

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

NATIONAL FOOTBALL LEAGUE	§	
PLAYERS ASSOCIATION, on its own	§	
Behalf and on behalf of EZEKIEL	§	
ELLIOTT,	§	
	§	
Petitioner,	§	
	§	
v.	§	No. 4:17-CV-00615-ALM
	§	
NATIONAL FOOTBALL LEAGUE and	§	
NATIONAL FOOTBALL LEAGUE	§	
MANAGEMENT COUNCIL,	§	
	§	
Respondents.	§	

RESPONDENTS’ SUPPLEMENTAL BRIEF

Just as a party cannot appeal a verdict while the jury is deliberating, it cannot petition to “vacate” an arbitration decision that has not yet issued. Binding Supreme Court and Fifth Circuit authority could not be clearer: Until a “grievance award *** [is] final and binding under the collective bargaining agreement, *no action under § 301 [of the LMRA] *** will lie.*” *Gen. Drivers, Warehousemen & Helpers, Local Union No. 89 v. Riss & Co.*, 372 U.S. 517, 520 (1963); *see Meredith v. La. Fed’n of Teachers*, 209 F.3d 398, 402 (5th Cir. 2000) (“Federal courts *lack jurisdiction*” under the LMRA “unless the employee has exhausted contractual procedures for redress.”). This Court indisputably lacked power to grant Petitioner any relief at the time the suit was filed.

That the Arbitrator’s award issued five days later does not (and could not) change that ineluctable conclusion. *See* Exhibit A to the Declaration of Daniel L. Nash (“Nash Decl.”) (the “Award”). Because a party cannot “create jurisdiction retroactively where it did not previously exist,” *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 328 (5th Cir. 2011), any

relief this Court awarded now would be void and subject to immediate reversal by the Fifth Circuit. Although the NFLPA may attempt to file a *new* suit now that the Award has been issued, the Court lacks jurisdiction over this one.

The fundamental jurisdictional defect in the NFLPA's suit is no mere technicality. Federal courts observe the "first filing" rule, under which the second court having jurisdiction over a controversy will defer to the first court with jurisdiction. Last night, *after* the award was issued, the NFL properly filed a petition to confirm in the Southern District of New York (the "New York Action")—the place where Elliott's suspension was handed down and where the Arbitration hearing took place. (*See* Nash Decl. Ex. B.) Unless this Court dismisses, the NFLPA will undoubtedly argue that this action, rather than the New York Action, is the "first filed" suit. The NFLPA should not be permitted to thumb its nose at basic jurisdictional precepts in order to manipulate first-filed status. Instead, the Southern District of New York, as the only court with jurisdiction to consider the NFLPA's arguments—and the only court in which any party has sought review of the actual, rather than a hypothetical, "forthcoming" Award—can and should adjudicate this dispute. This Court should deny the pending Motion for Temporary Restraining Order and dismiss the Petition to Vacate.

ARGUMENT

I. THIS COURT MUST DISMISS THE NFLPA'S PREMATURE SUIT

A. The Issuance Of The Award Does Not Change The Fact That This Court Cannot Grant Petitioner Any Relief

1. *Post-Filing Events Do Not Confer Jurisdiction Or Standing Where It Was Previously Lacking*

Because both jurisdiction and standing must be established at the time a suit is filed, Fifth Circuit precedent is clear that plaintiffs "cannot rely on events that unfolded after the filing of the

complaint to establish its standing” or a court’s subject-matter jurisdiction. *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 458 (5th Cir. 2005); *McKesson*, 649 F.3d at 328 (plaintiff cannot through amendment or otherwise “create jurisdiction retroactively where it did not previously exist”); *see also* Mot. to Dismiss at 9-10 (citing additional authority for proposition that jurisdiction, where initially lacking, does not materialize later due to subsequent events).

Thus, the fact that the Award issued five days after Petitioner filed suit is irrelevant to whether this Court can adjudicate Petitioner’s lawsuit. This Court lacks jurisdiction today if it lacked jurisdiction last Thursday. And as explained below, this Court has lacked jurisdiction from this suit’s commencement.

2. *Federal Courts Lack Authority Under The LMRA To Review Non-Final Arbitration Awards*

The NFLPA concedes that, unless the LMRA confers authority to review a “forthcoming” Arbitration Award, this Court lacks subject-matter jurisdiction. NFLPA Reply at 1 (“[T]he LMRA—not the FAA—supplies the jurisdictional basis for this case.”). But the Supreme Court has squarely held that until a “grievance award *** [is] final and binding under the collective bargaining agreement, *no action under § 301 [of the LMRA] to enforce it will lie.*” *Gen. Drivers, Warehousemen & Helpers*, 372 U.S. at 520. Put differently, until a petitioner has “fully exhausted” grievance procedures by obtaining a final arbitration award, a petitioner may not “resort[] to the courts.” *Vaca v. Sipes*, 386 U.S. 171, 184-85 (1967).

Fifth Circuit authority is fully in accord: “Federal courts *lack jurisdiction* to decide cases alleging violations of a collective bargaining agreement under the Labor Management Relations Act by an employee against his employer unless the employee has exhausted contractual procedures for redress.” *La. Fed’n of Teachers*, 209 F.3d at 402 (emphasis added) (citation omitted); *see also Espinoza v. Cargill Meat Sols. Corp.*, 622 F.3d 432, 445 (5th Cir. 2010)

(“Espinoza’s suit is barred because she failed to exhaust the [CBA’s] Claims Procedure.”); *Richter v. Merchants Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir. 1996) (“Because Richter did not exhaust his remedies under the CBA, he is therefore precluded from bringing suit.”); *Baker v. Farmers Elec. Co-op, Inc.*, 34 F.3d 274, 284-85 (5th Cir. 1994) (“It is clear that Baker’s claims were properly dismissed for failure to exhaust the grievance procedures in the CBA.”).

Indeed, courts across the country have found that, until an arbitration award is “final and binding,” a federal court may not review it under Section 301. *See, e.g., Local 36, Sheet Metal Workers Int’l Ass’n v. Pevely Sheet Metal Co.*, 951 F.2d 947, 949-50 (8th Cir. 1992) (“federal jurisdiction” under LMRA not “proper” if “arbitration was not complete”); *Millmen Local 550, United Bhd. of Carpenters & Joiners of Am. v. Wells Exterior Trim*, 828 F.2d 1373, 1374 (9th Cir. 1987) (dismissing review of LMRA Award for lack of jurisdiction where there was no “final and binding award under section 301” at the time party filed suit); *Union Switch & Signal Div. Am. Standard Inc. v. United Elec., Radio & Mach. Workers of Am., Local 610*, 900 F.2d 608, 614 (3d Cir. 1990) (“[T]he opinions in this case should alert the bench and bar to the necessity for an arbitration to be complete before a section 301 action is entertained so that a premature action will be discouraged or, if brought, will be met with a motion to dismiss.”); *see also Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers, Shopmen’s Local Union 501 v. Burtman Iron Works, Inc.*, 928 F. Supp. 83, 86 (D. Mass. 1996) (“As a general matter, federal courts decline to review an arbitrator’s decision under section 301 of the LMRA until the award is final.”) (citing cases).

The NFLPA admits that the “forthcoming” Award was not “final and binding” at the time it filed suit under Section 301. *See* NFLPA Reply at 3 (acknowledging that, as of the time it filed suit, “Arbitrator Henderson could theoretically vacate the discipline”). At the hearing, the

NFLPA contended that it could immediately challenge certain evidentiary rulings of the Arbitrator. But those interim rulings are plainly not “final” within the meaning of the LMRA. In fact, the NFLPA does not seek to vacate those evidentiary rulings. Nor could it: The only order subject to vacatur under the LMRA is the Arbitrator’s “final” Award. *See Millmen Local 550*, 828 F.2d at 1376 (“By analogy to the ‘final judgment’ rule of section 1291,” before an arbitration Award is “final,” its rulings are not “reviewable under section 301” of the LMRA.). This Court therefore lacks jurisdiction to grant the NFLPA any relief.

The NFLPA contends that a petitioner is free to file suit over a “forthcoming” Award so long as it “attempts” to exhaust its administrative remedies. NFLPA Reply at 2. That is nonsense. This is not a situation where exhaustion can be excused because the NFLPA refused to file a grievance on an employee’s behalf, or the Arbitrator refused to hear it. *See DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983) (although an employee must ordinarily “exhaust any grievance or arbitration remedies provided in the collective bargaining agreement,” “we recognize[] that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation”). The NFLPA here initiated the arbitration process and then simply filed suit prematurely, before seeing arbitration through to its proper conclusion. But it is “[t]he Arbitrator’s imposition of an award [that] represents the point at which [petitioner’s] administrative remedies have been exhausted”—not before. *Mamouzette v. Jerome*, No. 2013-0117, 2017 WL 3083628, at *15 (D.V.I. July 19, 2017).

The NFLPA cannot cite a single case where a party was permitted to file a lawsuit under Section 301 concerning a dispute that was submitted to arbitration, but before the arbitrator

rendered a decision. This Court should not be the first one to do so. “To allow judicial intervention prior to the final award would contravene the fundamental federal labor policy of deference to contractual dispute resolution procedures, and would interfere with the purpose of arbitration: the speedy resolution of grievances without the time and expense of court proceedings.” *Millmen Local 550*, 828 F.2d at 1376.

3. *The NFLPA Also Lacked Standing To Seek Vacatur Of An Award That Had Not Yet Issued*

Like statutory jurisdiction, a party must demonstrate Article III standing at the “commencement of the litigation,” *Davis v. FEC*, 554 U.S. 724, 732 (2008), and the absence of constitutional standing cannot be cured through subsequent pleadings or procedures, *see, e.g., Cotton v. Certain Underwriters at Lloyd’s of London*, 831 F.3d 592, 595 (5th Cir. 2016) (explaining that in *Summit Office Park, Inc. v. U.S. Steel Corp.*, 639 F.2d 1278 (5th Cir. 1981), district court correctly disallowed an amendment to the complaint that would have cured a standing defect and dismissed case “because jurisdiction was lacking over the entire case from its inception”). Here, it is clear that at the time the NFLPA brought suit seeking (as sole relief) vacatur of the “Award,” Pet. ¶ 86, a ruling from this Court could not have redressed any actual injury caused by the “Award” because, as the NFLPA tellingly states, the “Award” was by definition a “*forthcoming* Arbitration Award (‘Award’),” Pet. at 1 (emphasis added).

In an effort to avoid that conclusion, the NFLPA has argued that it had standing to “vacate” something that did not exist because its injury was “imminent.” NFLPA Reply at 2. But the concept of “imminent” injury does not encompass the NFLPA’s claim. As the Supreme Court has recently underscored, “[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury

is *certainly* impending. Thus, we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that [a]llegations of *possible* future injury are not sufficient.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (first alteration in original) (citations and internal quotation marks omitted). Given the NFLPA’s position in the underlying arbitration that the suspension *must* be overturned for myriad reasons, it cannot be the case that affirmance of the suspension was “certainly impending,” rather than merely “possible,” at the commencement of litigation.

The NFLPA’s “expect[ation]” that the Award would “deny[] Elliott and the NFLPA’s disciplinary appeal,” NFLPA Mot. at 1, is of no moment. The Supreme Court has expressly “declined to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.” 568 U.S. at 413; *see id.* at 414 n.5 (“Plaintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court.”) (citations and internal quotation marks omitted). Indeed, the Court in *Whitmore v. Arkansas* held that because “[i]t is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case,” “no amount of evidence” could establish a plaintiff’s standing. 495 U.S. 149, 159-60 (1990). To hold here that the NFLPA had standing at the outset of this suit based on sheer speculation about the substance of the forthcoming Award—an Award that the NFLPA conceded might have still granted full relief and thus cause no injury at all—would run headlong into that settled law.

B. The Only Proper Forum To Adjudicate This Dispute Is The Southern District Of New York

The jurisdictional defect in the NFLPA’s suit is no mere technicality. That is because the proper forum to review the Award issued by the Arbitrator is the United States District Court for the Southern District of New York, where the NFL Management Council filed an action to

confirm yesterday *after the Award actually issued*. (See Nash Decl. Ex. B.) The NFLPA has not filed a new lawsuit in this Court to vacate or enjoin the Arbitrator's Award, and neither the NFLPA's existing Petition nor its application for injunctive relief seeks review of the *actual* Award (versus the "forthcoming" one). Thus, the New York Action is properly considered the "first filed" action, and this Court should dismiss this suit so that the parties can adjudicate this dispute in the only court with subject-matter jurisdiction.

In the alternative, this Court may simply transfer the matter to the Southern District of New York. The NFLPA has successfully sought in the past to transfer a "first-filed" action to the Southern District of New York on the ground that it was appropriate to transfer to the forum where the arbitration took place and the award was issued. *See Johnson v. National Football League Players Ass'n*, 2017 WL 2882119, Case No. 5:17-CV-0047 (N.D. Ohio July 6, 2017). Consistent with that ruling, courts "have generally found that the interests of justice and the convenience of all involved are best served by having the action heard in the forum where the arbitration took place." *Crow Const. Co. v. Jeffrey M. Brown Assocs., Inc.*, No. 01 CIV. 3839 (AGS), 2001WL 1006721, at *2 (S.D.N.Y. Aug. 31, 2001) (collecting cases). And that is true in suits involving discipline under the parties' CBA, as well. *See, e.g., Nat'l Football League Players Ass'n v. Nat'l Football League*, Civ. No. 15-3168 (RHK/HB), 2015 WL 7596934, at *2 (D. Minn. July 30, 2015) (transferring case involving NFL player suspension appeal to the Southern District of New York where the arbitration proceedings took place and the award was issued in New York).¹

¹ *See also, e.g., Esso Expl. & Prod. Chad, Inc. v. Taylors Int'l Serv. Ltd.*, No. H-04-2483, 2006 WL 1544516, at *3 (S.D. Tex. June 1, 2006) (finding that because the arbitration was conducted in New York, the private interest factors weighed in favor of a transfer to the Southern District of New York, and also that the public concerns weighed in favor of transfer because the

Transferring would be particularly appropriate here because Petitioner’s anticipatory suit would have no basis to claim first-filed status even if this Court *had* jurisdiction. Anticipatory suits involve actions “brought in one forum in anticipation of the opposing party bringing suit in another, less favorable forum.” *Serv. Corp. Int’l v. Loewen Grp. Inc.*, Civil Action No. H-96-3269, 1996 WL 756808, at *2 (S.D. Tex. Nov. 29, 1996); *see also Platt v. Nash*, 2016 WL 6037856, at *2 (E.D. Tex. Oct. 14, 2016) (“The first-to-file rule does not apply where the first suit is brought in anticipation of the second suit.”). Such actions “are disfavored because they are an aspect of forum-shopping.” *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 n.3 (5th Cir. 1983). Where a case is found to have been “designed to preempt the [second-filer’s] suit and to secure the [first-filer’s] own choice of forum instead,” it is proper for the court where the anticipatory suit was filed to “yield” to the other forum. *Raz Imports, Inc. v. Luminara Worldwide, LLC*, No. 3:15-cv-02223-M, 2015 WL 6692107, at *3 (N.D. Tex. Nov. 3, 2015) (granting transfer of venue based on anticipatory suit and public and private interest factors). As the true first-filed action regarding the actual Award, the Southern District of New York is the proper court to resolve the parties’ dispute. *See Emp’rs Ins. of Wausau v. Fox Entm’t Grp.*, 522 F.3d 271, 275 (2d Cir. 2008) (courts need not defer to anticipatory filing involving “manipulative or deceptive behavior”).

II. THE AWARD SIMPLY CONFIRMS THAT PETITIONER CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS

The Arbitrator’s Award also confirms that the NFLPA cannot establish any likelihood of success on the merits. The Arbitrator considered the NFLPA’s arguments, including the very

Southern District of New York has greater familiarity and experience in dealing with whether the law was correctly applied by the arbitrator); *see also Drill Cutting Disposal Co. v. Gutierrez*, No. 15-cv-2532, 2016 WL 4541598, at *7 (W.D. La. Aug. 26, 2016) (transferring case to the Western District of Texas due largely to the arbitration proceedings being located in San Antonio, as “any evidence as to those proceedings is likely to be most easily accessible there”).

evidentiary and procedural issues the NFLPA raises in this proceeding, yet found that the Commissioner acted within his authority in imposing the discipline. That decision cannot be second guessed here. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (federal district courts “have no business weighing the merits of the grievance [or] considering whether there is equity in a particular claim.”) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987)); *United Steel v. Delek Ref., Ltd.*, 575 F. App'x 330, 333 (5th Cir. 2014) (as long as the “arbitrator acted within the ambit of his authority” in issuing an award, then “the arbitrator’s construction and award must be affirmed no matter how ‘good, bad, or ugly.’”) (quoting *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071 (2013)).²

First, the Arbitrator considered the NFLPA’s arguments that the discipline could not be upheld because Kia Roberts’ concerns regarding Tiffany Thompson’s credibility were concealed from the Commissioner. See Award at 6. The Arbitrator rejected this contention, finding that “all the statements and inconsistencies [identified by Roberts] are included in the investigative report and other materials provided to the Commissioner for his review,” and thus did not provide a basis to overturn the discipline. (*Id.* at 8.) Courts “do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.”

² The reason for this deference is clear. The typical at-will employee has no ability to litigate any discipline against him. See, e.g., *Dworschak v. Transocean Offshore Deepwater Drilling, Inc.*, 352 S.W.3d 191, 197 (Tx. Ct. App. 2011) (company’s human resources manual did not create contract entitling at-will employee to certain procedures before termination). The right to make such a challenge only arises if the employee and employer have agreed to such a process. See, e.g., *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1201 (5th Cir. 1987) (contract contained “specific limiting disciplinary procedural requirements which obviate the application of the Texas ‘at-will’ doctrine”). Consequently, an employee may not demand more than the contract provides. See, e.g., *NFLMC v. NFLPA*, 820 F.3d 527, 547 (2d Cir. 2016) (“*Brady*”) (“Had the parties wished to allow for more expansive discovery, they could have bargained for that right. They did not, and there is simply no fundamental unfairness in affording the parties precisely what they agreed on.”).

Misco, 484 U.S. at 38. As a result, an arbitration award must be upheld even if the court is convinced that the arbitrator committed “serious error.” *Id.* at 39 (“improvident, even silly, factfinding” does not provide a basis for a reviewing court to refuse to enforce the award).

Second, the Arbitrator construed Article 46 of the parties’ collective bargaining agreement and the Personal Conduct Policy promulgated pursuant to that Article in finding that the investigative process leading to Elliott’s discipline “fit squarely in the process outlined in the revised Policy”:

That process reserves the determination on discipline to the Commissioner by separating the functions; the disciplinary officer will provide a report on the investigation and also a disciplinary recommendation for the Commissioner’s consideration “if desired.”

(*Id.* at 6.) In reaching that conclusion, the Arbitrator unquestionably “constru[ed]” and “appl[ied]” the parties’ contract and acted “within the scope of his authority.” *Misco*, 484 U.S. at 38.³

The NFLPA’s contention that the Award should nonetheless be overturned based on “fundamental fairness” grounds falls flat. Indeed, as other circuits have explained, fundamental fairness is not an independent ground for vacating an award under the LMRA; instead, as long as an award draws its essence from the parties’ agreement, an arbitrator’s decision may not be vacated. *See, e.g., National Football League Players Ass’n ex rel. Peterson v. National Football*

³ The same principles apply to the Arbitrator’s conclusion not to compel Tiffany Thompson or the Commissioner to testify. *See, e.g., Brady*, 820 F.3d at 545 (“It is well-settled that procedural questions that arise during arbitration, such as which witnesses to hear and which evidence to receive and exclude, are left to the sound discretion of the arbitrator and should not be second-guessed by courts”) (citing *Misco*, 484 U.S. at 40). The Arbitrator’s decision on these issues also was based upon his interpretation of what was required under the parties’ collectively bargained process. *See* ECF #1-59 at 1-2 (“I am not persuaded that under the provisions of Article 46 the NFL is required to produce Ms. Thompson for testimony at the hearing.”); ECF #2-13 (Hearing Tr. Day 2) at 330-36, 348-49.

League, 831 F.3d 985, 999 (8th Cir. 2016) (“We have never suggested that when an award draws its essence from the collective bargaining agreement, a dissatisfied party nonetheless may achieve vacatur of the arbitrator’s decision by showing that the result is ‘fundamentally unfair’”); *Lippert Tile Co., Inc. v. Int’l Union of Bricklayers*, 724 F.3d 939, 948 (7th Cir. 2013) (“[LMRA] review simply does not include a free-floating procedural fairness standard absent a showing that some provision of the CBA was violated”). The NFLPA’s submission does not include a single case (from this Circuit or elsewhere) holding that a labor arbitrator’s procedural rulings or substantive award may be vacated as “fundamentally unfair” when the arbitrator was “arguably construing or applying [a collectively-bargained] contract and acting within the scope of his authority” when making these decisions. *Misco*, 484 U.S. at 38. Holding otherwise would overturn nearly 60 years of established Supreme Court precedent. The NFLPA fails to identify any case in which an arbitration award issued under Article 46 of the CBA (or its predecessor provisions) was overturned on these grounds.

As the Second Circuit held in *Brady*, the applicable statutory and Supreme Court authority holds:

Our role is not to determine for ourselves whether Brady participated in a scheme to deflate footballs or whether the suspension imposed by the Commissioner should have been for three games or five games or none at all. Nor is it our role to second-guess the arbitrator’s procedural rulings. Our obligation is limited to determining whether the arbitration proceedings and award met the minimum legal standards established by the [LMRA]. We must simply ensure that the arbitrator was “even arguably construing or applying the contract and acting within the scope of his authority” and did not “ignore the plain language of the contract.” These standards do not require perfection in arbitration awards. Rather, they dictate that even if an arbitrator makes mistakes of fact or law, we may not disturb the award so long as he acted within the bounds of his bargained-for authority.

Brady, 820 F.3d at 532 (quoting *Misco*, 484 U.S. at 38). Because the Award shows that the Arbitrator unquestionably was doing so here, the NFLPA has no chance of overturning it. The Award accordingly confirms that it has no likelihood of success on the merits of its petition.

CONCLUSION

For the foregoing reasons, and those stated in Respondents' other briefs, Petitioner's Motion for Temporary Restraining Order should be denied and the Petition to Vacate should be dismissed. Alternatively, the Court should transfer this action to the United States District Court for the Southern District of New York.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2017, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to the attorneys of record in this case who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Patrick G. O'Brien _____

4. I declare under penalty of perjury that the foregoing is true and correct.

DATED: September 6, 2017

/s/ Daniel L. Nash

Daniel L. Nash



NATIONAL FOOTBALL LEAGUE

September 5, 2017

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Re: Ezekiel Elliott Appeal – Player Conduct Policy

Gentlemen:

Ezekiel Elliot, a player with the Dallas Cowboys, was notified by letter from B. Todd Jones dated August 11, 2017, (i) that he was suspended without pay for the first six games of the 2017 season, and (ii) that he was directed to engage a qualified professional to arrange a clinical evaluation and, should counseling or treatment be recommended, to comply with those recommendations.

This discipline arose out of several domestic violence incidents in Columbus, Ohio during the week of July 16, 2016. Mr. Elliott's role in those incidents was found to have violated the NFL Personal Conduct Policy (the "Policy"). A timely appeal was filed on Mr. Elliot's behalf by the NFLPA, which appeal was heard on August 29, August 30, and September 1. This letter sets forth the decision regarding that appeal, which follows careful review and consideration of the evidence in the record, including witness testimony and documents submitted by the parties, as well as arguments of counsel that were made at the hearing.

BACKGROUND

In late July, 2016 the NFL became aware of allegations by Tiffany Thompson that Mr. Elliott had committed multiple acts of physical violence against her in Columbus, Ohio during the week of July 16, 2016. Those allegations were investigated by the Columbus Police Department and no arrest was made at that time. Subsequently, on September 6, 2016, the Columbus City Attorney's office publicly announced its decision not to pursue a criminal prosecution with respect to those incidents, "primarily due to conflicting and inconsistent information across all incidents resulting in concern regarding the sufficiency of the evidence to support the filing of criminal charges." NFL Exh. B-2 at Exh. 102.

The NFL learned of this announcement and promptly initiated an investigation of the allegations against Mr. Elliott under the direction of Ms. Lisa Friel, NFL Senior Vice President - Special Counsel for Investigations. An extensive investigation followed, which culminated in a report submitted by Ms. Friel and Kia Roberts, Director of Investigations, submitted on June 6,

2017. That report addressed interviews of Ms. Thompson and Mr. Elliott conducted on September 26 and September 28, 2016, respectively. Ms. Thompson was interviewed one other time in person, and four times by telephone.

After the report was submitted and shared with the NFLPA and counsel for Mr. Elliott, he was interviewed on June 26, 2017 by a panel of advisors selected by the Commissioner to advise him on this case. Mr. Elliott's counsel and NFLPA counsel were present for that interview, along with NFL executives and counsel. The transcript of that interview is part of this record. NFL Exh.E.

On August 11, 2017, Mr. Jones' discipline letter (NFL Exh.A-1) was sent, which included the following:

The Commissioner has now had the opportunity to review the record, including the investigative reports, transcripts of the June 26, 2017 meeting and the materials submitted on your behalf. He also consulted separately with each of the independent advisers concerning the evidence and the points made by your representatives. In that respect, the advisers individually were of the view that there is substantial and persuasive evidence supporting a finding that you engaged in physical violence against Ms. Thompson on multiple occasions during the week of July 16, 2016. The Commissioner has considered those views in the context of his evaluation of the record and the advice and recommendations of the advisers have helped to inform his findings and conclusions, which are set forth below. NFL Exhibit A-1, P.3.

The Commissioner found, based on the credible evidence in the record, that on three occasions Mr. Elliott had used physical force against Ms. Thompson resulting in her injury:

1) Early morning of July 17, 2016 at 1860 Canvasback Lane, Columbus, Ohio Mr. Elliott used physical force that caused injuries to Ms. Thompson's arms neck and shoulders which appear recent and consistent with Ms. Thompson's description of the incident and how that occurred.

2) On the morning of July 19, 2016 at the Canvasback Lane apartment, Mr. Elliot used physical force that caused injuries to Ms. Thompson's face, arms, wrists and hands.

3) In early morning hours of July 21, 2016 in an altercation at the Canvasback Lane apartment Mr. Elliott used physical force that caused injuries to Ms. Thompson's face, neck, arms, knees and hips. A witness stated that she observed these injuries to Ms. Thompson later the same day. It was determined that the injuries displayed appear recent and consistent with Ms. Thompson's descriptions of the incident and how they occurred.

Mr. Elliot was disciplined for those three incidents, and not for other incidents on July 18 and 22 that had also been addressed in the investigation.

The investigation also addressed an incident on March 11, 2017 during a Saint Patrick's Day parade in Dallas. A video was posted on the Internet showing Mr. Elliott pulling down the top of

a woman's blouse to expose her breast, which conduct he has admitted. No discipline was imposed for that incident, but Mr. Elliott's behavior during that event was inappropriate and disturbing, reflecting a lack of respect for women. When viewed together with the July incidents it suggests a pattern of poor judgment and behavior for which effective intervention is necessary for your personal and professional welfare. Clinical evaluation by a qualified professional was directed, as well as compliance with counseling or treatment recommendations, if any.

NFLPA POSITION

On behalf of Mr. Elliott the NFLPA argues that the record does not support a determination that credible evidence establishes the existence of a violation of the Policy, so the discipline must be overturned. Tr. pp. 24-25. The NFLPA asserts that the hearing officer under Article 46 of the CBA must apply the fair and consistent standard to decide if the evidence here is credible. The credible evidence standard is newly added in the policy, and did not appear in prior versions.. The NFLPA argues further that where there has been no criminal charge against the player, the credibility of the accuser and accused is key. Because the Commissioner did not interview either in this case, the union argues, he has no basis to judge the credibility of the only two people who directly witnessed the events- Ms. Thompson and Mr. Elliott. On the other hand, the Union contends, the Columbus City Attorney interviewed both and found credibility issues which caused him to decline filing a criminal charge. Columbus police officers who responded to the initial call made the same decision and did not arrest Mr. Elliott because of inconsistent and conflicting statements.

The NFLPA put great significance on the fact that NFL investigators found numerous inconsistencies among Ms. Thompson's statements. Even more significant, in their view, is the absence of a recommendation for discipline in the NFL's extensive investigation report, which they attribute to the lack of credible evidence sufficient to support the existence of a violation. Moreover, they contend that the NFL's refusal to produce Ms. Thompson to testify at the appeal hearing is further evidence of the lack of confidence in her credibility. Counsel for Mr. Elliott said that the hearing officer should draw an adverse inference from her absence and assume that her testimony would not be credible. Tr. 43 – 44.

According to the NFLPA, Ms. Thompson's lack of credibility is demonstrated not only by the many inconsistencies and conflicts in her statements to the league investigators and law enforcement about the events which transpired in the week of July 16, 2017, but on prior occasions as well. For example, in Aventura, FL she called the police to report that Mr. Elliott was assaulting her. Police officers responded and investigated, but declined to make an arrest or charge Mr. Elliott because Ms. Thompson showed no signs of injury and there were no witnesses to the events. According to the NFLPA, there should be no deference given the Commissioner's decision here because important facts were omitted from the Investigation Report and other materials on which he relied. Accordingly, the NFLPA argues, the discipline should be overturned in its entirety because the allegations are not supported by credible evidence as required by the Policy.

NFL POSITION

The league contends that the record in this case contains everything the Commissioner relied upon to make his decision on discipline. It includes an investigative report authored by Lisa Friel and Kia Roberts dated June 6, 2017 with exhibits 1-103 attached (NFL Exhibits B-1, B-2). He was also provided the NFL investigation report on the St. Patrick's Day incident (NFL Exhibit C- 1, C-2) and medical reports. (NFL exhibits D-1, D-2) The record also includes the Kia Robinson memorandum on inconsistencies in the Tiffany Thompson statements. NFL Exhibit 99. According to the NFL, in assessing whether discipline is fair and consistent the hearing officer must give deference to the Commissioner's decision. Transcript p. 84.

The NFL argues that the Commissioner gave careful consideration to all arguments. Tr. 85 According to the NFL, it is the Commissioner's responsibility to assess credibility in the first instance; the hearing officer's job is to review whether his determination is arbitrary and capricious. Tr. p. 86. The NFL contends that the conclusion of the Commissioner on discipline is supported by credible evidence, and that it is beyond the scope of a hearing officer's role to re-examine every bit of evidence and testimony that he reviewed and make a second determination on issues of credibility. Therefore, the NFL argues, the discipline in this case should be upheld.

DISCUSSION

I start by turning to the NFL Personal Conduct Policy for guidance in resolving this appeal. This policy originated in 1997 when Commissioner Tagliabue promulgated what was then called a violent crime policy. Over the 20 years since, the policy has been modified several times, usually in response to difficulties and issues that arose in the administration the policy, or in response to changing values and standards of society. The most recent changes were adopted and published in 2016 with significant changes in the procedures for discipline. In part, the revised policy provides as follows:

Discipline— A player violates this policy when he has a disposition of a criminal proceeding (as defined), or if the league's investigation demonstrates that he engaged in conduct prohibited by the Personal Conduct Policy. In cases where a player is not charged with a crime, or is charged but not convicted, he may still be found to have violated the Policy if the credible evidence establishes that he engaged in conduct prohibited by this Personal Conduct Policy.

The disciplinary officer, a member of the league office staff who will be a highly qualified individual with a criminal justice background, will follow the process outlined below to investigate a potential violation, produce a report and if desired present a disciplinary recommendation for the Commissioner's consideration. The Commissioner will review the report (and recommendation if presented) and determine the appropriate discipline, if any, to be imposed on the player.

To assist in evaluating a potential violation, expert and independent advisers may be consulted by the disciplinary officer, the Commissioner, and others as needed. Such advisers include former players and others with appropriate backgrounds and experience in law enforcement, academia, judicial and public service, mental health, and persons with other specialized subject matter expertise. Any experts or advisors consulted in this respect may provide advice and counsel or testimony as appropriate, but will not make any disciplinary determinations.

Players who are subject to discipline will be given notice of the potential violation for which discipline maybe imposed. The player will be furnished with the records and other reports that were relied on in addressing the matter, including records from law enforcement and a copy of any investigatory report and any documents relied upon by a league investigator in generating this report. The player will be permitted to submit information in writing to rebut or otherwise respond to the report. In addition, he will have the opportunity to meet with the disciplinary officer in advance of discipline being imposed. ...

Following review, the Commissioner, either directly or through a member of his staff, will communicate his decision to the player regarding any disciplinary action to be taken. Personal Conduct Policy 2016

In this case the player has not been charged with a crime, so only if credible evidence establishes that he engaged in prohibited conduct may he be found to have violated the Policy. The disciplinary officer, Todd Jones, directed an investigation which was conducted by Lisa Friel, Senior Vice President and Special Counsel-Investigations, and Kia Roberts, Director of Investigations in the League's Security Department, both seasoned prosecutors with extensive experience investigating domestic violence crimes. Both investigators expressed surprise that they were not asked to make a recommendation on discipline based on their investigation and report, and Ms. Roberts could not explain why she was not invited to participate in the meeting with the expert and independent advisers; however, their roles fit squarely into the process outlined in the revised Policy. That process reserves the determination on discipline to the Commissioner by separating the functions; the disciplinary officer will provide a report on the investigation and also a disciplinary recommendation for the Commissioner's consideration "if desired."

Other aspects of the process as outlined in the Policy were followed meticulously. A four person panel of expert and independent advisers reviewed the investigation report and attachments. They interviewed Mr. Elliot, who was accompanied by Union representatives and counsel. He was invited to provide for the record any documents or other evidence he wished to be considered, and he did so. He met with the panel in New York on June 26 2017 where he participated in the discussion and took that opportunity to answer questions and provide information to the panel.

At the opening of that meeting, NFL counsel Adolpho Birch introduced the outside advisers fn/ and stated on the record: "And, importantly, they are not going to be part of the decision-making process in the determination of this discipline. That is not their function as they well understand and as we understand and as the policy provides. That matter is committed to the Commissioner. But the role of the advisers us to provide, through their backgrounds and expertise, their perspectives to assist him in formulating his decision as he makes that determination." NFL Exhibit E, p. 8. Ms. Friel asked questions of Mr. Elliott and the advisers asked questions of Ms. Friel and Mr. Elliott. A transcript of this session was provided to Mr. Elliot that same week. NFL Exhibit 1, p. 3. On July 7 and July 17 Mr. Elliot, through counsel, submitted materials that he wanted to be included in the record. NFL Exhibits F and G.

The hearing transcript shows numerous instances where counsel and witnesses express surprise and dismay at the handling of some aspects of this disciplinary case. I submit that is because they are not fully aware of what the new Policy provides. This may the first time the new process was fully deployed, at least in a case where there was no criminal charge or conviction. Yet, on close inspection one can see a carefully thought out, detailed, multi-faceted process which was adhered to closely. A lack of familiarity does not necessarily mean irregularity. If this is in fact a first effort under the new procedures they got it right.

New Evidence: Mr. Elliott's counsel cites the emergence of "new" evidence not presented to the Commissioner as a basis for overturning the discipline. I need not to decide when new evidence, or its absence in the record, requires revisiting the issue for fairness and consistency because we are not presented such new evidence in this case. New evidence does not include anything the parties knew, or could have known, at the time the discipline was initially imposed.

Alvarez Jackson's corroboration of "everything Mr. Elliott said" surely is not new; Mr. Elliott's best friend since childhood and college roommate, Mr. Jackson cooperated with counsel's efforts to avoid charges against Mr. Elliott in Columbus, spending three hours with the City Attorney. He also provided affidavits on August 2 and again on August 12, 2016. Transcript 2, p. 200; NFL Exhibit B-1, Attachment 42. He testified at the appeal hearing that "I didn't feel that it was necessary to speak with the NFL because I spoke with the prosecutor, we spent a good amount of time together. We got all the facts down and they got it right." Tr. 2, p. 200.

fn/ The panel of advisers was composed of the following:

- Peter Harvey, Esq., former Attorney General for the State of New Jersey
- Mr. Kenneth Houston, former NFL player and member of the Pro Football Hall of Fame
- Ms. Tonya Lovelace, CEO of the Women of Color Network, Inc.; and
- Mary Jo White, Esq., Former United States Attorney for the Southern District of New York and former Chair of the Securities Exchange Commission

Similarly, Macie Hewitt's affidavit presents nothing that was not known, or could not have been known, based on the affidavit itself. She avers that she knows Mr. Elliott socially and that they have several mutual friends, that she attended his private birthday party, and that she was invited to and briefly attended his after-party at the Carriage House. No information was offered to explain the genesis of her affidavit, but I note that no year appears in the date line by the notary's signature and seal, so it is unknown if it was executed a few weeks after the incident or a few days before the hearing, more than a year later. Also, at paragraph 2 of the affidavit, she states that the incident occurred on Thursday, July 21, 2017. Absent an explanation as to why this information was not known and available to the player earlier, this is not "new" evidence that would call for reconsideration of the initial disciplinary decision. The affidavit refutes every aspect of Ms. Thompson's account of those events, as well as those of Ms. Mason, and explain the injuries she saw on Instagram the next day- injuries Mr. Elliott and several other witnesses did not see. Players Exh. 57.

The testimony of Ms. Friel and Ms. Roberts was said to reveal new evidence which, according to the NFLPA, would have affected the Commissioner's decision if he had known, namely that due to inconsistent statements they did not find Ms. Thompson sufficiently credible to support discipline in some of the incidents investigated. However, all the statements and inconsistencies are included in the Investigative report and other materials provided to the Commissioner for his review. Their recommendations were not sought or required at that point, pursuant to the recent changes to the Policy.

CONCLUSION

Appeals under Article 46 of the CBA are, in many ways, a unique exercise in labor arbitrations. It has long been settled that the Commissioner has broad discretion to decide the process for taking action against a player for conduct detrimental to the integrity of, or public confidence in, the game of professional football. That principle, first established in the League's Constitution and Bylaws, has been included in the CBA for many years, through many renegotiations, extensions and new agreements. The unusual and long-established characteristic of this process is the ability of the Commissioner to hear appeals of discipline for conduct detrimental or to appoint a designee to hear the appeal and act in his stead with the same final and binding effect on both parties.

As his designated Hearing Officer in this matter, my responsibility is to determine whether the Commissioner's decision on discipline of Mr. Elliott is arbitrary and capricious, meaning was it made on unreasonable grounds or without any proper consideration of circumstances. It is not the responsibility, nor within the authority of, the Hearing Officer to conduct a *de novo* review of the case and second guess his decision. Rather, the review is to determine whether the player was afforded adequate notice of his alleged violation, the right to representation, opportunity to present evidence, and a decision which is fair and consistent. In a case involving violation of a policy, fair and consistent means whether the process and result were in compliance with the terms of that policy. This one is, in every respect.

Here the process for imposing discipline outlined in the Policy has been followed closely, step by step. I find it unnecessary to reexamine all the evidence presented in this record because my careful and diligent review of everything the Commissioner reviewed and relied on draws me to the conclusion that the record contains sufficient credible evidence to support whatever determinations he made. He is entitled to deference on those judgments absent irregularities not present here. While the record contains inconsistencies in statements, an adjudicator makes informed judgments on the credibility of witnesses and evidence.

The Commissioner's determination is affirmed and the appeal is denied.

Sincerely,

A handwritten signature in blue ink that reads "Harold Henderson" followed by a circled "H" in parentheses.

Harold Henderson
Hearing Officer

cc: Heather McPhee, Esq.
Adolpho Birch, Esq.

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

NATIONAL FOOTBALL LEAGUE
MANAGEMENT COUNCIL,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION,

Defendant.

Case No:

COMPLAINT

This is an action to confirm and enforce an arbitration award pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. §§ 185 *et seq.*

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1331 and 29 U.S.C. § 185.

2. Venue is proper in this District pursuant to 29 U.S.C. § 185(a) and 28 U.S.C. § 1391.

PARTIES

3. The National Football League Management Council (“NFL Management Council”) is the sole and exclusive bargaining representative of present and future employer member clubs of the NFL. The NFL Management Council’s principal place of business is in New York, New York.

4. The National Football League Players Association (“NFLPA”) is the exclusive bargaining representative of all NFL Players. The Players Association regularly represents players in the Southern District of New York, and some of its members reside in this judicial district.

FACTS

5. The parties are bound by a Collective Bargaining Agreement (“CBA”) negotiated between the NFL Management Council (on behalf of the NFL member clubs) and the NFLPA (on behalf of all NFL players, including as relevant here, Ezekiel Elliott). Relevant portions of the CBA are attached hereto as Exhibit A.

6. Article 46 of the CBA expressly acknowledges the authority of the NFL Commissioner to discipline players for conduct that he determines is “detrimental to the integrity of, or public confidence in, the game of professional football[.]” *See* Ex. A, Art. 46, § 1(a).

7. Paragraph 15 of the standard NFL Player Contract, which is part of the CBA, further acknowledges the Commissioner’s authority to discipline players for engaging in conduct detrimental to the League or professional football—including where they engage in conduct that impairs “public confidence in the . . . integrity and good character of NFL players.” Ex. A, App. A, ¶ 15.

8. “All disputes” over discipline imposed by the Commissioner for conduct detrimental to the league must be resolved exclusively under the final and binding appeal procedures set forth in Article 46 of the CBA. Under Article 46, players have the right to appeal their discipline at a hearing. *See* Ex. A, Art. 46, § 2(a)-(d).

9. On August 11, 2017, the NFL notified Dallas Cowboys running back Ezekiel Elliott that, pursuant to the Commissioner’s authority under Article 46 of the CBA, he will be suspended without pay for the first six games of the 2017 NFL regular season games for engaging in conduct detrimental to the integrity of and public confidence in the game of professional football. As set forth in the letter from the NFL informing Elliott of the discipline, the suspension is based on his violation of the NFL’s Personal Conduct Policy concerning the use of physical force against a woman in the context of an intimate relationship.

10. On August 15, 2017, the NFLPA appealed Elliott’s suspension pursuant to Article 46 of the CBA.

11. On August 29 through August 31, 2017, a hearing was held before arbitrator Harold Henderson at the law firm of Akin Gump Strauss Hauer & Feld LLP located at One Bryant Park, New York, New York 10036.

12. On September 5, 2017, Arbitrator Henderson issued a final written decision on the NFLPA's appeal of Elliott's suspension ("Decision"), which is attached hereto as Exhibit B.

13. The Decision denied the NFLPA's appeal and confirmed Elliott's suspension.

14. Under the CBA, the Decision constitutes the "full, final and complete disposition of the dispute and will be binding upon the player(s), Club(s) and parties to this Agreement[.]" Ex. A, Art. 46, § 2(d).

COUNT 1 – CONFIRMATION OF ARBITRATION AWARD

1. The NFL Management Council repeats and re-alleges Paragraphs 1-14 as if set forth fully herein.

2. The NFL Management Council seeks an order confirming the Decision under well-established principles of federal labor law. The Decision was issued in full accord with the parties' CBA and draws its essence from the parties' agreements, as it interprets the terms of the CBA and Elliott's NFL Player Contract.

3. The NFL Management Council is entitled to confirmation and enforcement of the Decision and entry of judgment in conformity of the Decision pursuant to the Labor Management Relations Act, 29 U.S.C. § 185.

PRAYER FOR RELIEF

WHEREFORE, the NFL Management Council respectfully requests that this Court enter an Order:

(a) Confirming the Decision;

- (b) Entering judgment in favor of the NFL Management Council against the NFLPA; and
- (c) Providing the NFL Management Council with such other and further relief as the

Court deems proper.

New York, NY

Dated: September 5, 2017

/s/ Estela Díaz

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Exhibit A



**COLLECTIVE
BARGAINING
AGREEMENT**

August 4, 2011



NFL PLAYERS
ASSOCIATION

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ARTICLE 46 COMMISSIONER DISCIPLINE

Section 1. League Discipline: Notwithstanding anything stated in Article 43:

(a) All disputes involving a fine or suspension imposed upon a player for conduct on the playing field (other than as described in Subsection (b) below) or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows: the Commissioner will promptly send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such written notification, the player affected thereby, or the NFLPA with the player's approval, may appeal in writing to the Commissioner.

(b) Fines or suspensions imposed upon players for unnecessary roughness or unsportsmanlike conduct on the playing field with respect to an opposing player or players shall be determined initially by a person appointed by the Commissioner after consultation concerning the person being appointed with the Executive Director of the NFLPA, as promptly as possible after the event(s) in question. Such person will send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such notification, the player, or the NFLPA with his approval, may appeal in writing to the Commissioner.

(c) The Commissioner (under Subsection (a)), or the person appointed by the Commissioner under Subsection (b), shall consult with the Executive Director of the NFLPA prior to issuing, for on-field conduct, any suspension or fine in excess of \$50,000.

(d) The schedule of fines for on-field conduct will be provided to the NFLPA prior to the start of training camp in each season covered under this Agreement. The 2011 schedule of fines, which has been provided to and accepted by the NFLPA, shall serve as the basis of discipline for the infractions identified on that schedule. The designated minimum fine amounts will increase by 5% for the 2012 League Year, and each League Year thereafter during the term of this Agreement. Where circumstances warrant, including, but not limited to, infractions that were flagrant and gratuitous, larger fines, suspension or other discipline may be imposed. On appeal, a player may assert, among other defenses, that any fine should be reduced because it is excessive when compared to the player's expected earnings for the season in question. However, a fine may be reduced on this basis only if it exceeds 25 percent of one week of a player's salary for a first offense, and 50 percent of one week of a player's salary for a second offense. A player may also argue on appeal that the circumstances do not warrant his receiving a fine above the amount stated in the schedule of fines.

Section 2. Hearings:

(a) **Hearing Officers.** For appeals under Section 1(a) above, the Commissioner shall, after consultation with the Executive Director of the NFLPA, appoint one or more designees to serve as hearing officers. For appeals under Section 1(b) above, the parties shall, on an annual basis, jointly select two (2) or more designees to serve as hearing officers. The salary and reasonable expenses for the designees' services shall be

shared equally by the NFL and the NFLPA. Notwithstanding the foregoing, the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion.

(b) **Representation.** In any hearing provided for in this Article, a player may be accompanied by counsel of his choice. The NFLPA and NFL have the right to attend all hearings provided for in this Article and to present, by testimony or otherwise, any evidence relevant to the hearing.

(c) **Telephone Hearings.** Upon agreement of the parties, hearings under this Article may be conducted by telephone conference call or videoconference.

(d) **Decision.** As soon as practicable following the conclusion of the hearing, the hearing officer will render a written decision which will constitute full, final and complete disposition of the dispute and will be binding upon the player(s), Club(s) and the parties to this Agreement with respect to that dispute. Any discipline imposed pursuant to Section 1(b) may only be affirmed, reduced, or vacated by the hearing officer, and may not be increased.

(e) **Costs.** Unless the Commissioner determines otherwise, each party will bear the cost of its own witnesses, counsel and other expenses associated with the appeal.

(f) **Additional Procedures for Appeals Under Section 1(a).**

(i) **Scheduling.** Appeal hearings under Section 1(a) will be scheduled to commence within ten (10) days following receipt of the notice of appeal, except that hearings on suspensions issued during the playing season (defined for this Section as the first preseason game through the Super Bowl) will be scheduled for the second Tuesday following the receipt of the notice of appeal, with the intent that the appeal shall be heard no fewer than eight (8) days and no more than thirteen (13) days following the suspension, absent mutual agreement of the parties or a finding by the hearing officer of extenuating circumstances. If unavailability of counsel is the basis for a continuance, a new hearing shall be scheduled on or before the Tuesday following the original hearing date, without exception.

(ii) **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.

(iii) **Record; Posthearing Briefs.** Unless the parties agree otherwise, all hearings conducted under Section 1(a) of this Article shall be transcribed. Posthearing briefs will not be permitted absent agreement of the NFL and NFLPA or the request of the hearing officer. If permitted, such briefs shall be limited to five pages (single-spaced) and must be filed no later than three (3) business days following the conclusion of the hearing.

Section 3. Time Limits: Each of the time limits set forth in this Article may be extended by mutual agreement of the parties or by the hearing officer upon appropriate motion.

Section 4. One Penalty: The Commissioner and a Club will not both discipline a player for the same act or conduct. The Commissioner's disciplinary action will preclude or supersede disciplinary action by any Club for the same act or conduct.

Section 5. Fine Money:

(a) Fines will be deducted at the rate of no more than \$2,500 from each pay period, if sufficient pay periods remain; or, if less than sufficient pay periods remain, the fine will be deducted in equal installments over the number of remaining pay periods. For the 2016–2020 League Years, the amount will increase from a rate of \$2,500 to \$3,500 from each pay period.

(b) For any fine imposed upon a player under Section 1(b), no amount of the fine will be withheld from the player's pay pending the outcome of the appeal, except that if: (i) the fine is imposed on or after the thirteenth (13th) week of the regular season; (ii) the player or the NFLPA does not timely appeal; or (iii) the hearing on a fine imposed for conduct occurring through the thirteenth (13th) week of the regular season is delayed by the player or the NFLPA for any reason beyond the time provided for in Section 2(b) of this Article, the full amount of the fine shall be promptly collected.

(c) Unless otherwise agreed by the parties., fine money collected pursuant to this Article shall be allocated as follows: 50% to the Players Assistance Trust and 50% to charitable organizations jointly determined by the NFL and the NFLPA. In the absence of said joint determination, the NFL and the NFLPA shall each determine a charitable organization or organizations to which half of the second 50% shall be allocated.

**APPENDIX A
NFL PLAYER CONTRACT**

THIS CONTRACT is between _____, hereinafter “Player,” and _____, a _____ corporation (limited partnership) (partnership), hereinafter “Club,” operating under the name of the _____ as a member of the National Football League, hereinafter “League.” In consideration of the promises made by each to the other, Player and Club agree as follows:

1. TERM. This contract covers _____ football season(s), and will begin on the date of execution or March 1, _____, whichever is later, and end on February 28 or 29, _____, unless extended, terminated, or renewed as specified elsewhere in this contract.

2. EMPLOYMENT AND SERVICES. Club employs Player as a skilled football player. Player accepts such employment. He agrees to give his best efforts and loyalty to the Club, and to conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game. Player will report promptly for and participate fully in Club’s official mandatory minicamp(s), official preseason training camp, all Club meetings and practice sessions, and all preseason, regular season and postseason football games scheduled for or by Club. If invited, Player will practice for and play in any all-star football game sponsored by the League. Player will not participate in any football game not sponsored by the League unless the game is first approved by the League.

3. OTHER ACTIVITIES. Without prior written consent of the Club, Player will not play football or engage in activities related to football otherwise than for Club or engage in any activity other than football which may involve a significant risk of personal injury. Player represents that he has special, exceptional and unique knowledge, skill, ability, and experience as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages. Player therefore agrees that Club will have the right, in addition to any other right which Club may possess, to enjoin Player by appropriate proceedings from playing football or engaging in football-related activities other than for Club or from engaging in any activity other than football which may involve a significant risk of personal injury.

4. PUBLICITY AND NFLPA GROUP LICENSING PROGRAM.

(a) Player hereby grants to Club and the League, separately and together, the right and authority to use, and to authorize others to use solely as described below, his name, nickname, initials, likeness, image, picture, photograph, animation, persona, autograph/signature (including facsimiles thereof), voice, biographical information and/or any and all other identifying characteristics (collectively, “Publicity Rights”), for any and all uses or purposes that publicize and promote NFL Football, the League or any of its

member clubs in any way in any and all media or formats, whether analog, digital or other, now known or hereafter developed, including, but not limited to, print, tape, disc, computer file, radio, television, motion pictures, other audio-visual and audio works, Internet, broadband platforms, mobile platforms, applications, and other distribution platforms. Without limiting the foregoing, this grant includes the right to use Player's Publicity Rights for the purpose of publicizing and promoting the following aspects of NFL Football, the League and/or any of its member clubs: brands, games, ticket sales, game broadcasts and telecasts, programming focused on the NFL, one or more NFL clubs and/or their games and events (e.g., coaches shows, highlight based shows such as *Inside the NFL*, behind-the-scenes programming such as *Hard Knocks*), other NFL-related media offerings (e.g., branded content segments featuring NFL game footage and other programming enhancements), media distribution platforms (e.g., NFL.com, NFL Mobile, NFL Network), official events (e.g., NFL Kickoff, NFL Draft), officially sanctioned awards programs (e.g., Rookie of the Year), and public service or community oriented initiatives (e.g., Play60). For purposes of clarity, the foregoing grant of rights includes the right and authority to use, and to authorize affiliates or business partners to use, after the term of this Agreement any Publicity Rights fixed in a tangible medium (e.g., filmed, photographed, recorded or otherwise captured) during the term of this Agreement solely for the purposes described herein. Notwithstanding anything to the contrary, the foregoing grant does not confer, during or after the term of this Agreement, any right or authority to use Player's Publicity Rights in a manner that constitutes any endorsement by Player of a third-party brand, product or service ("Endorsement"). For purposes of clarity, and without limitation, it shall not be an Endorsement for Club or the League to use, or authorize others to use, including, without limitation, in third party advertising and promotional materials, footage and photographs of Player's participation in NFL games or other NFL events that does not unduly focus on, feature, or highlight, Player in a manner that leads the reasonable consumer to believe that Player is a spokesperson for, or promoter of, a third-party commercial product or service.

Player will cooperate with the news media, and will participate upon request in reasonable activities to promote the Club and the League.

Player and National Football League Players Association, including any of its affiliates ("NFLPA") do not and will not contest during or after the term of this agreement, and this hereby confirms their acknowledgment of, the exclusive rights of the League, Club and any NFL member club (i) to telecast, broadcast, or otherwise distribute, transmit or perform, on a live, delayed, or archived basis, in any and all media now known or hereafter developed, any NFL games or any excerpts thereof and (ii) to produce, license, offer for sale, sell, market, or otherwise distribute or perform (or authorize a third party to do any of the foregoing), on a live, delayed, or archived basis, any NFL games or any excerpts thereof, in any and all media now known or hereafter developed, including, but not limited to, packaged or other electronic or digital media.

Nothing herein shall be construed to grant any Publicity Rights for use in licensed consumer products, whether traditional or digital (e.g., video games, trading cards, apparel), other than such products that constitute programming (as described herein) or news and information offerings regardless of medium (e.g., DVDs, digital highlight offerings).

(b) Player hereby assigns the NFLPA and its licensing affiliates, if any, the exclusive and unlimited right to use, license and sublicense the right to use his name, nickname, initials, autograph/signature (including facsimiles), voice, picture, photograph, animation, image, likeness, persona, jersey number, statistics, data, copyrights, biographical information and/or other personal indicia (individually and collectively, "Rights") for use in connection with any product, brand, service, appearance, product line or other commercial use and any sponsorship, endorsement or promotion thereof, when more than five (5) NFL player Rights are involved, regardless of team affiliation and whether that number is reached using player Rights simultaneously or individually, in any form, media, or medium (now known or hereafter developed) during a consecutive 12-month period (a "group licensing program"). For sponsorships, endorsements, and promotions, group licensing programs are further defined as those: (a) in any one product category, as defined by industry standards; or (b) in different categories if the products all use similar or derivative design or artwork, or one player product is used to promote another player product.

The Rights may also be used for the promotion of the NFLPA, its affiliated entities and/or its designees (the "NFLPA Entities"), provided such promotion does not constitute an endorsement by Player of a commercial product not a part of a group licensing program. Player agrees to participate, upon request of the NFLPA and without additional compensation, in reasonable activities to promote the NFLPA Entities, which shall include (i) up to three (3) personal appearances per year or (ii) up to fifteen (15) minutes per week dedicated to promoting the NFLPA Entities. Player retains the right to grant permission to others to utilize his Rights if that individual or entity is not concurrently utilizing the Rights of five (5) or more other NFL players for any commercial purpose whatsoever. If Player's inclusion in an NFLPA program is precluded by an individual exclusive endorsement agreement, and Player provides the NFLPA with immediate written notice of that preclusion, the NFLPA agrees to exclude Player from that particular program. Should Player fail to perform any of his obligations hereunder, the NFLPA may withhold payments owed to Player, if any, in connection with this Group Licensing Assignment.

In consideration for this assignment of rights, the NFLPA agrees to use the revenues it receives from group licensing programs to support the objectives as set forth in the Bylaws of the NFLPA and as otherwise determined by the NFLPA Board. The NFLPA further agrees to use reasonable efforts to promote the use of NFL player Rights in group licensing programs, to provide group licensing opportunities to all NFL players, and to monitor and police unauthorized third-party use of the Rights. The NFLPA makes no representations regarding group licensing other than those expressed herein. This agreement shall be construed under Virginia law.

The assignment in this paragraph shall expire on December 31 of the latter of (i) the third year following the execution of this contract, or (ii) the year after this contract expires, and may not be revoked, terminated or otherwise assigned in any manner by Player until such date. Neither Club nor the League is a party to the terms of this paragraph, which is included herein solely for the administrative convenience and benefit of Player and the NFLPA.

Nothing in Paragraph 4b shall be construed or deemed to modify in any way the rights set forth in Paragraph 4a, and the fact that Paragraph 4b (or any of the terms thereof) appears in the Player Contract shall not be referred to, relied upon, or otherwise cited by Player and/or the NFLPA or any of its affiliates in any dispute or legal proceeding as evidence that the NFL, any NFL entity, any Club or Club Affiliate, or any licensee of any of the foregoing has consented, agreed, acknowledged, or does not contest the applicability or interpretation of Paragraph 4b.

5. COMPENSATION. For performance of Player’s services and all other promises of Player, Club will pay Player a yearly salary as follows:

\$	/*	for the 20____season;
\$	/*	for the 20____season;
\$	/*	for the 20____season;
\$	/*	for the 20____season;
\$	/*	for the 20____season.

(* - designates the compensation Club will pay player if the player is not on Club’s Active/Inactive List)

In addition, Club will pay Player such earned performance bonuses as may be called for in this contract; Player’s necessary traveling expenses from his residence to training camp; Player’s reasonable board and lodging expenses during preseason training and in connection with playing preseason, regular season, and postseason football games outside Club’s home city; Player’s necessary traveling expenses to and from preseason, regular season, and postseason football games outside Club’s home city; Player’s necessary traveling expenses to his residence if this contract is terminated by Club; and such additional compensation, benefits and reimbursement of expenses as may be called for in any collective bargaining agreement in existence during the term of this contract. (For purposes of this contract, a collective bargaining agreement will be deemed to be “in existence” during its stated term or during any period for which the parties to that agreement agree to extend it.)

6. PAYMENT. Unless this contract or any collective bargaining agreement in existence during the term of this contract specifically provides otherwise, Player will be paid 100% of his yearly salary under this contract in equal weekly or biweekly installments over the course of the applicable regular season period, commencing with the first regular season game played by Club in each season. Unless this contract specifically provides otherwise, if this contract is executed or Player is activated after the beginning of the regular season, the yearly salary payable to Player will be reduced proportionately and Player will be paid the weekly or biweekly portions of his yearly salary becoming due and payable after he is activated. Unless this contract specifically provides otherwise, if this contract is terminated after the beginning of the regular season, the yearly salary payable to Player will be reduced proportionately and Player will be paid the weekly or bi weekly portions of his yearly salary having become due and payable up to the time of termination.

7. DEDUCTIONS. Any advance made to Player will be repaid to Club, and any properly levied Club fine or Commissioner fine against Player will be paid, in cash on demand or by means of deductions from payments coming due to the Player under this contract, the amount of such deductions to be determined by Club unless this contract or any collective bargaining agreement in existence during the term of this contract specifically provides otherwise.

8. PHYSICAL CONDITION. Player represents to Club that he is and will maintain himself in excellent physical condition. Player will undergo a complete physical examination by the Club physician upon Club request, during which physical examination Player agrees to make full and complete disclosure of any physical or mental condition known to him which might impair his performance under this contract and to respond fully and in good faith when questioned by the Club physician about such condition. If Player fails to establish or maintain his excellent physical condition to the satisfaction of the Club physician, or make the required full and complete disclosure and good faith responses to the Club physician, then Club may terminate this contract.

9. INJURY. Unless this contract specifically provides otherwise, if Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and will continue to receive his yearly salary for so long, during the season of injury only and for no subsequent period covered by this contract, as Player is physically unable to perform the services required of him by this contract because of such injury. If Player's injury in the performance of his services under this contract results in his death, the unpaid balance of his yearly salary for the season of injury will be paid to his stated beneficiary, or in the absence of a stated beneficiary, to his estate.

10. WORKERS' COMPENSATION. Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workers' compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workers' compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workers' compensation.

11. SKILL, PERFORMANCE AND CONDUCT. Player understands that he is competing with other players for a position on Club's roster within the applicable player limits. If at any time, in the sole judgment of Club, Player's skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club's roster, or if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract. In addition, during the period any salary cap is legally in effect, this contract may be terminated if, in Club's opinion, Player is anticipated to make less of a contribution to Club's ability to

compete on the playing field than another player or players whom Club intends to sign or attempts to sign, or another player or players who is or are already on Club's roster, and for whom Club needs room.

12. TERMINATION. The rights of termination set forth in this contract will be in addition to any other rights of termination allowed either party by law. Termination will be effective upon the giving of written notice, except that Player's death, other than as a result of injury incurred in the performance of his services under this contract, will automatically terminate this contract. If this contract is terminated by Club and either Player or Club so requests, Player will promptly undergo a complete physical examination by the Club physician.

13. INJURY GRIEVANCE. Unless a collective bargaining agreement in existence at the time of termination of this contract by Club provides otherwise, the following Injury Grievance procedure will apply: If Player believes that at the time of termination of this contract by Club he was physically unable to perform the services required of him by this contract because of an injury incurred in the performance of his services under this contract, Player may, within 60 days after examination by the Club physician, submit at his own expense to examination by a physician of his choice. If the opinion of Player's physician with respect to his physical ability to perform the services required of him by this contract is contrary to that of the Club's physician, the dispute will be submitted within a reasonable time to final and binding arbitration by an arbitrator selected by Club and Player or, if they are unable to agree, one selected in accordance with the procedures of the American Arbitration Association on application by either party.

14. RULES. Player will comply with and be bound by all reasonable Club rules and regulations in effect during the term of this contract which are not inconsistent with the provisions of this contract or of any collective bargaining agreement in existence during the term of this contract. Player's attention is also called to the fact that the League functions with certain rules and procedures expressive of its operation as a joint venture among its member clubs and that these rules and practices may affect Player's relationship to the League and its member clubs independently of the provisions of this contract.

15. INTEGRITY OF GAME. Player recognizes the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that if he accepts a bribe or agrees to throw or fix an NFL game; fails to promptly report a bribe offer or an attempt to throw or fix an NFL game; bets on an NFL game; knowingly associates with gamblers or gambling activity; uses or provides other players with stimulants or other drugs for the purpose of attempting to enhance on-field performance; or is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to

fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.

16. EXTENSION. Unless this contract specifically provides otherwise, if Player becomes a member of the Armed Forces of the United States or any other country, or retires from professional football as an active player, or otherwise fails or refuses to perform his services under this contract, then this contract will be tolled between the date of Player's induction into the Armed Forces, or his retirement, or his failure or refusal to perform, and the later date of his return to professional football. During the period this contract is tolled, Player will not be entitled to any compensation or benefits. On Player's return to professional football, the term of this contract will be extended for a period of time equal to the number of seasons (to the nearest multiple of one) remaining at the time the contract was tolled. The right of renewal, if any, contained in this contract will remain in effect until the end of any such extended term.

17. ASSIGNMENT. Unless this contract specifically provides otherwise, Club may assign this contract and Player's services under this contract to any successor to Club's franchise or to any other Club in the League. Player will report to the assignee Club promptly upon being informed of the assignment of his contract and will faithfully perform his services under this contract. The assignee club will pay Player's necessary traveling expenses in reporting to it and will faithfully perform this contract with Player.

18. FILING. This contract will be valid and binding upon Player and Club immediately upon execution. A copy of this contract, including any attachment to it, will be filed by Club with the League Commissioner within 10 days after execution. The Commissioner will have the right to disapprove this contract on reasonable grounds, including but not limited to an attempt by the parties to abridge or impair the rights of any other club, uncertainty or incompleteness in expression of the parties' respective rights and obligations, or conflict between the terms of this contract and any collective bargaining agreement then in existence. Approval will be automatic unless, within 10 days after receipt of this contract in his office, the Commissioner notifies the parties either of disapproval or of extension of this 10-day period for purposes of investigation or clarification pending his decision. On the receipt of notice of disapproval and termination, both parties will be relieved of their respective rights and obligations under this contract.

19. DISPUTES. During the term of any collective bargaining agreement, any dispute between Player and Club involving the interpretation or application of any provision of the NFL collective bargaining agreement or this contract will be submitted to final and binding arbitration in accordance with the procedure called for in any collective bargaining agreement in existence at the time the event giving rise to any such dispute occurs.

20. NOTICE. Any notice, request, approval or consent under this contract will be sufficiently given if in writing and delivered in person or mailed (certified or first class) by

one party to the other at the address set forth in this contract or to such other address as the recipient may subsequently have furnished in writing to the sender.

21. OTHER AGREEMENTS. This contract, including any attachment to it, sets forth the entire agreement between Player and Club and cannot be modified or supplemented orally. Player and Club represent that no other agreement, oral or written, except as attached to or specifically incorporated in this contract, exists between them. The provisions of this contract will govern the relationship between Player and Club unless there are conflicting provisions in any collective bargaining agreement in existence during the term of this contract, in which case the provisions of the collective bargaining agreement will take precedence over conflicting provisions of this contract relating to the rights or obligations of either party.

22. LAW. This contract is made under and shall be governed by the laws of the State of _____.

23. WAIVER AND RELEASE. Player waives and releases: (i) any claims relating to the 2011 lockout; (ii) any antitrust claims relating to the Draft, restrictions on free agency, franchise player designations, transition player designations, the Entering Player Pool, the Rookie Compensation Pool, or any other term or condition of employment relating to conduct engaged in prior to the date of this Agreement; and (iii) any claims relating to conduct engaged in pursuant to the express terms of any collective bargaining agreement during the term of any such agreement. This waiver and release also extends to any conduct engaged in pursuant to the express terms of the Stipulation and Settlement Agreement in *White*. This waiver and release does not waive any rights player may have to commence a grievance under the 2006 CBA or to commence a grievance or other arbitration under the 2011 CBA.

24. OTHER PROVISIONS.

(a) Each of the undersigned hereby confirms that (i) this contract, renegotiation, extension or amendment sets forth all components of the player's remuneration for playing professional football (whether such compensation is being furnished directly by the Club or by a related or affiliated entity); and (ii) there are not undisclosed agreements of any kind, whether express or implied, oral or written, and there are no promises, undertakings, representations, commitments, inducements, assurances of intent, or understandings of any kind that have not been disclosed to the NFL involving consideration of any kind to be paid, furnished or made available to Player or any entity or person owned or controlled by, affiliated with, or related to Player, either during the term of this contract or thereafter.

(b) Each of the undersigned further confirms that, except insofar as any of the undersigned may describe in an addendum to this contract, to the best of their knowledge, no conduct in violation of the Anti-Collusion rules took place with respect to this contract. Each of the undersigned further confirms that nothing in this contract is designed or intended to defeat or circumvent any provisions of the collective bargaining agreement dated August 4, 2011, including but not limited to the Rookie Compensation

Pool and Salary Cap provisions; however, any conduct permitted by that Agreement shall not be considered a violation of this confirmation.

(c) PERFORMANCE-BASED PAY. Player's attention is called to the fact that he may be entitled to Performance-Based Pay in accordance with the procedures outlined in Article 28, and that his eligibility for such pay is based on a formula that takes into account his playtime percentage and compensation

25. SPECIAL PROVISIONS. THIS CONTRACT is executed in six (6) copies. Player acknowledges that before signing this contract he was given the opportunity to seek advice from or be represented by persons of his own selection.

_____	_____
PLAYER	CLUB
_____	_____
Home Address	By
_____	_____
Telephone Number	Club Address
_____	_____
Date	Date

PLAYER'S AGENT	

Address	

Telephone Number	

Date	

Copy Distribution:

White-League Office	Yellow-Player
Green-Member Club	Blue-Management Council
Gold-NFLPA	Pink-Player Agent

Exhibit B

September 5, 2017

Jeffrey Kessler, Esq.
Winston & Strawn
200 Park Avenue
New York, NY 10166-4193

Daniel Nash, Esq.
Akin Gump
1333 New Hampshire Ave NW
Washington, DC 20036

Re: Ezekiel Elliott Appeal – Player Conduct Policy

Gentlemen:

Ezekiel Elliot, a player with the Dallas Cowboys, was notified by letter from B. Todd Jones dated August 11, 2017, (i) that he was suspended without pay for the first six games of the 2017 season, and (ii) that he was directed to engage a qualified professional to arrange a clinical evaluation and, should counseling or treatment be recommended, to comply with those recommendations.

This discipline arose out of several domestic violence incidents in Columbus, Ohio during the week of July 16, 2016. Mr. Elliott’s role in those incidents was found to have violated the NFL Personal Conduct Policy (the “Policy”). A timely appeal was filed on Mr. Elliot’s behalf by the NFLPA, which appeal was heard on August 29, August 30, and September 1. This letter sets forth the decision regarding that appeal, which follows careful review and consideration of the evidence in the record, including witness testimony and documents submitted by the parties, as well as arguments of counsel that were made at the hearing.

BACKGROUND

In late July, 2016 the NFL became aware of allegations by Tiffany Thompson that Mr. Elliott had committed multiple acts of physical violence against her in Columbus, Ohio during the week of July 16, 2016. Those allegations were investigated by the Columbus Police Department and no arrest was made at that time. Subsequently, on September 6, 2016, the Columbus City Attorney’s office publicly announced its decision not to pursue a criminal prosecution with respect to those incidents, “primarily due to conflicting and inconsistent information across all incidents resulting in concern regarding the sufficiency of the evidence to support the filing of criminal charges.” NFL Exh. B-2 at Exh. 102.

The NFL learned of this announcement and promptly initiated an investigation of the allegations against Mr. Elliott under the direction of Ms. Lisa Friel, NFL Senior Vice President - Special Counsel for Investigations. An extensive investigation followed, which culminated in a report submitted by Ms. Friel and Kia Roberts, Director of Investigations, submitted on June 6,

2017. That report addressed interviews of Ms. Thompson and Mr. Elliott conducted on September 26 and September 28, 2016, respectively. Ms. Thompson was interviewed one other time in person, and four times by telephone.

After the report was submitted and shared with the NFLPA and counsel for Mr. Elliott, he was interviewed on June 26, 2017 by a panel of advisors selected by the Commissioner to advise him on this case. Mr. Elliott's counsel and NFLPA counsel were present for that interview, along with NFL executives and counsel. The transcript of that interview is part of this record. NFL Exh.E.

On August 11, 2017, Mr. Jones' discipline letter (NFL Exh.A-1) was sent, which included the following:

The Commissioner has now had the opportunity to review the record, including the investigative reports, transcripts of the June 26, 2017 meeting and the materials submitted on your behalf. He also consulted separately with each of the independent advisers concerning the evidence and the points made by your representatives. In that respect, the advisers individually were of the view that there is substantial and persuasive evidence supporting a finding that you engaged in physical violence against Ms. Thompson on multiple occasions during the week of July 16, 2016. The Commissioner has considered those views in the context of his evaluation of the record and the advice and recommendations of the advisers have helped to inform his findings and conclusions, which are set forth below. NFL Exhibit A-1, P.3.

The Commissioner found, based on the credible evidence in the record, that on three occasions Mr. Elliott had used physical force against Ms. Thompson resulting in her injury:

- 1) Early morning of July 17, 2016 at 1860 Canvasback Lane, Columbus, Ohio Mr. Elliott used physical force that caused injuries to Ms. Thompson's arms neck and shoulders which appear recent and consistent with Ms. Thompson's description of the incident and how that occurred.
- 2) On the morning of July 19, 2016 at the Canvasback Lane apartment, Mr. Elliot used physical force that caused injuries to Ms. Thompson's face, arms, wrists and hands.
- 3) In early morning hours of July 21, 2016 in an altercation at the Canvasback Lane apartment Mr. Elliott used physical force that caused injuries to Ms. Thompson's face, neck, arms, knees and hips. A witness stated that she observed these injuries to Ms. Thompson later the same day. It was determined that the injuries displayed appear recent and consistent with Ms. Thompson's descriptions of the incident and how they occurred.

Mr. Elliot was disciplined for those three incidents, and not for other incidents on July 18 and 22 that had also been addressed in the investigation.

The investigation also addressed an incident on March 11, 2017 during a Saint Patrick's Day parade in Dallas. A video was posted on the Internet showing Mr. Elliott pulling down the top of

a woman's blouse to expose her breast, which conduct he has admitted. No discipline was imposed for that incident, but Mr. Elliott's behavior during that event was inappropriate and disturbing, reflecting a lack of respect for women. When viewed together with the July incidents it suggests a pattern of poor judgment and behavior for which effective intervention is necessary for your personal and professional welfare. Clinical evaluation by a qualified professional was directed, as well as compliance with counseling or treatment recommendations, if any.

NFLPA POSITION

On behalf of Mr. Elliott the NFLPA argues that the record does not support a determination that credible evidence establishes the existence of a violation of the Policy, so the discipline must be overturned. Tr. pp. 24-25. The NFLPA asserts that the hearing officer under Article 46 of the CBA must apply the fair and consistent standard to decide if the evidence here is credible. The credible evidence standard is newly added in the policy, and did not appear in prior versions.. The NFLPA argues further that where there has been no criminal charge against the player, the credibility of the accuser and accused is key. Because the Commissioner did not interview either in this case, the union argues, he has no basis to judge the credibility of the only two people who directly witnessed the events- Ms. Thompson and Mr. Elliott. On the other hand, the Union contends, the Columbus City Attorney interviewed both and found credibility issues which caused him to decline filing a criminal charge. Columbus police officers who responded to the initial call made the same decision and did not arrest Mr. Elliott because of inconsistent and conflicting statements.

The NFLPA put great significance on the fact that NFL investigators found numerous inconsistencies among Ms. Thompson's statements. Even more significant, in their view, is the absence of a recommendation for discipline in the NFL's extensive investigation report, which they attribute to the lack of credible evidence sufficient to support the existence of a violation. Moreover, they contend that the NFL's refusal to produce Ms. Thompson to testify at the appeal hearing is further evidence of the lack of confidence in her credibility. Counsel for Mr. Elliott said that the hearing officer should draw an adverse inference from her absence and assume that her testimony would not be credible. Tr. 43 – 44.

According to the NFLPA, Ms. Thompson's lack of credibility is demonstrated not only by the many inconsistencies and conflicts in her statements to the league investigators and law enforcement about the events which transpired in the week of July 16, 2017, but on prior occasions as well. For example, in Aventura, FL she called the police to report that Mr. Elliott was assaulting her. Police officers responded and investigated, but declined to make an arrest or charge Mr. Elliott because Ms. Thompson showed no signs of injury and there were no witnesses to the events. According to the NFLPA, there should be no deference given the Commissioner's decision here because important facts were omitted from the Investigation Report and other materials on which he relied. Accordingly, the NFLPA argues, the discipline should be overturned in its entirety because the allegations are not supported by credible evidence as required by the Policy.

NFL POSITION

The league contends that the record in this case contains everything the Commissioner relied upon to make his decision on discipline. It includes an investigative report authored by Lisa Friel and Kia Roberts dated June 6, 2017 with exhibits 1-103 attached (NFL Exhibits B-1, B-2). He was also provided the NFL investigation report on the St. Patrick's Day incident (NFL Exhibit C- 1, C-2) and medical reports. (NFL exhibits D-1, D-2) The record also includes the Kia Robinson memorandum on inconsistencies in the Tiffany Thompson statements. NFL Exhibit 99. According to the NFL, in assessing whether discipline is fair and consistent the hearing officer must give deference to the Commissioner's decision. Transcript p. 84.

The NFL argues that the Commissioner gave careful consideration to all arguments. Tr. 85 According to the NFL, it is the Commissioner's responsibility to assess credibility in the first instance; the hearing officer's job is to review whether his determination is arbitrary and capricious. Tr. p. 86. The NFL contends that the conclusion of the Commissioner on discipline is supported by credible evidence, and that it is beyond the scope of a hearing officer's role to re-examine every bit of evidence and testimony that he reviewed and make a second determination on issues of credibility. Therefore, the NFL argues, the discipline in this case should be upheld.

DISCUSSION

I start by turning to the NFL Personal Conduct Policy for guidance in resolving this appeal. This policy originated in 1997 when Commissioner Tagliabue promulgated what was then called a violent crime policy. Over the 20 years since, the policy has been modified several times, usually in response to difficulties and issues that arose in the administration the policy, or in response to changing values and standards of society. The most recent changes were adopted and published in 2016 with significant changes in the procedures for discipline. In part, the revised policy provides as follows:

Discipline— A player violates this policy when he has a disposition of a criminal proceeding (as defined), or if the league's investigation demonstrates that he engaged in conduct prohibited by the Personal Conduct Policy. In cases where a player is not charged with a crime, or is charged but not convicted, he may still be found to have violated the Policy if the credible evidence establishes that he engaged in conduct prohibited by this Personal Conduct Policy.

The disciplinary officer, a member of the league office staff who will be a highly qualified individual with a criminal justice background, will follow the process outlined below to investigate a potential violation, produce a report and if desired present a disciplinary recommendation for the Commissioner's consideration. The Commissioner will review the report (and recommendation if presented) and determine the appropriate discipline, if any, to be imposed on the player.

To assist in evaluating a potential violation, expert and independent advisers may be consulted by the disciplinary officer, the Commissioner, and others as needed. Such advisers include former players and others with appropriate backgrounds and experience in law enforcement, academia, judicial and public service, mental health, and persons with other specialized subject matter expertise. Any experts or advisors consulted in this respect may provide advice and counsel or testimony as appropriate, but will not make any disciplinary determinations.

Players who are subject to discipline will be given notice of the potential violation for which discipline may be imposed. The player will be furnished with the records and other reports that were relied on in addressing the matter, including records from law enforcement and a copy of any investigatory report and any documents relied upon by a league investigator in generating this report. The player will be permitted to submit information in writing to rebut or otherwise respond to the report. In addition, he will have the opportunity to meet with the disciplinary officer in advance of discipline being imposed. ...

Following review, the Commissioner, either directly or through a member of his staff, will communicate his decision to the player regarding any disciplinary action to be taken. Personal Conduct Policy 2016

In this case the player has not been charged with a crime, so only if credible evidence establishes that he engaged in prohibited conduct may he be found to have violated the Policy. The disciplinary officer, Todd Jones, directed an investigation which was conducted by Lisa Friel, Senior Vice President and Special Counsel-Investigations, and Kia Roberts, Director of Investigations in the League's Security Department, both seasoned prosecutors with extensive experience investigating domestic violence crimes. Both investigators expressed surprise that they were not asked to make a recommendation on discipline based on their investigation and report, and Ms. Roberts could not explain why she was not invited to participate in the meeting with the expert and independent advisers; however, their roles fit squarely into the process outlined in the revised Policy. That process reserves the determination on discipline to the Commissioner by separating the functions; the disciplinary officer will provide a report on the investigation and also a disciplinary recommendation for the Commissioner's consideration "if desired."

Other aspects of the process as outlined in the Policy were followed meticulously. A four person panel of expert and independent advisers reviewed the investigation report and attachments. They interviewed Mr. Elliot, who was accompanied by Union representatives and counsel. He was invited to provide for the record any documents or other evidence he wished to be considered, and he did so. He met with the panel in New York on June 26 2017 where he participated in the discussion and took that opportunity to answer questions and provide information to the panel.

At the opening of that meeting, NFL counsel Adolpho Birch introduced the outside advisers fn/ and stated on the record: “And, importantly, they are not going to be part of the decision-making process in the determination of this discipline. That is not their function as they well understand and as we understand and as the policy provides. That matter is committed to the Commissioner. But the role of the advisers us to provide, through their backgrounds and expertise, their perspectives to assist him in formulating his decision as he makes that determination.” NFL Exhibit E, p. 8. Ms. Friel asked questions of Mr. Elliott and the advisers asked questions of Ms. Friel and Mr. Elliott. A transcript of this session was provided to Mr. Elliot that same week. NFL Exhibit 1, p. 3. On July 7 and July 17 Mr. Elliot, through counsel, submitted materials that he wanted to be included in the record. NFL Exhibits F and G.

The hearing transcript shows numerous instances where counsel and witnesses express surprise and dismay at the handling of some aspects of this disciplinary case. I submit that is because they are not fully aware of what the new Policy provides. This may the first time the new process was fully deployed, at least in a case where there was no criminal charge or conviction. Yet, on close inspection one can see a carefully thought out, detailed, multi-faceted process which was adhered to closely. A lack of familiarity does not necessarily mean irregularity. If this is in fact a first effort under the new procedures they got it right.

New Evidence: Mr. Elliott’s counsel cites the emergence of “new” evidence not presented to the Commissioner as a basis for overturning the discipline. I need not to decide when new evidence, or its absence in the record, requires revisiting the issue for fairness and consistency because we are not presented such new evidence in this case. New evidence does not include anything the parties knew, or could have known, at the time the discipline was initially imposed.

Alvarez Jackson’s corroboration of “everything Mr. Elliott said” surely is not new; Mr. Elliott’s best friend since childhood and college roommate, Mr. Jackson cooperated with counsel’s efforts to avoid charges against Mr. Elliott in Columbus, spending three hours with the City Attorney. He also provided affidavits on August 2 and again on August 12, 2016. Transcript 2, p. 200; NFL Exhibit B-1, Attachment 42. He testified at the appeal hearing that “I didn’t feel that it was necessary to speak with the NFL because I spoke with the prosecutor, we spent a good amount of time together. We got all the facts down and they got it right.” Tr. 2, p. 200.

fn/ The panel of advisers was composed of the following:

- Peter Harvey, Esq., former Attorney General for the State of New Jersey
- Mr. Kenneth Houston, former NFL player and member of the Pro Football Hall of Fame
- Ms. Tonya Lovelace, CEO of the Women of Color Network, Inc.; and
- Mary Jo White, Esq., Former United States Attorney for the Southern District of New York and former Chair of the Securities Exchange Commission

Similarly, Macie Hewitt's affidavit presents nothing that was not known, or could not have been known, based on the affidavit itself. She avers that she knows Mr. Elliott socially and that they have several mutual friends, that she attended his private birthday party, and that she was invited to and briefly attended his after-party at the Carriage House. No information was offered to explain the genesis of her affidavit, but I note that no year appears in the date line by the notary's signature and seal, so it is unknown if it was executed a few weeks after the incident or a few days before the hearing, more than a year later. Also, at paragraph 2 of the affidavit, she states that the incident occurred on Thursday, July 21, 2017. Absent an explanation as to why this information was not known and available to the player earlier, this is not "new" evidence that would call for reconsideration of the initial disciplinary decision. The affidavit refutes every aspect of Ms. Thompson's account of those events, as well as those of Ms. Mason, and explain the injuries she saw on Instagram the next day- injuries Mr. Elliott and several other witnesses did not see. Players Exh. 57.

The testimony of Ms. Friel and Ms. Roberts was said to reveal new evidence which, according to the NFLPA, would have affected the Commissioner's decision if he had known, namely that due to inconsistent statements they did not find Ms. Thompson sufficiently credible to support discipline in some of the incidents investigated. However, all the statements and inconsistencies are included in the Investigative report and other materials provided to the Commissioner for his review. Their recommendations were not sought or required at that point, pursuant to the recent changes to the Policy.

CONCLUSION

Appeals under Article 46 of the CBA are, in many ways, a unique exercise in labor arbitrations. It has long been settled that the Commissioner has broad discretion to decide the process for taking action against a player for conduct detrimental to the integrity of, or public confidence in, the game of professional football. That principle, first established in the League's Constitution and Bylaws, has been included in the CBA for many years, through many renegotiations, extensions and new agreements. The unusual and long-established characteristic of this process is the ability of the Commissioner to hear appeals of discipline for conduct detrimental or to appoint a designee to hear the appeal and act in his stead with the same final and binding effect on both parties.

As his designated Hearing Officer in this matter, my responsibility is to determine whether the Commissioner's decision on discipline of Mr. Elliott is arbitrary and capricious, meaning was it made on unreasonable grounds or without any proper consideration of circumstances. It is not the responsibility, nor within the authority of, the Hearing Officer to conduct a *de novo* review of the case and second guess his decision. Rather, the review is to determine whether the player was afforded adequate notice of his alleged violation, the right to representation, opportunity to present evidence, and a decision which is fair and consistent. In a case involving violation of a policy, fair and consistent means whether the process and result were in compliance with the terms of that policy. This one is, in every respect.

Here the process for imposing discipline outlined in the Policy has been followed closely, step by step. I find it unnecessary to reexamine all the evidence presented in this record because my careful and diligent review of everything the Commissioner reviewed and relied on draws me to the conclusion that the record contains sufficient credible evidence to support whatever determinations he made. He is entitled to deference on those judgments absent irregularities not present here. While the record contains inconsistencies in statements, an adjudicator makes informed judgments on the credibility of witnesses and evidence.

The Commissioner's determination is affirmed and the appeal is denied.

Harold Henderson
Hearing Officer

Cc: Heather McPhee, Esq.
Adolpho Birch, Esq.