IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, on its own behalf and on behalf of ADRIAN PETERSON,

Petitioner,

-v.-

NATIONAL FOOTBALL LEAGUE, NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, and ROGER GOODELL,

Respondents.

Case No. 14-cv-4990 (DSD/JSM)

THE NFLPA'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO HOLD THE NFL IN CIVIL CONTEMPT

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The National Football League Players Association ("NFLPA" or "Union"), on its own behalf, and on behalf of Adrian Peterson, hereby moves this Court to find the National Football League, the National Football League Management Council (collectively, "NFL" or "League"), and the NFL's Commissioner, Roger Goodell, in civil contempt of the Court's February 26, 2015 Order (Dkt. 39) (the "Order"). In support of this motion, the NFLPA states as follows:

PRELIMINARY STATEMENT

Since the Court issued its Order vacating Harold Henderson's Arbitration Award and remanding for further arbitral proceedings in accordance with the Court's decision, the NFL has been defying the Order as though it were a meaningless scrap of paper. Up until now, the NFLPA has refrained from filing a contempt motion in the vain hope that the NFL would eventually come into compliance, but the NFL's continued pattern of conduct in contravention of the Order has forced the NFLPA's hand. In short, the NFL's defiant above-the-law behavior leaves the NFLPA with no choice but to once again seek this Court's assistance.

In the Order, this Court held that retroactive application of the NFL's New Personal Conduct Policy ("New Policy") is prohibited by the essence of the parties' collective bargaining agreement ("CBA"). The Court further held that Mr. Henderson exceeded his CBA authority by deciding that Mr. Peterson's discipline could stand under the Personal Conduct Policy in effect at the time of his corporal punishment incident (the "Previous Policy") even though the Commissioner had not imposed any discipline under the Previous

Policy. The Court vacated the Arbitration Award, and "remanded for such further proceedings consistent with this order as the CBA may permit." Order at 16.

As shown below, from the time the Order was issued up through the present, the NFL has flouted the Court's rulings in an attempt to subject Mr. Peterson—and now yet another NFL Player, Greg Hardy (and perhaps more to come)—to retroactive punishment under the New Policy. Significantly, the NFL has engaged in this self-help, contumacious defiance of this Court's Order without even seeking—much less obtaining—any stay of the Order pending its appeal in the Eighth Circuit.[1]

First, notwithstanding this Court's direction that "further proceedings" regarding Mr. Peterson's appeal be "consistent with this order as the CBA may permit," the NFL successfully urged Mr. Henderson *not* to rule on Mr. Peterson's six-month-long disciplinary appeal so long as the League's appeal of the Order is pending. The reason, of course, is that the NFL does not want Mr. Henderson to make any ruling conforming to the Court's Order. But the CBA appeals process under Article 46 was expressly designed for expeditious relief so that players are not stuck in disciplinary limbo (*see* CBA, Art. 46 §§ 1(a), 2(d), 2(f)), and the NFLPA is unaware of any other conduct-detrimental appeal in the history of the NFL that has sat idly for half a year, like Mr. Peterson's. Mr. Henderson—further evidencing his partiality—has obeyed the NFL's contumacious request, refusing to make any ruling or to otherwise take any action at all. He has, in effect, granted the NFL a stay of the Order that may be granted only by this Court or the Eighth

[1] The NFL appealed the Order on the same day it was issued, February 26, 2015, but did not move for a stay pending its appeal.

Circuit. The result is that, rather than conducting "further proceedings" "consistent" with this Court's decision, as the Court ordered, the NFL has made sure that there are *no* arbitral proceedings in compliance with the Order. Such blatant defiance clearly supports a finding of civil contempt.

Second, although this Court specifically ruled that Mr. Henderson exceeded his authority under the CBA by adjudicating discipline that was never imposed—*i.e.*, discipline under the Previous Policy—the NFL has implored Mr. Henderson to *make the same hypothetical ruling* in the event he ever issues a new arbitral award. In other words, the NFL has asked Mr. Henderson to do exactly what this Court has already ruled that the CBA prohibits—again, defying this Court and the judicial process.

Third, in its latest act of contempt, the NFL recently suspended Dallas Cowboys Defensive End Greg Hardy for ten games under the New Policy, even though Mr. Hardy's alleged misconduct took place in May 2014, long before the New Policy was implemented. Thus, the NFL retroactively applied the New Policy to yet another NFL player despite this Court's ruling—based on CBA law of the shop—that such retroactive punishment violates the essence of the CBA. This conduct additionally and independently warrants a finding of contempt.

No matter how much the NFL may disagree with the Court's Order, absent a stay issued by this Court or the Eighth Circuit, the League must abide by it. The NFL chose not to seek a judicial stay pending appeal (recognizing it would likely not receive one), instead choosing to simply ignore the Court's Order as if it did not exist. The NFLPA refrained from filing this motion for as long as it could, but the NFL's retroactive

application of the New Policy to Mr. Hardy has punctuated the League's defiance of the Order and apparent belief that it is not bound by the law.

The NFLPA respectfully requests that the League and Commissioner Goodell, acting on the League's behalf, be found in contempt of the Order and be ordered to: (1) join the NFLPA in directing Mr. Henderson to rule immediately on Mr. Peterson's appeal or otherwise be replaced as the arbitrator on this matter; (2) cease and desist from advocating that Mr. Henderson adjudicate Mr. Peterson's discipline under the Previous Policy; (3) refrain from retroactively applying the New Policy to any NFL Player, including Mr. Hardy, for conduct engaged in prior to the announcement of the New Policy; and (4) reimburse the NFLPA for lawyers' fees and costs incurred as a result of the NFL's contumacious conduct, through the costs of litigating this Motion.[2]

RELEVANT FACTS

A. Mr. Henderson Sustains Mr. Peterson's Unlawful Suspension.

On December 12, 2014, Mr. Henderson issued the Arbitration Award rubber-stamping Commissioner Goodell's November 18, 2014 indefinite suspension of Mr. Peterson. In doing so, Mr. Henderson—ignoring the "law of the shop" in *Rice*, *Langhorne*, *Brown*, *Coles*, and *Bounty*, along with Commissioner Goodell's testimony in *Rice*—affirmed the Commissioner's retroactive application of the New Policy to Mr. Peterson's

[2] The CBA charges Commissioner Goodell with the exclusive authority to impose League discipline on players, and he is also the person who appoints Article 46 Hearing Officers, such as Mr. Henderson. As set forth herein, the requested relief concerns this conduct and therefore should apply to Commissioner Goodell, as the NFL's chief executive, to make certain it is effectuated.

conduct. *See* Arbitration Award at 4; Order at 12-13, 13 n.4; *see also* the NFL's December 2014 Personal Conduct Policy (Exhibit 1).[3] Mr. Henderson also ruled that Mr. Peterson's discipline could be sustained under the Previous Policy, an issue he had no CBA authority to decide because only the Commissioner may impose discipline, and the Commissioner did not discipline Mr. Peterson under the Previous Policy. Arbitration Award at 5; *see also* the NFL's Previous Personal Conduct Policy (Exhibit 2).

B. The NFLPA's Petition to Vacate the Arbitration Award.

On December 15, 2014, the NFLPA filed a Petition to Vacate the Arbitration Award on the grounds that: (1) the Arbitration Award violated the essence of the CBA; (2) Mr. Henderson exceeded his CBA authority; (3) Mr. Henderson was evidently partial and the factual record established he could not lawfully serve as arbitrator under this Circuit's governing test; and (4) the Arbitration Award and arbitration process were fundamentally unfair.

C. The Court Issues an Order Vacating the Arbitration Award and Remanding for Arbitral Proceedings Consistent with the Court's Order.

On February 26, 2015, this Court vacated the Arbitration Award on the Petition's first two grounds. *First*, this Court held that the Arbitration Award violated the essence of the CBA by ignoring established law of the shop on the CBA's "well-recognized bar against retroactivity." Order at 12-14. In so holding, this Court relied upon the decision of former U.S. District Court Judge Barbara Jones in the *Rice* arbitration, myriad other

[3] Unless otherwise noted, exhibit citations refer to the exhibits attached to the Affidavit of Barbara Podlucky Berens submitted herewith.

NFL arbitration decisions, and the Commissioner's sworn testimony in *Rice* that he was required to apply the New Policy only prospectively. *See id.*

Second, this Court vacated the Arbitration Award on the independent ground that Mr. Henderson "exceeded his authority." *Id.* at 14-16. Specifically, since the CBA permits Article 46 Hearing Officers to arbitrate only the discipline actually imposed, and because the basis of the NFLPA's appeal was "'the pure legal issue' of whether the New Policy could be applied retroactively," Mr. Henderson's "adjudicating the hypothetical question of whether [Mr.] Peterson's discipline could be sustained under the previous Policy" constituted a separate basis for vacatur. *Id.*

Having ruled on these two points, the Court declined to find facts or render judgment on the evident partiality and fundamental fairness grounds for vacatur.

Finally, this Court ordered "further proceedings ***consistent with this order as the CBA may permit***" and "for further proceedings before the arbitrator ***as permitted by the CBA***." *Id.* at 16 (emphases added).

D. Without Seeking a Judicial Stay, the NFL Tells Mr. Henderson to Disregard this Court's Order.

Shortly after the Order was issued, the NFLPA sent Mr. Henderson a letter informing him of the decision and asking him immediately to grant Mr. Peterson's appeal and vacate the discipline since it had been imposed pursuant to the New Policy in contravention of the essence of the CBA. *See* March 3, 2015 Letter from Jeffrey Kessler to Harold Henderson (Exhibit 3).

The NFLPA argued that in the event Mr. Henderson wished to hold another hearing, he should, consistent with Mr. Peterson's CBA right to an expedited appeal, convene the hearing "at the absolute earliest possible time, and with a decision issued '[a]s soon as practicable.'" *Id.* at 2; *see also* CBA Art. 46, § 2(f)(i) ("Appeal hearings under Section 1(a) will be scheduled to commence within ten (10) days following receipt of the notice of appeal . . . ."); *id.* § 2(d) ("As soon as practicable following the conclusion of the hearing, the hearing officer will render a written decision . . . .").

At the time of the NFLPA's letter, Mr. Peterson remained suspended indefinitely (he has since been reinstated by the Commissioner). He was in legal limbo, with his suspension at nearly four months and counting, and no lawful arbitral decision on his appeal. The NFLPA stressed all of this to Mr. Henderson—and did so repeatedly over the ensuing weeks—to underscore the urgency for a new arbitral award or conducting a new arbitration proceeding in accordance with the Court's Order. *See, e.g.*, Ex. 3.

The NFL chose a contumacious path. It could have sought a judicial stay of this Court's Order pending the NFL's appeal to the Eighth Circuit, but chose not to do so. Instead, the League told Mr. Henderson that he should do nothing to comply with the Court's remand during the pendency of the appeal—a self-help stay without judicial sanction. *See* March 4, 2015 Letter from Daniel Nash to Harold Henderson (Exhibit 4). Specifically, the NFL told Mr. Henderson he should take *no action* because "the NFL filed an immediate appeal of the Order . . . based on [its] view that the Order fundamentally ignores well-established precedent governing the district court's role in reviewing arbitration decisions." *Id.* at 1. Thus, the NFL instructed Mr. Henderson to ignore both

the District Court's remand for "further proceedings" and Mr. Peterson's CBA right to expedition, and to instead "defer taking any action until the parties receive a ruling from the Eighth Circuit." *Id.*

On March 5, 2015, the NFLPA responded by stating the obvious: the NFL's appeal did not function as a stay, and Mr. Henderson was required to abide by—not defy—the Court's Order. *See* March 5, 2015 Letter from Jeffrey Kessler to Harold Henderson (Exhibit 5); *see also* Fed. R. App. P. 8 (procedure for staying an order pending appeal). The NFLPA reiterated Mr. Henderson's "obligation on remand, and under the CBA, to hear and decide Mr. Peterson's appeal immediately." Ex. 5 at 1. The NFLPA also warned that if Mr. Henderson accepted the NFL's command to ignore the Order and defer decision on Mr. Peterson's appeal, the NFLPA would have no choice but to "seek an order of contempt." *Id.*[4]

Mr. Henderson responded to the parties the following day, stating that he "expect[ed] to be able to respond to [the parties'] communications on Monday, March 9," and advised the parties to submit any further communications "promptly." *See* March 6, 2015 E-mail from Harold Henderson to Jeffrey Kessler and Daniel Nash (Exhibit 6) (12:32 PM). The NFLPA responded right away, explaining that it had "nothing further to submit"

[4] The NFLPA provided notice to the NFL and Mr. Henderson on multiple occasions that it would seek relief for the NFL's contumacious conduct. *See also infra* Ex. 8 at 2 (NFLPA communicating that if Mr. Henderson followed the NFL's urging, "it would constitute blatant contempt for the District Court's Order."); *infra* Ex. 9 (3:03 PM) (advising Mr. Henderson that the NFLPA would consider "whether to seek relief from the District Court" if he continued to delay complying with the Order).

and "request[ing] a decision as soon as possible in light of the fact that the Court's Order ha[d] already been pending for a week." *Id.* (4:06 PM). But the NFL had other ideas.

On March 9, 2015, the NFL wrote Mr. Henderson, instructing him again to "defer ruling until the Eighth Circuit has issued its decision." *See* March 9, 2015 Letter from Daniel Nash to Harold Henderson at 1(Exhibit 7). The NFL then took its contumacious conduct a step further—telling Mr. Henderson that, should he find "that deferral is not appropriate, ***the discipline imposed by the Commissioner should be upheld in its entirety under the personal conduct policy in effect prior to August 28, 2014.***" *Id.* at 1 (emphasis added). The NFL also stated, "[e]ven assuming that the Eighth Circuit were to uphold Judge Doty's finding that the Award improperly affirmed Mr. Peterson's discipline based on the retroactive application of a new policy, the appropriate remedy would not be to vacate the discipline altogether but rather to apply the prior policy." *Id.* at 3. The NFL continued that "[t]o the extent you do not defer your ruling, we request that you issue an order affirming, under the 'prior policy,' the discipline imposed by the Commissioner on November 18, 2014." *Id.*

The NFLPA immediately responded, explaining that the NFL was now urging Mr. Henderson to defy this Court's Order in two separate ways, *i.e.*, by telling Mr. Henderson not to decide Mr. Peterson's appeal at all, or, in the alternative, by deciding Mr. Peterson's discipline under the Previous Policy even though the Court had already ruled that Mr. Henderson had no authority under the CBA to do this. *See* March 9, 2015 Letter from Jeffrey Kessler to Harold Henderson (Exhibit 8). The NFLPA also reiterated that the NFL's conduct constituted "blatant contempt for the District Court's Order." *Id.* at 2.

Although Mr. Henderson previously informed the parties that he would respond to their submissions on March 9 (Ex. 6), he instead followed the NFL's preferred alternative and did nothing. After a week passed, the NFLPA wrote to Mr. Henderson on March 16, stating the Union "understood from [Mr. Henderson's March 6] email that [he] would issue a decision on Monday, March 9" and reminded him that "time [was] of the essence for Mr. Peterson, the CBA entitle[d] Mr. Peterson to an immediate decision, and the District Court ordered that any further proceedings conducted by [him] comply with the CBA (and with the District Court's Vacatur Order)." *See* March 16, 2015 E-mail from David Greenspan to Harold Henderson (Exhibit 9) (3:03 PM).

Mr. Henderson finally responded, with the incredible assertion that the reason he still had not acted in compliance with the Court's Order was that he had "underestimated both the complexity of this matter and the requirements of other unrelated matters which needed [his] attention." *Id.* (10:00 AM). He further expressed that he did "not share [the NFLPA's] sense of urgency." *Id.* Nonetheless, Mr. Henderson pledged that he was "making every effort to complete [his] work on this matter as soon as practicable and expect[ed] to have a decision shortly." *Id.*

The next day (March 17), the NFL, apparently concerned that Mr. Henderson might actually do something in accordance with the Court's Order, wrote Mr. Henderson, once again urging him to defy the Order by either staying Mr. Peterson's then-four-month-long appeal, or alternatively, by finding that "***the discipline and conditions for Mr. Peterson's reinstatement imposed by Commissioner Goodell . . . were fair and consistent with prior cases under the [prior] policy and should be affirmed in their entirety***." *See* March 17,

2015 E-mail from Daniel Nash to Harold Henderson (Exhibit 10) (9:19 AM) (emphasis added). In response, the NFLPA informed Mr. Henderson that it stood by its prior submissions and reiterated its previous requests for an immediate decision. *See id* (7:02 AM). All of this was to no avail.

Most recently, in a letter relating to Mr. Hardy's appeal (*see infra* § F), the NFL again urged Mr. Henderson to defy the Court's Order by arguing "there is no immediate need for you to conduct further proceedings [in Mr. Peterson's appeal] prior to the Eighth Circuit's decision, as [Mr.] Peterson has not and will not suffer any prejudice from the delay." *See* May 13, 2015 Letter from Daniel Nash to Harold Henderson (Exhibit 11). Even more brazenly, the NFL argued that "it would be nonsensical and serve no purpose for [Mr. Henderson] now to consider [Mr.] Peterson's arguments about how [Mr. Henderson] should apply Judge Doty's order given that the ruling is subject to change by the Eighth Circuit." *Id.*

Now, more than eleven weeks after this Court's Order, Mr. Henderson has still not acted at all—nothing. His inaction effectively granted the NFL, *sub silentio*, the unlawful stay of this Court's Order that the NFL desired but never obtained, or even sought. The fact that Mr. Henderson will not even formally rule on the NFL's stay motion is a clear sign that he does not wish to comply with the Court's Order but at the same time is trying to evade any further judicial review of his actions.

E. Mr. Peterson's Reinstatement by the Commissioner Under the New Policy.

On April 16, 2015, the NFL reinstated Mr. Peterson, thus ending his indefinite suspension—nearly two months after this Court determined it to violate the essence of the CBA. However, this reinstatement did nothing to redress the salary lost by Mr. Peterson as a result of his improper suspension. To the contrary, it purported to be a reinstatement pursuant to the very New Policy discipline which the Court held to violate the essence of the CBA. Mr. Henderson, meanwhile, has yet to hold "further proceedings" or issue an arbitral decision "consistent" with the CBA, as required by the Court.

F. The NFL Has Further Defied This Court's Order by Retroactively Applying the New Policy to Greg Hardy.

The depth of the NFL's contempt of the Order became apparent on April 22, 2015, when the NFL suspended Mr. Hardy for ten games *under the New Policy* for his alleged "actions of May 13, 2014"—*i.e.*, *before* the New Policy was implemented (and around the same time of Mr. Peterson's challenged conduct). *See* April 22, 2015 Letter from Roger Goodell to Greg Hardy (Exhibit 12) ("Hardy Discipline Letter"). At that point, it became clear that the NFL's insistence that Mr. Henderson delay issuing a new arbitral ruling on Mr. Peterson's appeal was not merely to maintain that unlawful discipline, but also to facilitate the League's retroactive application of the New Policy to other players, like Mr. Hardy. It is hard to imagine a more strident act of contempt than the Commissioner continuing to apply the New Policy retroactively whenever he sees fit.

To be sure, Commissioner Goodell's disciplinary letter to Mr. Hardy makes a halfhearted and disingenuous attempt to conceal this defiance. It deliberately refers only

to the "Personal Conduct Policy" (without specifying which version of the Policy was applied), whereas the disciplinary letter to Mr. Peterson expressly referred to application of the New Policy. *Id.* at 1. The disciplinary letter to Mr. Hardy also states that his suspension "would be appropriate under any version of the Personal Conduct Policy or its predecessors." *Id.* at 6. But the League's retroactive application of the New Policy to Mr. Hardy is unmistakable.

Indeed, if the League had any intention of complying with the Court's Order, Commissioner Goodell would have stated in Mr. Hardy's discipline letter in no uncertain terms that the Previous Policy was being applied. Instead, he deliberately refrained from identifying which Policy was being applied because he knew that the law of the shop would not permit a ten-game suspension under the Previous Policy. In addition, Commissioner Goodell did not want to admit that he was retroactively applying the New Policy because this had been prohibited by this Court's Order. Thus, the Commissioner tried to sidestep the truth by claiming the ten-game suspension of Mr. Hardy would be appropriate under "any" version of the Policy, even though such discipline is improper in either case.

Mr. Hardy's discipline has all of the indelible hallmarks of the New Policy, rather than the Previous Policy. For starters, the Commissioner imposed a ten-game suspension, whereas the maximum suspension under the Previous Policy for a first-time domestic violence offender like Mr. Hardy would have been two games. *See* Order at 4 ("first-time domestic violence offenders [under the Previous Policy] faced a likely maximum suspension of two games"); *Rice* at 5 n.3 (citing twenty-one CBA arbitration precedents for this law of the shop). Further, according to the Hardy Discipline Letter, if Mr. Hardy

were to appeal his suspension (which he has), he would "remain on the [Commissioner] Exempt List . . . pending the resolution of the appeal." Ex. 12 at 7. Involuntary placement on the Commissioner Exempt List as part of the disciplinary process is one of the features of the New Policy which did not exist under the Previous Policy. *See* Ex. 1 at 4-5; *see also* Peterson Discipline Letter at 4 ("You will remain on the [Commissioner] Exempt List and continue to be paid pending a decision in any appeal that you take.").

Finally, NFL Executive Vice President and General Counsel Jeffrey Pash eliminated any doubt about which Policy had been applied when he candidly confirmed the League's retroactive application of the New Policy to Mr. Hardy in an interview one day after the NFL imposed its discipline:

> This suspension was imposed after a lengthy and detailed independent investigation of the kind that we really haven't done before. ***We said last September, and throughout the fall, and in the new personal conduct policy that we were not going to simply defer to the criminal justice system and rely on law enforcement. And that's exactly what happened here***.
>
> We did an independent investigation. We didn't rely simply on the records here. Greg Hardy had a tremendous amount of due process and procedural safeguards after the charges were dropped. We undertook to find out what the facts were, and it was on the basis of a voluminous record that the suspension was imposed. ***And I think the process that went into the decision that the Commissioner made is really what's important and really what's meaningful and new in terms of how we're going to approach these issues going forward***.[5]

[5] Mike Florio, *NFL's New Disciplinary Process, Player Rights Make for Delicate Balance*, PROFOOTBALLTALK, (Apr. 23, 2015, 7:37 PM EDT) (emphasis added), available at http://profootballtalk.nbcsports.com/2015/04/23/nfls-new-disciplinary-process-player-rights-make-for-delicate-balance/.

LEGAL STANDARD

A district court is vested with "inherent power to enforce compliance with [its] lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). A finding of civil contempt is appropriate where, as here, a party fails to comply with a court order. *NLRB v. Ralph Printing & Lithographing Co.*, 433 F.2d 1058, 1060-62 (8th Cir. 1970) (affirming finding of civil contempt where employer violated "letter and intent" of court order requiring employer to bargain collectively with union); *ABC Bus Leasing, Inc. v. Traveling in Style (TIS) Inc.*, No. 06-cv-4819 (PJS/RLE), 2009 WL 3427347 (D. Minn. Oct. 23, 2009) (ordering party to show why it was not in contempt of court where it failed to comply with the Court's directives to timely pursue arbitration). The underlying order that has been violated must be "sufficiently specific to be enforceable." *Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 213 (8th Cir. 1974); *see also Hazen v. Reagen*, 16 F.3d 921, 924 (8th Cir. 1994).

The party seeking contempt bears the initial burden of establishing "by clear and convincing evidence, that the alleged contemnors violated a court order." *Chi. Truck Drivers v. Bhd. Labor Leasing*, 207 F.3d 500, 505 (8th Cir. 2000). A movant need not demonstrate that the violation of the court's order was willful. Instead, "contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (citations omitted); *see also Hartman v. Lyng*, 884 F.2d 1103, 1106 (8th Cir. 1989).

After the movant makes its showing, the burden then shifts to the contemnor to establish that: (1) it was unable to comply, explaining why categorically and in detail; (2) its inability to comply was not self-induced; and (3) it made in good faith all reasonable efforts to comply. *Chi. Truck Drivers*, 207 F.3d at 506.

Importantly, the power to sanction for contempt reaches "beyond the court's confines, for [t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary. . . ." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (alteration in original) (internal citation omitted). Thus "[c]ivil contempt may be employed either to coerce the defendant into compliance with a court order or to compensate the complainant for losses sustained, or both." *Chi. Truck Drivers*, 207 F.3d at 505. In either case, any contempt order issued must "specifically identify those actions necessary to bring the contemnor into compliance." *Int'l Bhd. of Elec. Workers v. Hope Elec. Corp.*, 293 F.3d 409, 418 (8th Cir. 2002). A court may also award a movant its attorneys' fees and other costs incurred in prosecuting the contempt motion. *See Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 630, 630-31 (8th Cir. 1984) (per curiam) (affirming award of attorneys' fees for litigating contempt motion where nonmoving party violated court order).

ARGUMENT

I. THE NFL VIOLATED THE COURT'S ORDER BY REPEATEDLY URGING MR. HENDERSON TO REFRAIN FROM ARBITRATING MR. PETERSON'S APPEAL IN A MANNER CONSISTENT WITH THE COURT'S DECISION

In vacating the Arbitration Award, the Court remanded this matter "for such further proceedings consistent with this order as the CBA may permit." Order at 16; *see also id.* (ordering "further proceedings before the arbitrator as permitted by the CBA."). The record is clear and convincing that the NFL disregarded this aspect of the Order by making the decision not to seek a judicial stay of the Court's Order while imploring Mr. Henderson not to rule on Mr. Peterson's appeal and letting him languish in his then-indefinite suspension (notwithstanding Mr. Peterson's plain CBA right to an expedited appeal). *See* CBA, Art. 46 §§ 1(a), 2(d) (requiring a decision "[a]s soon as practicable"), 2(f)(i) (requiring a hearing "within ten (10) days following receipt of the notice of appeal").[6]

The NFL's contumacious direction to Mr. Henderson to ignore this Court's Order and to refrain from "further proceedings" consistent with this Court's Order was successful. As a result, Mr. Peterson remained suspended (on the Exempt List) for nearly two months after the Court issued its Order, only to be just recently reinstated on the NFL's terms and on the NFL's timetable pursuant to the New Policy. Even since Mr. Peterson was

[6] Even prior to Mr. Peterson's reinstatement, despite the fact that Mr. Peterson was under suspension, the NFL argued to Mr. Henderson that "[b]ecause there is no exigency or irreparable harm to the player, you should defer ruling until the Eighth Circuit has issued its decision." Ex. 7 at 1; *see also* Ex. 4 at 1-2. Numerous decisions of this Court have held otherwise, *i.e.*, that suspensions irreparably harm players. *See Brady v. Nat'l Football League*, 779 F. Supp. 2d 992, 1034-35 (D. Minn. 2011) (finding irreparable harm from inability to practice and play during the NFL offseason), *rev'd on other grounds*, 644 F.3d 661 (8th Cir. 2011); *Nat'l Football League Players Ass'n v. Nat'l Football League (StarCaps)*, 598 F. Supp. 2d 971, 982 (D. Minn. 2008) (Judge Magnuson finding irreparable harm to players due to their suspensions from playing games); *Jackson v. Nat'l Football League*, 802 F. Supp. 226, 231 (D. Minn. 1992) ("The existence of irreparable injury is underscored by the undisputed brevity and precariousness of the players' careers in professional sports, particularly in the NFL.").

reinstated, Mr. Henderson still will not rule on Mr. Peterson's appeal, such that there is no arbitral decision consistent with this Court's Order, leaving the retroactive financial penalties on Mr. Peterson intact.[7]

Six months have now passed since Mr. Peterson was disciplined, and still there is no lawful decision on his appeal. The NFL, through its contempt, has thus induced Mr. Henderson to evade any step of compliance with the Court's Order, leaving the NFL free to thumb its nose at the Court.

The NFL's rationale for its position? It filed a notice of appeal to the Eighth Circuit. But that is not a lawful basis for disregarding an existing court order. *See Chaganti & Assoc. v. Nowotny*, 470 F.3d 1215, 1223 (8th Cir. 2006) (finding district court had jurisdiction to enter a contempt order "notwithstanding [the party's] appeal [of the order] on the merits"); *In re Grand Jury Subpoenas Duces Tecum*, 85 F.3d 372, 375-6 (8th Cir. 1996) (finding "the district court retains jurisdiction to the extent necessary to enforce its judgment which has not been stayed"). Indeed, "[i]f [an] order is not obeyed, the party in violation may be held in contempt, even if he or she later succeeds in getting the order overturned on appeal." *Cedar Rapids Lodge & Suites, LLC v. JFS Dev., Inc.*, No. 09-CV-175-LRR, 2011 WL 4625661, at *4 (N.D. Iowa Oct. 3, 2011); *Knight v. Colvin*, No. CIV 12-0382-JB/LFG, 2014 WL 59994, at *6 (D.N.M. Jan. 2, 2014) ("a district court retains jurisdiction to enforce its orders or judgments through contempt proceedings following the

[7] Mr. Peterson lost pay for the three games he missed while suspended. The NFL has indicated it will not seek to enforce the remaining fine amount until after the Eighth Circuit rules—a further reflection of the League's belief it can avail itself of a self-help stay.

filing of an appeal."). And the NFL's self-serving opinions challenging the soundness of the Court's Order have no bearing, because "[r]egardless of the validity of [an] order, a party has 'no right to take the law into his own hands and disobey the order.'" *Cedar Rapids*, 2011 WL 46256612, at *4.

The NFL told Mr. Henderson that, because of its appeal, the NFLPA's request for a new ruling consistent with this Court's Order is "premature" and any new arbitral decision on Mr. Peterson's appeal should be issued only after the Eighth Circuit makes a decision—whenever that might be. *See* Ex. 4 at 1. If the NFL wanted a judicial stay of the Court's Order, it should have moved for one. *See* Fed. R. App. P. 8. It did not. Mr. Peterson has a CBA right to a timely hearing and "full, final and complete disposition" of this matter. *See* CBA, Art. 46 §§ 1(a), 2(d), 2(f). At the NFL's insistence, Mr. Peterson has been deprived of his right, in defiance and civil contempt of this Court's Order, which mandated *further proceedings consistent with the CBA.*

II. THE NFL VIOLATED THE COURT'S ORDER BY URGING MR. HENDERSON TO EXCEED HIS AUTHORITY (AGAIN) BY ARBITRATING MR. PETERSON'S DISCIPLINE UNDER THE PREVIOUS POLICY

The NFL committed further contempt by asking Mr. Henderson—in the event he declined the NFL's improper stay request—to uphold Mr. Peterson's discipline under the Previous Policy. *See* Ex. 7 at 1 ("the discipline imposed by the Commissioner should be upheld in its entirety under the personal conduct policy in effect prior to August 28, 2014."); *see also id.* at 3 ("To the extent you do not defer your ruling, we request that you

issue an order affirming, under the 'prior policy,' the discipline imposed by the Commissioner on November 18, 2014."). The NFL's request was in direct contravention of the Order, in which the Court had already ruled that this very action by Mr. Henderson exceeded his authority under the CBA. *See, e.g.*, Order at 15-16 (ruling that "[Mr.] Henderson strayed beyond the issues submitted by the NFLPA and in doing so exceeded his authority."). It is blatant contempt for the NFL to ask Mr. Henderson to commit the same CBA violation a second time in the face of this Court's Order requiring further arbitral proceedings "consistent" with the decision.

III. THE NFL VIOLATED THE COURT'S ORDER BY RETROACTIVELY APPLYING THE NEW POLICY TO DISCIPLINE MR. HARDY

The latest act of contempt by the NFL is its application of the New Policy to discipline Mr. Hardy for conduct engaged in under the Previous Policy. This action lays bare that one of the motivations for the NFL urging Mr. Henderson not to issue a new arbitral award consistent with the Order is its intention to continue to apply the New Policy retroactively pending the NFL's Eighth Circuit appeal. The Court should not tolerate such blatant disregard of its ruling.

In its Order, the Court concluded that the arbitration decision in *Rice*, many prior NFL arbitration decisions, and the Commissioner's own sworn admissions constitute binding law of the shop precluding retroactive application of the New Policy. Order at 12-14 (Arbitration Award disregarded the "well-recognized bar against retroactivity."); *id.* (the decision in *Rice* "unequivocally recognized that the New Policy cannot be applied retroactively, notwithstanding the Commissioner's broad discretion in meting out

punishment under the CBA"). But the NFL has unilaterally decided it does not have to comply with this ruling and has now punished Mr. Hardy in the same manner—by retroactively applying the New Policy. The NFL cannot credibly deny that such an act is contumacious. Nor can it evade a finding of contempt by pointing to the charade of deliberate obfuscation set forth in Commissioner Goodell's disciplinary letter (*i.e.*, that Mr. Hardy was not punished under any particular version of the Personal Conduct Policy, but rather under "any" version). The evidence that the NFL is again retroactively applying the New Policy is clear and convincing.

Under the Previous Policy, the NFL never suspended any first-time domestic violence offender for more than two games. Whether this was a good or a bad policy, it was the law of the shop under the Previous Policy. *See* Order at 4 ("It is undisputed that under the previous Policy, first-time domestic violence offenders faced a likely maximum suspension of two games."); *Rice* at 5. In contrast, Mr. Hardy was suspended for ten games—five times more than the first-time violator maximum under the Previous Policy. *See* Ex. 12 at 6. The only way the Commissioner could impose a ten-game suspension would be to apply the new six-game minimum under the New Policy, and then increase the period of suspension for alleged exacerbating factors.

In addition, the Hardy Discipline Letter states that if Mr. Hardy appeals his suspension, he "will remain on the [Commissioner] Exempt List . . . pending the resolution of the appeal"—another telltale sign that discipline was imposed under the New Policy. *Id.* at 7. Indeed, a comparison of the New Policy and the Previous Policy quickly reveals

that only the New Policy provides for such use of "Leave With Pay." *Compare* Ex. 1 at 4-5 *with* Ex. 2.

Mr. Pash's public statements further confirm the NFL's application of the New Policy in punishing Mr. Hardy. As noted above, Mr. Pash stated, "We said last September, and throughout the fall, and in the new personal conduct policy that we were not going to simply defer to the criminal justice system and rely on law enforcement. *And that's exactly what happened here.*" *See* Florio, *supra* note 5 (emphasis added); *see also id.* ("And I think the process that went into the decision that the Commissioner made is really what's important and really what's meaningful *and new in terms of how we're going to approach these issues going forward*.") (emphasis added).

The bottom line is that if the League cared at all about complying with the Court's Order, it would have left no doubt that it was applying the Previous Policy to Mr. Hardy. It didn't. The only explanation for the ambiguity of the Hardy Discipline Letter is a disingenuous and futile attempt to disguise the League's contempt for the Court's essence-of-the-CBA ruling. The NFL engaged in this contumacious conduct knowing that there was no possible way to justify its ten-game suspension of Mr. Hardy under the Previous Policy. At a minimum, by deliberately concealing the specific Personal Conduct Policy it was applying in the Hardy Discipline Letter, the NFL has failed to "take reasonable steps" to ensure its compliance with the Order. *Ford Motor Co. v. B & H Supply, Inc.*, 646 F. Supp. 975, 1002 (D. Minn. 1986), *supplemented by* CIV. No. 3-85-865, 1987 WL 59519 (D. Minn. Apr. 13, 1987) (ordering contempt where defendant "did not take all reasonable steps to prevent the violations" of the underlying order).

Taken as a whole, the evidence is clear and convincing that the NFL has violated this Court's Order by taking whatever steps it can to avoid compliance with the Order. *See Int'l Bhd. of Elec. Workers*, 293 F.3d at 418 ("As a general matter, when a litigant refuses to respect the authority of the court, it is not an abuse of discretion for the court to hold the litigant in contempt and impose a sanction to coerce compliance"); *Ralph Printing*, 433 F.2d at 1060-62 (affirming finding of civil contempt where ample evidence that employer violated "letter and intent" of court order requiring employer to bargain collectively with union).

IV. THE ORDER IS SUFFICIENTLY SPECIFIC TO FIND THE NFL IN CIVIL CONTEMPT

Finally, there can be no question that the Order is sufficiently specific to serve as the basis for an order of contempt. *Int'l Bhd. of Elec. Workers*, 293 F.3d at 418 (ruling "contempt orders must be based upon a party's failure to comply with a clear and specific underlying order"). The Order unequivocally requires that this case be "remanded for such further proceedings consistent with this order as the CBA may permit." Order at 16. It is crystal clear that the Order requires further CBA arbitral proceedings, and that such proceedings must be "consistent with" the Order. *Id.*; *compare Int'l Bhd. of Elec. Workers*, 293 F.3d at 418 (rejecting argument that order was vague where it included clear statement that employer must "take specific actions regarding specific employees and execute and abide by the attached contract") *with Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 74 (1967) (order was unclear where it "contains only an abstract conclusion of law, not an operative command capable of 'enforcement'").

The Order is likewise unambiguous in its holdings that Mr. Henderson lacks the authority under the CBA to arbitrate Mr. Peterson's discipline under the Previous Policy and that the NFL may not retroactively apply the New Policy. Order at 15-16. Accordingly, any suggestion that the Court's Order lacks sufficient clarity to be enforceable by civil contempt would be meritless. *See Int'l Bhd. of Elec. Workers*, 293 F.3d at 418 (contempt ordered where "[i]t cannot reasonably be argued that the [] order was in any way unclear").

CONCLUSION

As established herein, the NFL has repeatedly violated the Court's Order, evidencing a profound disregard for the Court's authority, the rule of law, and the rights of NFL players. The NFLPA thus respectfully requests that the Court grant the NFLPA's motion and:

(1) Order the NFL and Commissioner Goodell to:

> (a) Join the NFLPA in requiring Mr. Henderson to rule on Mr. Peterson's appeal as soon as practical or be replaced as arbitrator;
>
> (b) Cease and desist from advocating that Mr. Henderson uphold Mr. Peterson's suspension under the Previous Policy; and
>
> (c) Cease and desist from further retroactive application of the New Policy to any NFL players (including Mr. Hardy) for conduct engaged in prior to the announcement of the New Policy.

(2) Award the NFLPA its reasonable attorneys' fees and costs in this contempt proceeding; and

(3) Grant the NFLPA such other and further relief as may be necessary and proper.

Dated: May 19, 2015

Respectfully submitted,

By: s/ Barbara Podlucky Berens

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