No. 17-3510

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,
Plaintiff-Counter-Defendant-Appellee,
v.
NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,
Defendant-Counter-Claimant-Appellant.

On Appeal from the United States District Court for the
Southern District of New York, No. 17-cv-6761-KPF

OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiff-Counter-Defendant-Appellee states the following:

The National Football League ("NFL" or "League") is an unincorporated association of 32 member clubs organized under the laws of New York. The National Football League Management Council ("Management Council"), the sole and exclusive collective bargaining representative of the NFL member clubs, is an unincorporated association made up of the NFL member clubs. The member clubs of the NFL and Management Council are:

CLUBS	ENTITIES
Arizona Cardinals	Arizona Cardinals Football Club LLC
Atlanta Falcons	Atlanta Falcons Football Club, LLC
Baltimore Ravens	Baltimore Ravens Limited Partnership
Buffalo Bills	Buffalo Bills, LLC
Carolina Panthers	Panthers Football, LLC
Chicago Bears	The Chicago Bears Football Club, Inc.
Cincinnati Bengals	Cincinnati Bengals, Inc.
Cleveland Browns	Cleveland Browns Football Company LLC
Dallas Cowboys	Dallas Cowboys Football Club, Ltd
Denver Broncos	PDB Sports, Ltd. d/b/a Denver Broncos Football Club
Detroit Lions	The Detroit Lions, Inc.
Green Bay Packers	Green Bay Packers, Inc.
Houston Texans	Houston NFL Holdings, L.P.

CLUBS	ENTITIES
Indianapolis Colts	Indianapolis Colts, Inc.
Jacksonville Jaguars	Jacksonville Jaguars, LLC
Kansas City Chiefs	Kansas City Chiefs Football Club, Inc.
Los Angeles Chargers	Chargers Football Company, LLC
Los Angeles Rams	The Los Angeles Rams, LLC
Miami Dolphins	Miami Dolphins, Ltd.
Minnesota Vikings	Minnesota Vikings Football, LLC
New England Patriots	New England Patriots LLC
New Orleans Saints	New Orleans Louisiana Saints, L.L.C.
New York Giants	New York Football Giants, Inc.
New York Jets	New York Jets LLC
Oakland Raiders	The Oakland Raiders, a California Limited Partnership
Philadelphia Eagles	Philadelphia Eagles, LLC
Pittsburgh Steelers	Pittsburgh Steelers LLC
San Francisco 49ers	Forty Niners Football Company LLC
Seattle Seahawks	Football Northwest LLC
Tampa Bay Buccaneers	Buccaneers Team LLC
Tennessee Titans	Tennessee Football, Inc.
Washington Redskins	Pro-Football, Inc.

No publicly held corporation owns 10 percent or more of any of the above-listed entities' stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

INTRODUCTION

There is no basis here for the extraordinary remedy of an injunction pending appeal. After reviewing the arbitration record and substantial briefing and hearing over two hours of oral argument, the district court rejected the NFLPA's request to enjoin the results of a labor arbitration conducted pursuant to the parties' collective bargaining agreement ("CBA"). The decision to reject that request was not a close call. Recognizing that the standard facing a party challenging an arbitrator's decision is among the most daunting known to the law, the district court correctly determined that the NFLPA's request did not present a serious question on the merits and did not satisfy the other prerequisites for a preliminary injunction. Indeed, the district court recognized that the NFLPA's entire merits argument is premised on a fundamental fairness theory that multiple courts have rejected and that this Court has never embraced, and that, in all events, the NFLPA's complaints about the arbitrator's evidentiary rulings do not come close to demonstrating that the proceedings were fundamentally unfair. Despite all that, the NFLPA now asks this Court to grant an injunction pending appeal that would effectively reverse the district court's thorough and thoughtful decision and allow Ezekiel Elliott to resume playing in football games. The NFLPA has provided no compelling reason to alter the status quo and provide Elliott with the precise relief that he tried and failed to receive below.

BACKGROUND

The Commissioner of the National Football League suspended Ezekiel Elliott, a running back for the Dallas Cowboys, for six games after finding that Elliott violated League policy by committing multiple acts of physical violence against Tiffany Thompson, a woman he had been dating. *See* Ex.B6.[1] That decision followed a year-long investigation conducted in careful adherence to the procedures set forth in the parties' CBA and a separate Personal Conduct Policy (the "Policy") promulgated pursuant to powers granted by the CBA. That comprehensive investigation culminated in an exhaustive 164-page report, authored by investigators Lisa Friel and Kia Roberts, that included summaries of all witness interviews, photographs of Thompson's injuries, and Roberts' analysis of inconsistencies between Thompson's interview statements and other evidence.

After reviewing all the evidence, the Commissioner found credible evidence that Elliott used physical force against Thompson on three of five occasions alleged. The Commissioner specifically acknowledged the concerns that Elliott had repeatedly raised about Thompson's credibility, and made clear that "no finding, and no disciplinary action, was based simply on one individual's statements," but "[r]ather ... a combination of photographic, medical, testimonial and other [credible]

[1] Unless otherwise noted, Ex.__ refers to the Exhibits accompanying the NFLPA's Motion.

evidence." Ex.L4. The two incidents for which the Commissioner did not find credible evidence supporting Thompson's allegations corresponded to the incidents where the report identified significant credibility concerns or a paucity of corroborating photographic and medical evidence. *See* Ex.L3-4.

Elliott exercised his right under the CBA to appeal the Commissioner's decision, and, as permitted under the CBA, the Commissioner designated Harold Henderson to serve as the Review Officer or Arbitrator. The Arbitrator made several procedural rulings, some favoring the League, others favoring the NFLPA. As relevant here, he granted the NFLPA's motion to compel Friel and Roberts to testify, but denied its requests to compel Thompson or the Commissioner to testify. Ex.P1-2; Ex.R (8/30) at 348-49. The Arbitrator then presided over a three-day evidentiary hearing during which Elliott called seven witnesses and submitted additional testimony by affidavit. He cross-examined Friel and Roberts, who testified that their report included all evidence raising concerns about Thompson's credibility, as well as Roberts' summary of inconsistencies in Thompson's account. *See* Ex.R (8/29) 174:7-8 ("Any concerns, any inconsistencies were completely put into the report."). Friel also testified that the Commissioner was separately made aware of Roberts' concerns with Thompson's credibility before issuing his decision. On September 5,

2017, the Arbitrator affirmed the Commissioner's decision in a written opinion. Ex.W.[2]

Before the Arbitrator could even render that decision, the NFLPA filed a lawsuit in the Eastern District of Texas seeking to enjoin and vacate the "forthcoming" arbitration award. The district court there preliminarily enjoined the award, Ex.D, but the Fifth Circuit vacated the injunction and ordered that suit to be dismissed for lack of subject-matter jurisdiction, Ex.F. The NFLPA did not seek rehearing, and the time for doing so has now expired.

Once the Arbitrator's award actually issued, the NFL initiated this petition to confirm the award in the Southern District of New York. The NFLPA filed a counterclaim seeking to vacate the award and, after the Fifth Circuit rejected its premature effort to litigate in Texas, filed a motion for a temporary restraining order ("TRO") and preliminary injunction. In seeking injunctive relief, the NFLPA did not argue that the Arbitrator had violated any provision of the CBA, but rather argued that the arbitration process was "fundamentally unfair" because of the Arbitrator's adverse evidentiary rulings. Judge Failla was temporarily unavailable to consider the TRO request, and Judge Crotty, acting as Part One judge, granted a TRO in her absence. Ex.C. Two weeks later, after substantial briefing and oral argument, Judge

[2] The NFLPA's Exhibits do not include the Arbitrator's decision or the Personal Conduct Policy. They are attached here as Ex.W and Ex.X.

Failla denied the NFLPA's motion for a preliminary injunction in a comprehensive opinion. Ex.B.

The district court began by ruling that "the NFLPA fail[ed] to establish a serious question" on the merits and, *a fortiori*, had not established a "likelihood of success." Ex.B14-15. At the outset, the court declined the NFLPA's invitation to import the "fundamental fairness" standard of the Federal Arbitration Act ("FAA") into cases, like this one, arising under the Labor Management Relations Act ("LMRA"). Ex.B15-17. The court noted that the Second Circuit "'ha[s] never held that the requirement of fundamental fairness applies to arbitration awards under the LMRA,'" Ex.B16 (quoting *NFL Mgmt. Council v. NFLPA* (*Brady*), 820 F.3d 527, 553 n.13 (2d Cir. 2016)), and identified several "reasons for a court to be hesitant" to do so. *Id.*

But the court further concluded that, even assuming the "fundamental fairness" standard applied, "the NFLPA has failed to show that Elliott's arbitration hearing fell below this standard." Ex.B18. *First*, the court found no fundamental unfairness with respect to how Roberts' views were communicated to the Commissioner. The court explained that regardless of whether the Commissioner knew what Roberts' bottom-line recommendation would have been—*i.e.*, what Roberts would have done if she were the Commissioner—the Commissioner indisputably knew about her concerns about Thompson's credibility, which were

highlighted throughout the investigative report and specifically acknowledged in the Commissioner's decision. As the court put it, the NFLPA's argument "confuses Roberts's views concerning Thompson's credibility, which were both sought by and communicated to the Commissioner, with her views concerning the propriety of discipline, which were not similarly sought." *Id.*

Second, the court found no fundamental unfairness in the Arbitrator's decision not to compel Thompson's testimony because "arbitrators are not required to apply the normal rules of evidence that might otherwise compel a right of confrontation." *Id.* at 19. The CBA, in fact, requires only one evidentiary procedure—"that 'the parties shall exchange copies of any exhibits upon which they intend to rely' within three days of the hearing," *id.* (quoting CBA, Art. 46, §2(g)(i) (Ex.Q))—and it "provides no express authority for an arbitrator to compel anyone, much less a non-NFL employee, to testify," *id.* Moreover, "given Thompson's alleged abuse, coupled with the preexisting evidentiary record containing Thompson's statements and reports casting doubt on her credibility, the arbitrator could reasonably interpret the CBA to decline to compel testimony that would be emotionally difficult and likely duplicative." *Id.* at 19-20.

Third, the court found no fundamental unfairness in the Arbitrator's refusal to compel the Commissioner's testimony. The court emphasized that the CBA does not require the Arbitrator "to compel the Commissioner to testify." Ex.B20. In

addition, the court observed that because the NFLPA made this request belatedly, compelling the Commissioner's testimony could "very well have thwarted the 'twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'" *Id.* (quoting *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993)).

Ultimately, while the court acknowledged that "reasonable minds could differ on the evidentiary decisions made by the arbitrator," it recognized that "[t]he arbitrator gave Mr. Elliott ample opportunity, in terms of both proceedings and evidence, to challenge the Commissioner's decision," and concluded that "the arbitrator's ultimate decision against Mr. Elliott does not render these proceedings any less fair." *Id.*

The court next explained that even if there were substantial questions on the merits, the NFLPA had failed to establish that the balance of harms "tips decidedly in its favor." *Id.* The court identified serious flaws with the NFLPA's theories of irreparable injury, noting that "economic injuries such as lost profits are compensable through monetary awards," and that "any individual honors Elliott might attain absent suspension depend on countless variables ... that together render this alleged harm far too speculative to justify injunctive relief." Ex.B21. The court also rejected Elliott's reliance on alleged reputational harm, noting that "cases in this Circuit require a more concrete economic impact than mere negative publicity." *Id.*

While the court acknowledged that Elliott's concerns are "not insubstantial," it ultimately concluded that they "are outweighed by the broader, league-wide concerns proffered by the [NFL]," including the League's countervailing interests in "obtaining the benefit of its bargain" under the CBA and "ensuring player compliance with the [Policy], particularly in the area of combating off-the-field misconduct." Ex.B23. Finally, the court concluded that "the public interest weighs in favor of denying injunctive relief," observing that the NFLPA's "one-sided view of the public interest" ignores "the LMRA's purpose of 'promot[ing] industrial stabilization through the collective bargaining agreement'—particularly where the relevant CBA implicates the ability of those in positions of authority to address an issue as dire as domestic violence." Ex.B24 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)).

After denying a preliminary injunction, the district court stayed its order for 24 hours "to afford the parties an opportunity to consider their appellate options." *Id.* Instead of availing itself of that window to file in this Court, the NFLPA waited nearly 24 hours before filing an "Emergency Motion For An Injunction Pending Appeal" *in the district court*, asking for an injunction pending appeal or, in the alternative, pending this Court's consideration of an emergency motion that had not yet been filed. The district court promptly denied that motion, noting that it "was surprised to receive this filing, as the Court had explicitly provided a stay in its

October 30, 2017 Order and Opinion in order to permit either side promptly to appeal its decision to the Second Circuit and seek relief from that Court." Ex.A1. And the court declined to grant an injunction pending appeal that "would, in effect, be to reverse its decision of last evening denying the NFLPA's motion for injunctive relief." *Id.*

ARGUMENT

The NFLPA asks this Court to maintain the "status quo" pending appeal by issuing an injunction, Mot.21, but the NFLPA has a mistaken conception of the status quo in this case. The Commissioner imposed a six-game suspension on Elliott, and that suspension became final when upheld by the Arbitrator. That suspension is in effect, and is the status quo, especially in light of Judge Failla's denial of the NFLPA's motion for preliminary injunction. Indeed, the whole reason the NFLPA sought a preliminary injunction and seeks an injunction (and not a stay) pending appeal is that it seeks to alter the status quo that Elliott is suspended. *See Nken v. Holder*, 556 U.S. 418, 429 (2009) ("A stay simply suspend[s] judicial alteration of the status quo, while injunctive relief grants judicial intervention that has been withheld by lower courts."). The facts that the suspension did not take immediate effect based on an erroneous injunction issued by a Texas court without jurisdiction and then by a TRO issued by Judge Crotty to preserve Judge Failla's primary role in the case may be very good reasons for avoiding any further delay, but they are no

excuse for misstating the status quo. The status quo—which Judge Failla twice declined to alter—is that Elliott is suspended for six games. The NFLPA's request to disturb that status quo and enter the same relief the district court denied after a thorough review of a complete record faces a daunting burden and should be denied.

I. The NFLPA Is Not Entitled To An Injunction Pending Appeal.

The four factors to consider when determining whether to issue an injunction pending appeal are demanding: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007). As the district court correctly concluded, the NFLPA cannot satisfy any of those factors.

A. The NFLPA's Appeal Has No Likelihood of Success.

The NFLPA's attempt to collaterally attack the labor arbitrator's evidentiary decisions has little prospect of success. As this Court has held, "a federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, among the most deferential in the law." *Brady*, 820 F.3d at 532. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the court must enforce the arbitrator's

decision—even if the "court is convinced he committed serious error." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Indeed, even if an arbitrator's findings are "improvident" or "silly," a federal court "may not reject those findings simply because it disagrees with them" or "on the ground that the arbitrator misread the contract." *Id.* at 39. That exceedingly deferential standard becomes still more deferential when, as here, an arbitrator's *procedural* rulings are attacked: "[P]rocedural questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator." *Id.* at 40. If federal courts could intervene based on mere disagreement with the arbitrator's decisions about which evidence to admit, "the speedy resolution of grievances by private mechanisms would be greatly undermined." *Id.* at 38.

Here, the district court recognized its limited role, finding that the Arbitrator's evidentiary rulings were not only *arguably*, but *actually*, grounded in the CBA. The NFLPA nonetheless contends that it is likely to succeed on appeal, claiming that the Arbitrator's failure to compel the testimony of Thompson and the Commissioner rendered the arbitration hearing "fundamentally unfair," Mot.14-17, and that the district court's "analysis of fundamental fairness rests on two undeniable errors of law." Mot.18.[3] The NFLPA is wrong on both counts.

[3] In district court, the NFLPA also challenged the Arbitrator's decision not to compel production of the investigators' notes and the supposed concealment of

1. At the outset, the NFLPA's claims face a particularly low likelihood of success because the NFLPA has put all its eggs in a basket that may not exist. In seeking injunctive relief, the NFLPA does not argue that the arbitral decision conflicts with or is not grounded in the CBA. Instead, it stakes its case on the proposition that the FAA's "fundamental fairness" standard applies to cases arising under the LMRA. Multiple courts have held that it does not, *see*, *e.g.*, *NFLPA v. NFL*, 831 F.3d 985, 998-99 (8th Cir. 2016); *Lippert Tile Co. v. Int'l Union of Bricklayers & Allied Craftsmen*, 724 F.3d 939, 948 (7th Cir. 2013); this Court has never held that it does, *see Brady*, 820 F.3d at 545 n.13;[4] and after carefully examining the LMRA's text, context, and purpose, the district court declined to import the FAA standard, Ex.B15-17. That decision makes eminent sense because there is nothing fundamentally unfair about holding parties to terms of their bargain. And unless the NFLPA can convince this Court to part company with the Seventh

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Roberts' views. The NFLPA does not contend the district court erred by rejecting those challenges.

[4] The NFLPA asserts that this Court "expressly held that *in an LMRA case* arbitrators must 'grant the parties a fundamentally fair hearing.'" Mot.12 (citing *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, UAW*, 500 F.2d 921, 923 (2d Cir. 1974)). That is incorrect; the quoted language from *Bell* is plainly dicta, which the *Brady* Court expressly recognized in noting that neither *Bell* nor any other circuit precedent has "held that the requirement of 'fundamental fairness' applies to arbitration awards under the LMRA." 820 F.3d at 545 n.13.

and Eighth Circuits and the district court on this issue, it has *no* likelihood of success on the merits.

2. The district court did not rest its decision exclusively on this threshold issue, but instead correctly determined that even if the FAA's "fundamental fairness" standard were imported into the LMRA, the NFLPA has not come close to demonstrating that "the arbitrators were guilty of misconduct ... in refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. §10(a)(3). That decision was plainly correct.

First, while the NFLPA makes much of its claim that "[t]hree federal judges have already concluded" that the arbitration proceedings were fundamentally unfair, Mot.21, the simple reality is that the only court with jurisdiction definitively rejected that argument. The three contrary decisions the NFLPA trumpets are (1) a since-vacated decision by a judge without subject-matter jurisdiction, (2) a dissenting opinion from a Fifth Circuit decision as to which the NFLPA declined to seek rehearing en banc, and (3) a TRO issued by Judge Crotty's that reflected "the fact that he did not believe that this was something that should be resolved by a Part One judge." Ex.G19-20. Those vacated, dissenting, or temporary orders are no match for the considered and thorough opinion of the district court with jurisdiction over the matter.

Attempting to prove otherwise, the NFLPA first claims that "the linchpin of the district court's fundamental fairness analysis was its demonstrably erroneous conclusion that 'the CBA does not grant authority, much less require, an arbitrator to compel' an individual to testify." Mot.19. According to the NFLPA, the court "rewrote the CBA *itself* to preclude Article 46 arbitrators from compelling witnesses." *Id.* That alarmist claim is without basis. In reality, the district court did not hold, or even suggest, that the CBA prohibits arbitrators from compelling witnesses. It simply observed that the CBA "provides no *express* authority for an arbitrator to compel anyone, much less a non-NFL employee, to testify," and "does not grant authority to, much less require, an arbitrator to compel *the Commissioner* to testify." Ex.B18 (emphasis added). Both points are, of course, indisputably correct, and the NFLPA does not suggest otherwise. Indeed, as the district court recognized, the only CBA provision "broaching the issue of evidentiary procedure" provides only that "'the parties shall exchange copies of any exhibits upon which they intend to rely' within three days of the hearing." Ex.B19.

That other arbitrators have chosen to compel testimony from League employees or affiliates, Mot.19, is therefore entirely beside the point. Setting aside the problem that the NFLPA identifies *no* instance in which an arbitrator compelled the testimony of a *non*-employee like Thompson, it identifies nothing in the CBA that *requires* arbitrators to compel testimony from any witnesses (let alone from

unaffiliated individuals or the Commissioner himself). Instead, the examples the NFLPA supplies merely reflect that, at least as to NFL employees or affiliates, arbitrators have the discretion to compel testimony. Because the district court never suggested otherwise, the NFLPA's first argument is much ado about nothing, and certainly does not provide any basis to disturb the district court's conclusion that the Arbitrator was at least "arguably construing or applying the contract," *Misco*, 484 U.S. at 38, when he concluded that the CBA gave him the discretion to compel the testimony of Friel and Roberts but decline to compel the testimony of Thompson or the Commissioner. Ex.B20.

In all events, the district court's observation that the CBA did not require the Arbitrator to compel the testimony sought was hardly the "linchpin" of its decision. With respect to Thompson, the court also correctly rejected the NFLPA's attempt to read the Confrontation Clause into the CBA, Ex.B19, and found that, "given Thompson's alleged abuse, coupled with the preexisting evidentiary record containing Thompson's statements and reports casting doubt on her credibility, the arbitrator could reasonably interpret the CBA to decline to compel testimony that would be emotionally difficult and likely duplicative," Ex.B19-20. And with respect to the Commissioner, the court noted that "the NFLPA made this request *during* the hearing, and compelling the Commissioner's testimony could thus very well have thwarted the 'twin goals of arbitration, namely, settling disputes efficiently and

avoiding long and expensive litigation.'" Ex.B20. Those findings, which the NFLPA does not challenge here, underscore that the Arbitrator's sensible decisions plainly fell within the wide discretion that the deferential standards of judicial review (which leave even "silly" decisions undisturbed) grant to labor arbitrators. *Misco*, 484 U.S at 38; *see Brady*, 820 F.3d at 545.

As the district court recognized in denying an injunction pending appeal, the NFLPA's second claim of error is pure semantics. *See* Ex.A1-2. The NFLPA accuses the district court of improper "surmise" because it noted that the Arbitrator reasonably concluded that that Thompson's testimony would be "duplicative." Mot.20. But while the Arbitrator did not use the word "duplicative," that is a perfectly accurate description of what he concluded, which was that Thompson's testimony was not "essential" to the hearing because the Commissioner had access to affidavits, statements, and interview reports that exhaustively recounted Thompson's version of events. Ex.P3-4. Moreover, although the Arbitrator did not expressly state that forcing the victim of domestic abuse to testify would be "emotionally difficult," the district court's commonsense recognition of that fact is hardly an "undeniable error[]." Mot.18.

3. Finally, the NFLPA attempts to liken this case to *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d Cir. 1997), but that case, which featured prominently in the NFLPA's unsuccessful arguments in *Brady*, is distinguishable at every turn.

Tempo Shain is an FAA case in which the arbitrator excluded evidence from the sole negotiator for one side of a business, where there was no substitute for that excluded evidence. *Id.* at 21. Unlike *Tempo Shain*, this case arises under the LMRA, not the FAA. Thus, the apposite precedent is *Misco*, which arose under the LMRA and held that, even if the FAA's "pertinent and material evidence" standard applies to the LMRA, it would not empower courts to second-guess evidentiary rulings, but would reach only evidentiary rulings either issued "in bad faith or so gross as to amount to affirmative misconduct." 484 U.S. at 40. Moreover, the arbitrators in *Tempo Shain* did not have any evidence *at all* from the key witness. *See* 120 F.3d at 17-18. Here, by contrast, the League's investigators conducted six interviews with the key witness, and the decisionmaker—the Commissioner—based his decision not only on extensive accounts of those interviews, but also on other photographic and forensic evidence (all of which was available to Elliott and the NFLPA). *See* Ex.L4.

Moreover, unlike the arbitrator in *Tempo Shain*, the Arbitrator who declined to compel Thompson's testimony (Henderson) was not tasked with conducting a *de novo* review and resolving the underlying question of whether Elliott committed domestic violence against Thompson. Instead, his role was only 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." Ex.B10. Answering that question did not require

the Arbitrator to hear Thompson's testimony and make his own credibility judgments; it simply required him to determine whether the information on which *the Commissioner* relied in reaching his decision sufficed to satisfy that standard. The Arbitrator thus acted well within his discretion in concluding that he should confine his review to evidence that the Commissioner considered, which included an exhaustive "evidentiary record containing Thompson's statements and reports casting doubt on her credibility." Ex.B19-20. After reviewing that evidence and considering the NFLPA's arguments, the Arbitrator had all the information he needed to conclude that the Commissioner acted reasonably in deciding that Elliott's actions warranted a suspension.

In sum, the NFLPA has no likelihood of success on appeal. Its claims depend on this Court accepting the fundamental fairness standard and then finding that deferential standard satisfied in a situation where the Arbitrator's evidentiary decisions were not just arguably grounded in the CBA, but eminently reasonable.

B. Any Harm to Elliott Does Not Outweigh the Countervailing Harm to the League.

The NFLPA insists that Elliott would be irreparably harmed absent an injunction, essentially arguing that while suspensions do not irreparably injure other workers, they are uniquely injurious to professional football players. *See* Mot.7-8 (asserting that "[t]his case presents the starkest possible case for irreparable harm."); *but cf. Berry v. Epps*, 552 U.S. 1007 (2007) (granting stay of execution). In other

words, the NFLPA maintains that every case involving an NFL player's suspension necessarily involves irreparable injury.

That position is untenable, for the LMRA cannot mean one thing for professional athletes and another for every other employee. *See* Ex.B17. Courts have soundly rejected such a distinction, and for good reason, as "players return routinely from extended absences due to injury or suspension on other grounds to play and to play well." *NFLPA v. NFL*, 724 F. Supp. 1027, 1028 (D.D.C. 1989); *see Brown v. Pro Football, Inc.*, 518 U.S. 231, 249-50 (1996) ("We cannot find a satisfactory basis for distinguishing football players from other organized workers."). Such a rule would also subvert the streamlined procedures negotiated in the CBA. In the past season and a half alone, roughly 100 players have been suspended for approximately 500 games. Ex.G39. Elliott's claim of irreparable injury is indistinguishable from those that could be made by 100 other players, all of whom are governed by a CBA that makes disciplinary decisions enforceable once the internal appeals process has run its course.

Moreover, as the district court correctly recognized, the injuries the NFLPA asserts are "not insubstantial," but neither are they irreparable in the relevant sense. Ex.B23; *see New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 660 (2d Cir. 2015) (defining irreparable harm as "injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of

monetary damages"). Lost compensation is readily remediable through monetary damages; the harms related to personal awards, team performance, and injury risk are highly speculative; and the reputational harms are the product of Elliott's own conduct and his decision to release the League's investigative report. And "the ever-looming threat of injury" that may shorten a professional athlete's career, Mot.7, is avoided during a suspension because a player is not on the field. Conversely, a player injured during a game while a looming suspension is judicially stayed could drop the judicial action and serve the suspension while recuperating—a prospect that would injure the competitive interests of the League and 31 other teams.

The NFLPA also conveniently ignores the competing interests of the League and its teams in ensuring that bargained-for procedures are followed and suspensions timely served. The League has a strong interest in ensuring that players know that they cannot violate the CBA without facing swift discipline. And both the League and its teams have a strong interest in ensuring that the collectively bargained disciplinary procedures are not manipulated by players and teams seeking to strategically time a judicial challenge to delay the suspension until a more convenient time (*e.g.*, a stretch of the schedule with weaker opponents, an injury that would already require a player to remain off the field). Accordingly, even assuming the NFLPA has asserted some irreparable injury, as the district court correctly

concluded, "[a]ny such harms ... are counterbalanced by the harms identified by the [NFL]." Ex.B23.

Attempting to demonstrate otherwise, the NFLPA suggests that because the NFL voluntarily agreed to delay Elliott's suspension by one week while the arbitration proceeding was *still pending*, it has forfeited its interest in timely enforcing suspensions once the arbitral process is *complete*. Mot.8-9. But that one-week delay was consistent with the CBA, which allows players to exhaust their *arbitral* remedies before serving suspensions. At the same time, the CBA underscores the importance of timely served suspensions by requiring appeals of in-season suspensions to be heard no later than "the second Tuesday" following the appeal notice, with a "binding" final decision to follow "[a]s soon as practicable" thereafter. Ex.Q §2(d), (f)(i).[5] There is no comparable agreement to put discipline on hold while the NFLPA collaterally attacks arbitral agreements in courts via lawsuits that are exceptionally unlikely to succeed given the daunting standard of

[5] To be clear, the NFL decided to defer Elliott's suspension by a week while the appeal of the discipline to the Arbitrator was still pending, but the Arbitrator's decision issued before the Sunday of the first week of the season. The NFL determined that, given the need for both teams to set their rosters, imposing the discipline in that first week was not "practicable." That judgment has no relevance here and in no way undermines the League's substantial interest in the timely imposition of discipline.

review. Indeed, the fact that the NFLPA's arguments here could routinely put suspensions on hold for a full season is reason enough to reject the submission.

C. The Public Interest Counsels Against an Injunction.

Finally, the NFLPA just regurgitates the same "one-sided view of the public interest" that the district court rejected. Ex.B24. It makes no mention of the public's strong interest in timely and effective enforcement of CBAs, or of the strong interest that victims of abuse, NFL fans, and the public at-large have in "redress[ing] and combat[ing] domestic abuse by NFL players," which prompt and effective investigation and discipline will promote. Ex.B23. The district court correctly concluded that those interests outweigh any public interest the NFLPA has asserted, Ex.B24, and this Court should do the same.

* * *

In sum, the NFLPA's motion does not present any new information or provide any new ground for relief. The district court—the only court that has had jurisdiction over this matter—gave full consideration to all of the NFLPA's arguments, reviewing the parties' "comprehensive written submissions" and "hearing extensive oral argument." Ex.B2. After that thorough review, the district court rejected every single one of the NFLPA's contentions and denied injunctive relief. The NFL will defend that manifestly correct decision on whatever schedule this Court deems appropriate, but in the meantime, this Court should not disturb that decision by

entering, based on the papers alone, an injunction that would effectively reverse the district court's considered judgment and provide Elliott with the exact same relief he failed to secure from the district court.

CONCLUSION

This Court should deny the request for an injunction pending appeal.

Respectfully submitted,

s/Paul D. Clement

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,196 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Word 2016.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

November 2, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, on November 2, 2017, an electronic copy of the foregoing Opposition to Motion for Injunction Pending Appeal was filed with the Clerk of Court using the ECF system and thereby served upon all counsel appearing in this case.

s/Paul D. Clement
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