reasoned judgment, the district court adopted a legal conclusion that the objecting party had disavowed during arbitration, that the contract expressly contradicts, that relies on a policy aimed at fundamentally different conduct, that misreads the policy as precluding suspensions when it expressly provides for them, and that ignores the Commissioner's superior experience and familiarity with the issues. The LMRA prohibits courts from second-guessing an arbitrator's award precisely to avoid these sorts of errors and the disruption they can cause.

B. The District Court's Refusal To Enforce the Commissioner's Award Reduces to a Refusal To Accept His Factual Findings.

Appellees' remaining attempts to defend the district court's "notice" ruling reduce to exactly what they concede courts may not do—namely, "challenge [the

[4] Appellees suggest that Brady's spoliation was harmless because "all of Brady's text communications with Patriots equipment staff were already in Paul, Weiss's possession." Appellees' Br. 25. But the investigators never obtained a number of text messages exchanged between Brady and Jastremski in the days following the AFC Championship Game; those were apparently destroyed with Brady's phone. *See* JA984. And the premise of Appellees' statement is false: Brady had been asked to produce *all* text messages regarding the relevant topics, not just text messages with Patriots equipment staff. *See* JA1032.

Commissioner's] factual findings." Appellees' Br. 39. They first claim that Brady lacked notice that he could receive a four-game suspension for "'general awareness' of others' misconduct." Appellees' Br. 46. But that is not what *the Commissioner* found. After considering the Wells Report as well as the evidence that Brady himself introduced at the hearing, the Commissioner found that Brady did not merely have "general awareness" of ball tampering, but actually "*participated in* a scheme to tamper with the game balls after they had been approved by the game officials for use in the AFC Championship Game." SPA54 (emphasis added). And based on the additional evidence offered at the hearing, the Commissioner found that Brady had not merely failed to cooperate fully, but that he had "willfully obstructed the investigation by, among other things, affirmatively arranging for destruction of his cellphone knowing that it contained potentially relevant information that had been requested by the investigators." *Id*.

Appellees nonetheless persist in proceeding as if the operative finding is the Wells Report's conclusion that Brady was "at least generally aware of" the ball tampering scheme and that it was "unlikely that" the scheme was undertaken "without [his] knowledge." JA329. Appellees do not even try to explain why the Wells Report's findings should trump the Commissioner's findings based on a broader record. The Wells Report was designed to give the Commissioner a basis to

draw his *own* conclusions from the extensive record, not to limit him to the conclusions of the Report.

Nor do Appellees explain their seeming view that the Commissioner could not consider his own assessment of Brady's credibility or the new evidence that came to light at the hearing. They claim that the arbitrator may not "exceed[] the scope of the [parties'] submissions," *United Steelworkers of Am. v. Enterprise Wheel*, 363 U.S. 593, 597 (1960), but the Commissioner did no such thing. To the contrary, he made findings based on, among other things, the new evidence that Appellees themselves brought to light and Brady's credibility in light of that new evidence. Surely Appellees cannot mean to suggest that the Commissioner's fact finding was limited to only those new facts that would have benefitted Brady. The whole point of the appeal hearing was to give the Commissioner an opportunity to hear additional evidence and to reconsider his initial findings and discipline. Nothing in the CBA prohibited him from considering all the available evidence and concluding that Brady's misconduct was even worse than he had initially thought.

Appellees alternatively protest that the Commissioner erred by failing to "apportion" the suspension between ball-tampering activities and evidence-tampering activities. But this misunderstands both the Commissioner's authority and his conclusions. Nothing in the CBA required the Commissioner to "apportion" discipline between his findings. Moreover, as even Appellees acknowledge when it

suits their purposes, the evidence-tampering and ball-tampering were not discrete events, but "inextricably intertwined." Appellees' Br. 6. Thus, the destruction of Brady's cell phone not only constituted "conduct detrimental" in its own right, it supported the Commissioner's finding that Brady had participated in and provided inducements in support of a scheme to deflate balls.

Finally, Appellees' repeated refrain that the discipline imposed here was unprecedented ignores the Commissioner's factual finding that the misconduct was unprecedented. The Commissioner found that Brady's actions were "fundamentally different from" any previous case to which any party attempted to compare it. SPA55. He therefore brought his interpretation of the CBA and his experience as Commissioner to bear on this unique set of facts to fashion a remedy that reasonably reflected the nature and seriousness of the offense. *See Crouch*, 845 F.2d at 402-03. The LMRA does not prohibit discipline whenever the relevant misconduct is unprecedented. On the contrary, in those circumstances, arbitrators are granted considerable leeway—especially where the CBA already affords them broad authority—to fashion an appropriate remedy. *See*, *e.g.*, *Misco*, 484 U.S. at 41.[5]

[5] Appellees offer a half-hearted objection to the Commissioner's analogy to the penalties for performance-enhancing drugs. *See* Appellees' Br. 45. But it is crystal clear from the Commissioner's decision that he did not apply the steroid policy to Brady's conduct. He merely noted that the steroid policy, which is similarly concerned with misconduct that improperly seeks to obtain an unfair competitive advantage, would provide an even *harsher* suspension than Brady's. *See* SPA57.

At any rate, even if the Commissioner's judgment in this case differed from the judgment of Commissioners in past cases, that would not justify the district court's refusal to enforce the award. This Court has repeatedly rejected the "argument that an arbitrator has a duty to follow arbitral precedent and that failure to do so is reason to vacate an award." *Wackenhut*, 126 F.3d at 32 (citing *Conn. Light & Power Co. v. Local 420, IBEW, AFL-CIO*, 718 F.2d 14, 20-21 (2d Cir. 1983) (collecting cases)). The court evaluates whether the arbitrator's decision is "grounded in the collective bargaining agreement," not whether it is grounded in "arbitral precedent." *Id.* And "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the court *must* enforce his decision—even if "arbitral precedent" might support a different result. *Misco*, 484 U.S. at 38; *Connecticut Light*, 718 F.2d at 20. Thus, the *Ray Rice*, *Bounty*, and *Adrian Peterson* arbitration cases, while obviously factually distinguishable, are simply irrelevant to this Court's analysis.[6]

Moreover, players are not entitled to notice of every analogy an arbitrator might mention when crafting a remedy for that player's misconduct.

[6] Appellees' other citations are also off-point. In *187 Concourse Associates v. Fishman*, 399 F.3d 524 (2d Cir. 2005), *Leed Architectural Products, Inc. v. United Steelworkers of America, Local 6674*, 916 F.2d 63 (2d Cir. 1990), *In re Marine Pollution Service, Inc.*, 857 F.2d 91 (2d Cir. 1988), and *Boise Cascade Corp. v. Paper Allied-Industries*, 309 F.3d 1075 (8th Cir. 2002), the arbitrators ignored or directly contravened the plain text of the governing CBA. The Commissioner's decision here was consistent with and expressly supported by the CBA.

Appellees decline to defend a number of the district court's other legal conclusions. Most notably, they dismiss as an "academic question" the district court's insistence that the Commissioner improperly imposed discipline under the Competitive Integrity Policy instead of Article 46. Appellees' Br. 46 n.8. Appellees are right to abandon the argument. But the positional shift is remarkable nonetheless. This argument was the centerpiece of Appellees' presentation to the Commissioner and to the district court. They have now entirely abandoned it in favor of an argument that they disavowed during the arbitration hearing. As their flip-flopping suggests, neither argument is persuasive, both should be rejected, and the foundation of their defense of the district court's decision has collapsed.

In sum, the Commissioner unquestionably drew his award from the essence of the parties' agreement. When a CBA delegates broad disciplinary authority, like "conduct detrimental" authority, the arbitrator "is to bring his informed judgment to bear in order to reach a fair solution of a problem," especially with respect to remedies, where "the need is for flexibility in meeting a wide variety of situations." *Enterprise Wheel*, 363 U.S. at 597. The Commissioner brought his informed judgment to bear in this case, and he reached a fair conclusion rooted in the contract. He found that "Brady knew about, approved of, consented to, and provided inducements and rewards in support of a scheme … [to] tampe[r] with the game balls" "after they had been approved by the game officials for use in the AFC

Championship Game." SPA51, 54. From that, he concluded that Brady's misconduct, coupled with his destruction of relevant evidence, constituted "conduct detrimental" under Article 46. And he imposed a form of discipline expressly contemplated by the agreement. His award thus flowed *directly* from the CBA. The district court's refusal to enforce it is indefensible.

II. The Commissioner's Procedural Rulings Provide No Basis For Sustaining the District Court's Refusal To Enforce The Award.

Appellees' also fail in their attempts to defend the district court's refusal to accept the Commissioner's procedural rulings. The LMRA requires, if anything, an even more deferential standard of review when it comes to collateral attacks on an arbitrator's procedural rulings. The Supreme Court has admonished that, "when the subject matter of a dispute is arbitrable," as here, "'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator." *Misco*, 484 U.S. at 40; *see also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). This deferential stance makes especially good sense here, where the Commissioner is well positioned to interpret the procedural rules that he is frequently required to apply in Article 46 hearings.

The LMRA's deferential standard dooms Appellees' defense of the district court's untenable holding that the Commissioner erred by declining to allow discovery of the Paul Weiss attorneys' internal work product. Appellees do not and cannot dispute that the Commissioner rooted that ruling in the explicit terms of the

CBA; they instead claim (albeit implicitly) that the Commissioner misinterpreted the CBA. But as the Commissioner explained, Article 46 §2(f)(ii) does not contemplate "extensive discovery" into everything on which the opposing party relied in preparing its case, let alone into "attorney work product of a kind that is ordinarily protected from discovery." SPA65, 66. It instead provides only that "the parties shall exchange copies of any *exhibits* upon which they intend to rely." JA346 (emphasis added).

Ignoring the word "exhibits," Appellees insist that the work product should have been turned over because the League may have "'relied' on" it somewhere along the line. Appellees' Br. 54. But as the Commissioner correctly recognized, that is not a defensible reading of Article 46, let alone a reading so unassailably correct that anyone who concluded otherwise could not "even arguably [be] construing or applying the contract." *Misco*, 484 U.S. at 38. The plain import of Article 46 §2(f)(ii) is that parties must exchange the *exhibits* that they intend to introduce *during the hearing*, not everything that they "relied" on when crafting their arguments. And that is clear not only from the reference to "exhibits," but also from the next sentence, which reads: "Failure to timely provide any intended exhibit shall preclude its introduction at the hearing." JA346. It is thus Appellees' arguments (and the district court's decision adopting them), not the Commissioner's ruling, that

are not even "plausibly grounded in the parties' agreement." *Wackenhut Corp.*, 126 F.3d at 32.[7]

Moreover, even if there were a procedural error, Appellees do not begin to explain how it was sufficiently harmful to justify refusal to enforce the final award. As the Commissioner explained, in addition to the Wells Report itself, Appellees were given "all of the NFL documents considered by the investigators in preparing their reports, including notes of interviews conducted by in-house NFL investigators prior to the time that the Paul Weiss investigation began," and they were given a full opportunity to question Wells "about the substance and conclusions of the report." SPA65; *see also* D. Ct. Doc. 28-228 at 2 (explaining that the League had "provided the NFLPA with more than 1,500 pages of documents, including the Wells Report as well as documents considered by the Paul, Weiss firm in preparing the Report"). That was more than sufficient to ensure that they could "properly prepare a response and participate fully in the hearing." SPA65.[8]

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[7] Appellees off-handedly point to other NFL arbitration proceedings to dispute the Commissioner's ruling. But arbitral precedent *supported* the Commissioner's decision. As his decision noted, the arbitrator in the *Ray Rice* arbitration interpreted §2(f)(ii) exactly as the Commissioner did here. *See* SPA64. And as explained above, the federal courts do not police an arbitrator's application of arbitral precedent. Whether or not the decision is perfectly consistent with all past procedural rulings in all past arbitrations, what matters is that the Commissioner's decision was grounded in the CBA—which it clearly was here.

[8] The League never suggested that Appellees were given documents, other than the final report, "*generated by* the Pash/Wells investigation." Appellees' Br. 54

Instead of meaningfully responding to those findings, Appellees just repeat the district court's *ipse dixit* that Brady must have been "prejudiced" because he "'was denied the opportunity to examine and challenge materials that may have led to his suspension.'" Appellees' Br. 55 (quoting SPA37). But that is just a restatement of the district court's (erroneous) finding of procedural error, not an independent finding of prejudice, let alone the sort of complete departure from the CBA required to vacate the Commissioner's ruling. Indeed, the bare fact that one party was erroneously denied access to material is not even enough to justify vacating a district court's final judgment, let alone refusing to enforce an arbitrator's award.

Appellees fare no better in their effort to defend the district court's refusal to defer to the Commissioner's ruling on the testimony of NFL General Counsel Jeff Pash. The CBA does not require the testimony of *any* witnesses in an Article 46 hearing, and the Commissioner plainly articulated and applied a contractually permissible approach to deciding what testimony he would allow. Basing his decision on his factual findings about which potential witnesses had personal knowledge of the relevant facts, he compelled the testimony of the lead investigator, Ted Wells, but declined to compel the testimony of Pash because he had played no

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(emphasis added). To the contrary, the League's opening brief made clear that the League did not turn over "the Paul Weiss attorneys' internal attorney work product." Appellants' Br. 15.

substantive role in the investigation. In an abundance of caution, the Commissioner offered to "revisit" his ruling should testimony at the hearing reveal that he was mistaken. After Appellees declined to press him on the matter at the hearing, the Commissioner reaffirmed his pre-hearing ruling, again rejected Appellees' argument on the merits of this procedural issue, and also noted that the issue had been waived. SPA60 n.21.

Appellees do not even attempt to argue that the Commissioner's ruling was not "plausibly grounded in the parties' agreement." *Wackenhut Corp.*, 126 F.3d at 32. Indeed, they do not even identify any contractual provision that they think compelled the Commissioner to reach a different conclusion. They instead just continue to refuse to accept the Commissioner's factual finding that Pash played no material substantive role in the investigation—just as the district court did below. That was a manifestly impermissible basis for rejecting an arbitrator's procedural ruling; courts simply do not have the power to revisit an arbitrator's factual findings. The Commissioner expressly found—repeatedly—that there was no support for Appellees' insistence that Pash was substantively involved in the investigation, which explains why he stuck by his decision that Wells' testimony would suffice. No matter how strenuously Appellees disagree with that factual finding, it remains a factual finding protected from collateral attack in the courts.

Moreover, Appellees never explain how the district court could possibly have been justified in refusing to enforce the arbitration award on a ground that the Commissioner found that Appellees had waived. Indeed, they do not even acknowledge the Commissioner's waiver holding, instead attempting to characterize their waiver problem as something that the League manufactured on appeal. *See* Appellees' Br. 57; *but see* SPA60 n.21 (finding that "the NFLPA waived this argument by not seeking at the hearing reconsideration of my decision denying its motion to compel Mr. Pash's testimony"). They then try to blame the Commissioner for failing to reconsider his earlier ruling *sua sponte*, but they ignore the fact that the Commissioner actually *did* revisit the issue in his final decision and concluded that the testimony at the hearing "confirmed" his earlier finding that "[t]he NFLPA's premise—that Mr. Pash played a significant role in the investigation—is simply incorrect." SPA60 n.21.[9]

Finally, even if Appellees could defend the district court's error finding, they could not defend its refusal to enforce the award. Indeed, Appellees have not identified a single relevant issue on which Pash's testimony might have made a

[9] This case is thus decidedly unlike *Tempo Shain Corp. v. Bertek*, Inc., 120 F.3d 16, 20-21 (2d Cir. 1997), where the testimony of a key witness was excluded even though the witness undeniably possessed unique and extensive knowledge on a crucial issue. Here, the Commissioner concluded, even putting waiver aside, that the evidence simply did not support Appellees' claim that Pash had relevant testimony to offer, much less extensive testimony on a subject crucial to the hearing.

difference. Most of their argument is based on vague innuendo about whether the Wells Report was sufficiently "independent," Appellees' Br. 57-58, but that issue is irrelevant. Appellees are simply wrong to claim that the Commissioner "expressly *relied on* the Wells Report's purported 'independence' in rendering" his decision. Appellees' Br. 57. To the contrary, the Commissioner expressly found that even "[i]f the entire investigation had been conducted by in-house NFL employees instead of an outside law firm, [he] would still view it as a thorough and reliable basis for [his] findings and conclusions and a thorough and detailed means of providing Mr. Brady and the NFLPA notice of the conduct detrimental for which the suspension was imposed." SPA60 n.20. Thus there is no error, much less the sort of extreme error required for vacating an award under the LMRA, in the Commissioner's fact-dependent conclusion that there was no legally relevant topic on which Pash could have offered non-cumulative testimony.

III. This Court Should Enter Judgment Enforcing The Commissioner's Award, Rather Than Remanding The Case For Further Proceedings.

Appellees fare no better with their alternative arguments to support the judgment—arguments that not even the district court embraced. Those arguments are not just meritless, but would provide a roadmap for demanding the Commissioner's recusal in every conduct detrimental case despite the parties' agreement in the CBA to designate him as the arbitrator for "any" Article 46 appeal hearing involving game-related misconduct. JA346. In the interest of judicial

economy and to bring an end to this already disruptive litigation, this Court should resolve those additional questions and enforce the Commissioner's award.

Appellees first claim that the Commissioner improperly delegated his disciplinary authority to NFL Vice President Troy Vincent because Vincent signed Brady's initial disciplinary letter. But even assuming that the signature was improper (which it was not), the Commissioner explained that he "did not delegate [his] authority as Commissioner to determine conduct detrimental or to impose appropriate discipline." SPA59. He just "concurred in [Vincent's] recommendation and authorized him to communicate to Mr. Brady the discipline imposed under [the Commissioner's] authority"—a procedure that the Commissioner noted "ha[d] been employed in numerous disciplinary hearings over the past two decades and ha[d] never before been asserted as a basis for compelling the Commissioner or anyone else to testify in an Article 46 disciplinary proceeding." SPA62. Because the argument directly addressed his own actions, and because his explanation was independently confirmed by Vincent's letter, which stated that the Commissioner had "authorized [Vincent] to inform" Brady of the discipline the Commissioner had imposed for his misconduct, the Commissioner was perfectly situated to resolve the matter. JA329. There are no grounds for disturbing that ruling.

In fact, as their brief makes clear, Appellees' delegation argument is nothing more than a thinly veiled attempt to disqualify the Commissioner from presiding

over the arbitration hearing. Because they raised a single claim questioning his own actions, Appellees contend that the Commissioner was insufficiently impartial and thus required to recuse himself from the entire arbitration. *See* Appellees' Br. 60. That argument does not even make sense on its own terms, as the Commissioner's purported "partiality" on the delegation question does not translate to "partiality" on the rest of the arbitration. In fact, if the Commissioner was not the initial decisionmaker, as Appellees contend (albeit without any factual support), then he would arguably be *less* partial rather than more. But in all events, parties to arbitration have no more right than litigants in court to force recusals by manufacturing baseless accusations against the decisionmaker. If anything, they should have far less right to do so since, unlike with a randomly assigned federal judge, the parties to a CBA were able to bargain over the identity of the decisionmaker. Indeed, Appellees' argument is a roadmap for generating a basis for recusal in every case despite the CBA's designation of the Commissioner as an appropriate arbitrator for "conduct detrimental" appeals.

The CBA does not countenance such gamesmanship. That is why the Eighth Circuit rejected a similarly spurious claim in *Williams v. NFL*, 582 F.3d 863 (8th Cir. 2009). As the court explained, "the parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." *Id.* at 885 (quotation marks omitted); *see also Aviall, Inc. v. Ryder*

Sys., Inc., 110 F.3d 892, 896-97 (2d Cir. 1997). In *Williams*, the court found it dispositive that the parties had "agree[d] in the CBA that the Commissioner's designee … could serve as arbitrator." 582 F.3d at 886. Here, the parties agreed that the Commissioner should be authorized to preside over Article 46 appeals, *see* JA346, even though he always plays some role in the underlying discipline. Having bargained for that result, they cannot complain that the Commissioner's decisions leading up to the hearing render him impartial.

The precedents that Appellees invoke are inapposite and do not pose the same sort of threat to the parties' agreement. Neither *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972), nor *Morris v. New York Football Giants*, 575 N.Y.S.2d 1013 (N.Y. Sup. Ct. 1991), involved collectively bargained arbitration procedures. As Appellees' own authority explains, "[t]his distinction [is] significant [because,] [a]s the Supreme Court has recognized, a collective bargaining agreement is more than just a contract—it erects a system of industrial self-government." *NHLPA v. Bettman*, 1994 WL 738835, at *19 (S.D.N.Y. Nov. 9, 1994) (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-83, 585 (1960)). Thus, arbitration provisions in CBAs are "generally … enforced as written … [and] deference should be given to the parties' contractual choices, including presumably the choice of arbitrator." *Id.*; *see also Williams*, 582 F.3d at 886.

In addition, both cases involved strikingly different circumstances from those present here. In *Erving*, this Court affirmed a lower court's conclusion that, in the specific circumstances of the case, the Commissioner of the American Basketball Association could not fairly arbitrate a dispute where his law partners represented one side in the case. 468 F.2d at 1067-68 n.2. And the state court's order in *Morris*, which is not binding precedent on this Court, was similarly limited to the unique facts of that "specific matter"—where the Commissioner had previously advocated one side of the dispute as a private lawyer. 575 N.Y.S.2d at 1017. Neither of those concerns was inherent to the parties' agreement, and neither has any application here, where the Commissioner resolved a claim challenging his disciplinary decision on factual grounds uniquely within his competence. Indeed, the parties in this case expressly agreed in their CBA that the Commissioner has authority to impose discipline for conduct detrimental and may, in "his discretion," preside over conduct detrimental appeals. JA345-46. Appellees' contrary arguments seek to rewrite the CBA and open a loophole for any player to disqualify the Commissioner in any future conduct detrimental appeals.[10]

[10] Moreover, in both *Erving* and *Morris*, the courts ordered the substitution of a different arbitrator *before* arbitration had begun. Neither involved a collateral attack on an arbitration award that had already been issued and thus neither supports Appellees' attempt to vacate the Commissioner's well-grounded decision.

In short, the Commissioner's resolution of Brady's arbitration appeal comes nowhere close to the sort of "bad faith" or "affirmative misconduct" required to vacate his award. *Misco,* 484 U.S. at 40; *Saint Mary Home,* 116 F.3d at 44-45. There is thus no need for the Court to remand the case, and in fact there are strong reasons for *not* prolonging this collateral attack on the Commissioner's decision. Arbitration is designed to promote labor peace by resolving disputes efficiently and avoiding protracted litigation. This Court should resolve the case without a remand, as it has in similar circumstances. *See, e.g., Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 218 (2d Cir. 2002) (Sotomayor, J.); *Booking v. Gen. Star Mgmt. Co.*, 254 F.3d 414, 419 (2d Cir. 2001). The Commissioner's decision should be enforced.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's decision and order that the Commissioner's award be enforced.

Respectfully submitted,

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December 21, 2015

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because it contains 6,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point font.

December 21, 2015

s/ Michael H. McGinley
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CERTIFICATE OF SERVICE

I hereby certify that, on December 21, 2015, an electronic copy of the foregoing Brief for Appellants was filed with the Clerk of Court using the ECF system and thereby served upon all counsel appearing in this case for Appellees. Two copies of the same were also served via first-class U.S. mail to Appellant Michelle McGuirk at the following address provided for that purpose:

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