

MOTION INFORMATION STATEMENT

Docket Number(s): 15-2801(L), 15-2805(Con)

Caption [use short title]

Motion for: Leave to File as Amicus Curiae  
In Support of Appellees' Petition for Panel  
Rehearing or Rehearing En Banc

NATIONAL FOOTBALL LEAGUE MANAGEMENT  
COUNCIL, ET AL. v. NATIONAL FOOTBALL  
LEAGUE PLAYERS ASSOCIATION, ET AL.

Set forth below precise, complete statement of relief sought:

Leave to File Amicus Brief Pursuant to  
FRAP 29

MOVING PARTY: Kenneth R. Feinberg, Amicus Curiae

☐ Plaintiff

☐ Defendant

☐ Appellant/Petitioner

☐ Appellee/Respondent

MOVING ATTORNEY: Anthony S. Barkow

[name of attorney, with firm, address, phone number and e-mail]

Jenner & Block LLP

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(212) 891-1600, abarkow@jenner.com

OPPOSING PARTY: National Football League Management Council

OPPOSING ATTORNEY: National Football League Management Council

Bancroft PLLC

500 New Jersey Avenue, N.W., 7th Floor

Washington, D.C. 20001

Court-Judge/Agency appealed from: United States District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):



Yes



No (explain):

Opposing counsel's position on motion:



Unopposed



Opposed



Don't Know

Does opposing counsel intend to file a response:



Yes



No



Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND  
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?



Yes



No

Has this relief been previously sought in this Court?



Yes



No

Requested return date and explanation of emergency:

Is oral argument on motion requested?



Yes



No

(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?



Yes



No

If yes, enter date:

Signature of Moving Attorney:

/s/ Anthony S. Barkow

Date: 5/31/2016

Service by: ☒ CM/ECF



Other [Attach proof of service]

# 15-2801(L)

## 15-2805 (Con)

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### United States Court of Appeals for the Second Circuit

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NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,  
PLAINTIFF-COUNTER-DEFENDANT-APPELLANT

AND

NATIONAL FOOTBALL LEAGUE, DEFENDANT-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

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK, NOS. 15-5916, 15-5982

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### **UNOPPOSED MOTION OF KENNETH R. FEINBERG FOR LEAVE TO FILE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING EN BANC**

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Pursuant to Federal Rule of Appellate Procedure 29(b), Kenneth R. Feinberg hereby moves the Court for leave to file the accompanying brief, as *Amicus Curiae* in Support of Appellees' Petition for Panel Rehearing or Rehearing En Banc.

All parties have consented to the filing of Mr. Feinberg's amicus brief. In support of this motion, Mr. Feinberg states as follows:

**I. Statement Of Interest.**

Mr. Feinberg has a strong interest in the outcome of this appeal, which—particularly given the high-profile nature of this case—has serious potential to affect public confidence in arbitral proceedings as a means of alternative dispute resolution. Mr. Feinberg has more than three decades of expertise as an arbitrator and neutral. In *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), Justice Ginsburg, joined by Justices Stevens and Breyer, recognized Mr. Feinberg as an experienced arbitrator and leader within the international dispute resolution community. *Id.* at 688 & n.1 (Ginsburg, J., dissenting).

Mr. Feinberg is uniquely qualified to address the consequences of high profile arbitration. In 1999, pursuant to a new Federal Statute, Mr. Feinberg served on a three arbitrator panel, together with United States Solicitor General Walter Dellinger and Former Third Circuit Appeals Court Judge Arlin Adams, to determine the fair market value of the Federal Government's seizure of the Zapruder Film of the Kennedy Assassination. *See, e.g.*, David Johnston, *Zapruder Heirs Get \$16 Million for Dallas Film*, The New York Times (Aug. 4, 1999), available at <http://www.nytimes.com/1999/08/04/us/zapruder-heirs-get-16-million-for-dallas-film.html>. In 2001, Mr. Feinberg served as a co-arbitrator with

Former Attorney General Nicholas Katzenbach with authority to divide approximately \$52 million in legal fees among 51 lawyers who had pursued successful litigation against the German Government and industry seeking reparations for Nazi-era slave laborers. The work of Messrs. Feinberg and Katzenbach as arbitrators was praised as resolving an issue that had previously seemed “unseemly” in a manner that resulted in an allocation that seemed “fair” to the stakeholders. *See Jane Fritsch, \$52 Million for Lawyers’ Fees in Nazi-Era Slave Labor Suits*, The New York Times (June 15, 2001), *available at* <http://www.nytimes.com/2001/06/15/world/52-million-for-lawyers-fees-in-nazi-era-slave-labor-suits.html>.

Beyond his role as an arbitrator, Mr. Feinberg has been selected to help resolve many of the nation’s most complex and challenging disputes, adding to his understanding of the broader consequences of the panel’s decision and the issues at stake in this case. A sampling of Mr. Feinberg’s many high-profile appointments as a neutral include:

- September 11<sup>th</sup> Victim Compensation Fund (special master)
- TARP Executive Compensation Fund (special master)
- BP Deepwater Horizon Disaster Victim Compensation Fund (government-appointed administrator)

- Hokie Spirit Memorial Fund (administrator of the Fund, established in the wake of shooting attacks at Virginia Tech)
- Aurora victim relief fund (established in the wake of the Aurora, Colorado movie theater shooting)
- One Fund Boston (donations for Boston Marathon bombing victims)
- Newtown-Sandy Hook Community Foundation
- General Motors ignition switch

Mr. Feinberg is also a well-respected member of the academic community. He has authored two books on the design and the administration of dispute resolution systems, focusing, in particular, on how procedural design and process can promote participant satisfaction in private dispute resolution. See Kenneth R. Feinberg, *Who Gets What: Fair Compensation After Tragedy and Financial Upheaval* (2012); Kenneth R. Feinberg, *What is Life Worth: The Inside Story of the 9/11 Fund and Its Effort to Compensate the Victims of September 11th* (2005). He serves as an adjunct professor at many of the nation's most prominent law schools, including: Harvard Law School, Columbia University School of Law, University of Pennsylvania Law School, Georgetown University Law Center, New York University School of Law, and the University of Virginia School of Law.

Mr. Feinberg has not sought or received any compensation in connection with the proposed brief. He submits it out of earnest concern and a desire to see

arbitration and other private dispute resolution mechanisms remain credible and viable alternatives to the public adjudication system.

## **II. The Proposed Brief Is Desirable And Relevant.**

This case is of exceptional importance to arbitrators in light of the issues it raises about the power of arbitrators to disregard relevant portions of the parties' arbitration agreement in issuing their judgments, and to rely on new grounds in affirming employer discipline. The resolution of this case will have implications for the fairness of future arbitral proceedings and the legitimacy of future arbitral awards. This is particularly so in light of the high-profile nature of and public attention received by this case.

Mr. Feinberg's brief offers analysis and discussion regarding the significance of this case to the broader arbitration community and the integrity of arbitral proceedings. The points made are directly relevant to the Court's inquiry as to whether the panel "overlooked or misapprehended" certain considerations, so as to warrant panel rehearing, Fed. R. App. P. 40(a)(2), or whether this case "involves a question of exceptional importance," so as to warrant rehearing en banc, Fed. R. App. P. 35(a)(2).

Mr. Feinberg respectfully submits that his combination of scholarly and real-world expertise can provide context about the consequences for the law of

arbitration, which are desirable, relevant and indeed necessary to preserving a just and viable system of arbitration.

May 31, 2016

Respectfully submitted,

/s/ Anthony S. Barkow  
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*Counsel for Amicus Curiae*

### **CERTIFICATE OF SERVICE**

I hereby certify that, on May 31, 2016, an electronic copy of this motion was filed with the Clerk of Court using the ECF system and thereby served upon all counsel appearing in this case.

/s/ Anthony S. Barkow

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