UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, Plaintiff, v. THE NATIONAL FOOTBALL LEAGUE, and THE NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, Defendants.	CASE NO. 08-cv-6254 (PAM/JJG)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

Plaintiff National Football League Players Association ("NFLPA") seeks to enjoin and vacate two final and binding labor awards upholding the suspension of five professional football players who were disciplined for violating the collectively-bargained NFL Policy on Anabolic Steroids and Related Substances (the "Policy" or "Steroid Policy"). Federal law requires that plaintiff's motion be denied.

As an initial matter, plaintiff's request for an injunction in the context of this labor dispute is specifically prohibited by the Norris-LaGuardia Act, 29 U.S.C. § 101. And even if an injunction were not prohibited by well-established statutory principles, plaintiff cannot meet the standard for a preliminary injunction under Fed. R. Civ. P. 65 because

there is no likelihood of success on the merits of its claims: Plaintiff cannot meet the extraordinarily high standard for overturning an arbitrator's decision under Section 301 of the Labor Management Relations Act, nor can plaintiff meet the equally high standards for overturning an arbitral decision in federal court based on allegations that the decision violates public policy or was issued by a biased arbitrator. Contrary to these allegations, plaintiff obtained precisely what it bargained for in this case—a disciplinary decision enforcing a collectively-bargained steroid policy consistently as to all players, rendered by an arbitrator plaintiff agreed to in the collective-bargaining process.

Congress long ago decided that neither labor unions nor employers may be permitted to use the federal court system as a tool to adjust labor grievances through restraining orders and injunctions, or to serve as a *de novo* appellate review system for arbitration decisions. Plaintiffs' motion for a preliminary injunction asks the Court to do both. Plaintiff's motion must be denied because it is inconsistent with these established federal principles, has no chance of success on the merits, and fails to satisfy the strict requirements for a preliminary injunction under Rule 65.

STATEMENT OF FACTS

The underlying facts in this dispute are set forth in detail at pages 4-14 of Defendants' Memorandum of Law in Support of Motion to Vacate and Dissolve Temporary Restraining Order ("Def. Mot. to Vacate"), filed in *Williams, et al. v. The*

National Football League, et al., Case No. 08-cv-06255 (PAM/JJG), and are incorporated herein by reference.[1]

In sum, plaintiff's complaint arises out of the suspension of five players by defendant the National Football League ("NFL") for testing positive for a prohibited substance under the Policy, which was adopted pursuant to Article XLIV, Section 6(b) of the NFL collective bargaining agreement ("CBA"). *See* Def. Mot. to Vacate at 10-13. Pursuant to the terms of the binding dispute resolution provisions of the Policy, the players appealed their suspensions to a Hearing Officer appointed by the NFL Commissioner. *Id.* at 9-10. At the appeal hearings, the players argued that their violations of the Policy should be excused because the NFL and Dr. John Lombardo, who the parties specifically designated as the "Independent Administrator" of the Policy, failed to disclose the presence of a prohibited substance in the supplement they ingested. *Id.* at 11.

The Hearing Officer upheld the suspensions after two separate hearings. *Id.* at 11-13. In doing so, the Hearing Officer considered whether the Policy imposed a duty on the NFL and the Independent Administrator of the Policy to notify players as to the potential presence of prohibited substances in specific supplements, but found no such duty. *Id.* Rather, the Hearing Officer found that the Policy and various notices sent to players

[1] The *Williams* plaintiffs are two of the five players on whose behalf the NFLPA seeks relief in this action. *See* NFLPA Compl. ¶ 1. Their case has been consolidated with this action. For all purposes material to this motion, the facts and circumstances of the suspensions of the other three players upon whose behalf the NFLPA seeks relief (Charles Grant, Deuce McAllister, and Will Smith) are identical to those underlying the claims by Kevin Williams and Pat Williams. *See generally* Def. Mot. to Vacate at 4-14.

repeatedly warned players that they would be suspended for inadvertant ingestion of prohibited substances, including substances contained in supplements not listed by the NFL as banned and not identified in a supplement's list of ingredients. *Id.* The Hearing Officer's decision, which analyzed the relevant provisions of the Policy, was consistent with longstanding interpretation of the Policy and is final and binding pursuant to the terms of the Policy. *Id.* at 8, 11-12.

ARGUMENT

I. This Court Lacks Jurisdiction to Issue a Preliminary Injunction

Plaintiff's request for injunctive relief is barred by the Norris-LaGuardia Act ("the Act"), 29 U.S.C. § 101 *et seq.* With certain narrow exceptions inapplicable to the present motion, the Act divests federal courts of "jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute . . . ." *Id.* at § 101. Plaintiff's briefing ignores this broad prohibition on injunctive relief in the context of labor-management relations. Plaintiff, however, is intimately familiar with its preclusive effect. On at least two previous occasions, federal courts have applied the Act to strike down requests by the NFLPA and its members for injunctive relief against the NFL. *See Powell v. Nat'l Football League*, 690 F. Supp. 812 (D. Minn. 1988) (applying Act to preclude NFLPA from seeking injunctive relief regarding free agency); *National Football League Players Ass'n v. Nat'l Football League*, 724 F. Supp. 1027 (D. D.C. 1989) ("*NFLPA*") (applying Act to preclude NFLPA from seeking injunctive relief regarding suspensions under NFL steroid policy).

These courts have recognized that "[t]he Act's scope is intentionally broad, covering any case . . . in which 'the employer-employee relationship [is] the matrix of the controversy.'" *Powell*, 690 F. Supp. at 812 (citing *United Telegraph Workers, AFL-CIO v. Western Union*, 771 F.2d 699 (3d Cir. 1985) (quoting *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 712-13 (1982)) (internal quotations omitted); *see also* 29 U.S.C. § 113(c) (broadly defining "labor dispute" to encompass "any controversy concerning terms and conditions of employment . . . .").[2] The Act is intended "to effectuate the strong federal policy of encouraging arbitration by making an injunction a last line of defense available only when other reasonable methods fail." *Taylor v. Sw. Bell Tel. Co*., 251 F.3d 735, 742 (8th Cir. 2001). To effectuate this purpose, courts routinely apply the Act to bar injunctive relief in actions, like plaintiff's, brought pursuant to Section 301 of the LMRA. *See, e.g.*, *Jacksonville Bulk Terminals, Inc.*, 457 U.S. at 704; *E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 707-08 (7th Cir. 2005).

The U.S. District Court for the District of Columbia considered the application of the Act to a request for injunctive relief by the NFLPA in this precise context—the availability of a preliminary injunction to the NFLPA to enjoin player suspensions under

[2] Limited exceptions to the Act's broad sweep are not applicable to this case. *See id.* at § 107 (providing for an exception upon a showing, *inter alia*, that "unlawful acts have been threatened" as well as inadequate remedies at law); *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) (recognizing a narrow exception where the requested injunction is not necessary to preserve a mandatory arbitration process). Rather, plaintiff is seeking an injunction that would plainly interfere with the collectively-bargained grievance procedures by effectively overturning an arbitrator's decision and excusing plaintiff from abiding by the collectively-bargained Steroid Policy and appeal procedures.

the NFL Steroid Policy—and held the request for injunctive relief to be barred by the Norris-LaGuardia Act. *See NFLPA*, 724 F. Supp. at 1027-28. (As explained, the court also held that a 30-day suspension from play under the Steroid Policy does not constitute "irreparable harm" justifying injunctive relief.) The NFLPA does not, and cannot, explain why the result reached by that court under identical circumstances as those presented here should not apply in this case.

Nor does the NFLPA address a ruling by Judge Doty applying the Act to deny a request for injunctive relief brought by the NFLPA on behalf of another group of professional football players. *See Powell*, 690 F. Supp. at 812. In *Powell*, the NFLPA sought to enjoin the NFL from limiting free agent players in their ability "to negotiate with, and ultimately play for, any NFL team" pending the outcome of their antitrust claims at trial. *See id.* at 814. Like the court in *NFLPA*, Judge Doty denied the players' request, finding "[t]he strong federal labor policy embodied in the Norris-LaGuardia Act dictating non-interference in the bargaining process [] compels denial of the players' request for injunctive relief." *Id*. at 816. This Court's reasoning in *Powell* applies with equal force in this context: "Collective bargaining involves agreements on, and trade-offs among, a broad range of different items affecting the terms and conditions of employment," and issuing a preliminary injunction on the subjects collectively bargained between the parties would "distort the relative bargaining strength of the parties and effectively undermine the collective bargaining process." *Id*. at 816-17.

A decision by this Court to intervene in this matter necessarily would call into question the continuing validity of the requirements under the Policy and would disturb

the longstanding practice agreed to by the NFLPA and the Management Council to hold players accountable "for what is in their bodies." *See* Steroid Policy at 10 (Jacobson Decl., Ex. A) (emphasis in original). At its core, plaintiff's motion asks the Court to enjoin the application of Article XLIV of the NFL CBA, as supplemented by the collectively bargained Steroid Policy. Plaintiff's injunctive request would create an exception to the strict liability standards of the Policy, which are critical to the fair and effective implementation of that policy. In short, the NFLPA would have the Court rewrite the terms of the parties' CBA by way of the injunctive process, rather than leave these important issues to the parties and the "collective bargaining and . . . administrative techniques for the peaceful resolution of industrial disputes" preferred by Congress. *Powell*, 690 F. Supp. at 817.

The Norris-LaGuardia Act was intended to prevent this sort of interference. *See, e.g.*, *Powell*, 690 F. Supp. at 817 (the "broad policy" underlying the Act is "to encourage collective bargaining and prevent judicial interference in management-labor relations"); *NFLPA*, 724 F. Supp. at 1028. Plaintiff's motion for preliminary injunction falls squarely within the clear prohibition of the Act, and therefore must be denied.[3]

[3] It also bears mention that the CBA itself, in Article IV, Section 2, bans any suit by the NFLPA or its members "with respect to any claim relating to . . . any term of this Agreement." The Policy was adopted pursuant to Article XLIV, Section 6(b) of the CBA. Accordingly, not only does this Court lack jurisdiction to issue an injunction; the NFLPA and its members are barred by contract from seeking one.

II. Plaintiffs Cannot Satisfy the Standards for a Preliminary Injunction

Even if this Court were to conclude the Norris-LaGuardia Act does not bar the issuance of a preliminary injunction, plaintiff's request nonetheless should be denied because the NFLPA cannot establish the threshold requirements for such extraordinary relief.

"Preliminary relief under Federal Rule of Civil Procedure Rule 65 is a drastic and extraordinary remedy that is not to be routinely granted." *Vision-Ease Lens, Inc. v. Essilor Int'l SA*, 322 F. Supp. 2d 991, 992 (D. Minn. 2004). In order to obtain a preliminary injunction, plaintiff bears the heavy burden to prove that: (1) there is a substantial threat of irreparable harm absent the injunction; (2) the irreparable harm to the moving party outweighs any potential harm caused to the non-moving party by the injunction; (3) there is a substantial probability that the moving party will prevail on the merits of the underlying claims; and (4) an injunction is in the public interest. *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc); *see also United Indus. Corp. v. Clorox Corp.*, 140 F.3d 1175, 1179 (8th Cir. 1998); *Midwest Theatres Corp. v. IMAX Corp.*, No. 08-5823, 2008 U.S. Dist. LEXIS 89349, at *4 (D. Minn. Nov. 3, 2008) (citing *Dataphase*, 640 F.2d at 114).

Courts must balance the four factors to determine whether the balance weighs in favor of granting the injunctive relief sought, and no one factor is determinative. *Taylor Corp. v. Four Seasons Greetings, LLC*, 315 F.3d 1039, 1041 (8th Cir. 2003); *Dataphase*, 640 F.2d at 113. Here, each of the factors weighs against the issuance of a preliminary injunction.

A. Plaintiff's Legal Theories Have No Likelihood of Success

Plaintiff is not entitled to injunctive relief because it has not shown any prospect of prevailing on the merits of its legal theories. Contrary to plaintiff's suggestion, the law of this Circuit holds that a movant's ability to demonstrate the likelihood of success on the merits is *always* part of the requisite showing that must be made in order to obtain preliminary injunctive relief. *See Dataphase*, 640 F.2d at 113; *see also Taxpayers' Choice Volunteer Comm. v. Roseau County Bd. of Comm'rs*, 903 F. Supp. 1301, 1307-08 (D. Minn. 1995) (citing *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987)) ("The party requesting the injunction bears 'the complete burden' of proving that a preliminary injunction should be granted"); *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003) (including a showing that there is at least a "fair chance" that the moving party will ultimately succeed on their claims). If, as here, "a plaintiff's legal theory has no likelihood of success on the merits, preliminary injunctive relief must be denied." *Newton County Wildlife Assn. v. United States Forest Serv.*, 113 F.3d 110 (8th Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998).

Plaintiff asserts three reasons why the arbitrator's decision should be overturned: (1) it defies the essence of the collectively-bargained agreement; (2) it violates public policy; and (3) it was the product of a "fundamentally unfair proceeding[]" in which the arbitrator was "biased." Pl.'s Mem. In Supp. of Mot. for Prelim. Inj. at 1; NFLPA Compl. ¶¶ 45-49. Each of these arguments is baseless.

1. The Final and Binding Arbitration Award Drew Its Essence from the Collectively-Bargained Policy And Cannot Be Vacated

Fundamental principles of labor law recognize that a federal court's ability to vacate an arbitrator's final and binding decision is extremely limited in actions brought under Section 301 of the LMRA. Plaintiffs have not, and cannot, show that there is any basis for overturning the Awards under this narrow standard of review based on their contention that the Awards "def[ied] the essence of the collectively-bargained agreement . . . ." Pl.'s Mem. in Supp. Of Mot. for Prelim. Inj.

The Supreme Court has warned that "[c]ourts are not to usurp those functions which collective bargaining contracts have properly 'entrusted to the arbitration tribunal, . . . but should defer to the tribunal chosen by the parties finally to settle their disputes.'" *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-63 (1976) (quoting *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 566 (1960)). Accordingly, where the grievance and appeal procedures set forth in a collective bargaining agreement have been exhausted, the parties are bound by the finality provisions of the agreement "subject to very limited judicial review." *Del Costello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983). This review "is among the narrowest known to the law." *Brotherhood of Maintenance of Way Employees v. Terminal R.R. Ass'n of St. Louis*, 307 F.3d 737, 739 (8th Cir. 2002); *Keebler Co. v. Milk Drivers & Dairy Employees Union, Local No. 471*, 80 F.3d 284, 287 (8th Cir. 1996) (labor awards must be given an "extraordinary level of deference.").

Under the Supreme Court's standards, the Hearing Officer's decision upholding the players' suspensions under the express terms of the Policy cannot be vacated as long as they "draw[] [their] essence" from the labor agreement. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *Manion*, 392 F.3d at 298 (court may overturn an arbitral award on irrationality grounds only where it "fails to draw its essence from the agreement," and may vacate an award for manifest disregard of the law only where the arbitrator clearly identified the applicable, governing law, and then proceeded to ignore it). An arbitral decision "draws its essence" from the contract so long as the "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." *United Paperworkers Int'l. v. Misco, Inc.*, 484 U.S. 29, 30 (1987). As the Supreme Court has explained, "[c]ourts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (citing *Misco*, 484 U.S. at 36).

Here, there can be no doubt that the Hearing Officer construed and interpreted the terms of the Policy in rendering his decisions to uphold the suspensions. His decisions, which followed hearings during which the players had a full and fair opportunity to introduce evidence and present witness testimony, set forth the Hearing Officer's factual findings and conclusions applying the specific terms of the Policy to each of the players' claims. *See generally* Ex. B to Pl.'s Mem. in Supp. Of Mot. for Prelim. Inj. at 2-4. In particular, the Hearing Officer relied on the Policy's "rule of strict liability" to reject the players' assertion that they should be excused from their violations of the Policy because

neither Independent Administrator Dr. John Lombardo nor the NFL itself had a duty to warn them that the particular dietary supplements the players allegedly ingested contained a prohibited substance under the Policy. In doing so, the Hearing Officer referred to the Policy's specific provisions to find that the "Policy does not articulate or impose an obligation to issue specific warnings about specific products, and nothing in the record suggests that the bargaining parties have ever contemplated imposing such a requirement on Dr. Lombardo." *Id.* at 7. More to the point, the Hearing Officer noted that the Policy specifically warned players, in clear and unmistakable terms, that the many nutritional supplements available over the counter, particularly weight loss products, may contain substances prohibited under the Policy and that players *will* be suspended if they test positive after using such substances regardless of their knowledge or intent. In addition, the Hearing Officer noted that the Policy encouraged players to contact Dr. Lombardo if they had any questions, and the record clearly established that none of the players challenging their suspensions here had done so. Under such circumstances, the Hearing Officer concluded that the players' appeals were not supported by the clear terms of the Policy and the parties' past practice in applying it.

As its sole basis for arguing that the Awards do not draw their essence from the Policy, the NFLPA argues that, in failing to find an obligation on the part of the Independent Administrator to disclose the presence of a prohibited substance in a supplement, the decisions "put the health of NFL players at serious risk" in contravention of the Policy's goal of "protecting the health of NFL players." Pl.'s Mem. In Supp. of Mot. for Prelim. Inj. at 26; *see also* NFLPA Compl. ¶¶ 46, 49.

Plaintiff's allegations are inapposite. The "essence" inquiry is not directed toward whether the arbitrator correctly weighed competing concerns and policies when interpreting the provisions of the CBA. Instead, it focuses on whether the arbitrator failed to construe or interpret the provisions of the Policy or otherwise acted outside the scope of his authority. *Misco, Inc.*, 484 U.S. at 30. Plaintiff does not allege that the Hearing Officer failed to interpret the Policy or acted outside the authority conferred upon him by the collective bargaining agreement. To the contrary, plaintiff's own evidence shows that the Hearing Officer engaged in a detailed and deliberate interpretation of the Policy and its application to the players' appeals. Decades of Supreme Court precedent holds that, under these circumstances, the Hearing Officer's Awards must be enforced. Plaintiff's "essence of the contract" claim cannot succeed on the merits.

2. The Awards Do Not Violate Public Policy

Plaintiff's argument that the Hearing Officer's decisions should be vacated because they violate "public policy" is also without merit.

The public policy exception is "narrow," and is implicated only "when enforcement of the award compels one of the parties to take action which *directly* conflicts with public policy." *Eastern Associated Coal Corp. v. United Mine Workers of Am. Dist. 17*, 531 U.S. 57, 63 (2000) (emphasis added); *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993). To qualify for the exception, the arbitrator's award "must violate 'an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed

public interests.'" *See MidAmerican Energy Co. v. Int'l Bhd. Of Elec. Workers Local 499*, 345 F.3d 616, 620 (8th Cir. 2003) (emphasis added) (citing *Eastern Associated Coal Corp.*, 531 U.S. at 62-63). The public policy exception does not apply to "complaint[s] that the [arbitrator] failed to interpret the law correctly." *Brown*, 994 F.2d at 782.

Plaintiff's general and speculative claims regarding "fiduciary duties" and "failures to warn" cannot possibly satisfy the narrow and exacting standard that must be satisfied in order for a court to overturn a labor decision on "public policy" grounds. Plaintiff points to no statute, regulation, or law of any kind that would be violated if the Awards are enforced. Instead, plaintiff engages in a series of attacks on the merits of the Hearing Officer's conclusion that the disclosures made by the Independent Administrator or defendants regarding the supplement at issue were adequate under the Policy. Pl.'s Mem. In Supp. of Mot. for Prelim. Inj. at 21-23. These generalized assertions fall well short of establishing that compliance with the decisions will require a party "to take action which *directly* conflicts with public policy." *Eastern Associated Coal Corp.*, 531 U.S. at 63. To the contrary, complying with the award will advance the public's interest in discouraging the use of steroids and other dangerous substances.

For this reason, this case is distinguishable from vacated arbitration awards cited by plaintiff that required employers to put previously-intoxicated pilots back at the controls of a passenger plane, or nuclear workers back on the job after violating federal safety regulations. *See Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l,* 861 F.2d 665, 674 (11th Cir. 1988); *Iowa Elec. Light & Power Co. v. Local Union 204 of Int'l Brotherhood of Elec. Workers (AFL-CIO)*, 834 F.2d 1424, 1428 (8th Cir. 1987). Plaintiff

has not met its burden to introduce facts or case authority to show any likelihood that it may succeed on its "public policy" claim.

3. The Arbitration Was Not Biased or Fundamentally Unfair

Plaintiff's allegations that the Hearing Officer was biased and that the underlying proceedings were fundamentally unfair also cannot succeed. *See* Pl's. Mot. at 26-29.

Plaintiff's bias arguments were raised by plaintiff's counsel and rejected under virtually identical circumstances in *National Hockey League Players' Ass'n v. Bettman*, No. 93 Civ. 5769 (KMW), 1994 WL 738835 (S.D.N.Y. Nov. 9, 1994). In *Bettman*, the National Hockey League Players' Association ("NHLPA") filed suit to vacate an arbitration award by the President of the NHL regarding the validity of offer sheets signed by two NHL players. *Id.* at *1. The parties' collective bargaining agreement identified the President as the individual responsible for resolving such disputes. *Id.* The NHLPA nonetheless argued that the award was tainted by bias by virtue of the Commissioner's "inherent bias" and "evident partiality" as representative for the NHL's owners. *Id.*

The court rejected the NHLPA's bias arguments:

> The initial, and short, answer to this argument is that the Players' Association agreed in the Collective Bargaining Agreement to a provision . . . that assigned such disputes solely to the League President for resolution. Since any inherent tendency by the President to favor holding down team expenses by impeding free agency was fully known or knowable to the Association at the time that it signed the Agreement, it cannot now be heard to complaint about this asserted bias.

Id. at *14. Other courts similarly have held that a party may not claim unfair bias by the arbitrator where, as here, they have agreed to the selection of the arbitrator through the

collective bargaining process. *Id.* at *13; *Black v. Nat'l Football League Players Ass'n*, 87 F. Supp. 2d 1, 6 (D.D.C. 2000) ("An NFL-selected arbitrator may have an incentive to appease his or her employer, but 'the parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen.'") (quoting *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983)); *Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 551-53 (8th Cir. 2007) (refusing to vacate allegedly biased arbitrator's award where arbitrator's selection was consistent with the contract and industry custom); *Mandich v. N. Star P'ship*, 450 N.W.2d 173 (Minn. Ct. App. 1990) (rejecting alleged arbitrator bias where NHL President's role as arbitrator in disputes between players and the club was explicitly provided for in the collective bargaining agreement).

Plaintiff's allegations of bias are even weaker here than in *Bettman*. The NFLPA not only agreed in the collective bargaining process that the Commissioner or his designee would render the final decision on appeals from suspensions pursuant to the Steroid Policy, but the players' individual counsel *specifically requested* that Mr. Pash hear their appeals. *See* Declaration of Adolpho A. Birch ("Birch Decl."), ¶ 6. Plaintiff may not now vacate a decision it dislikes because the collective bargaining agreement it negotiated and the wishes of its members were followed.

Plaintiff's bias argument also must fail because plaintiff can proffer only speculative and conclusory allegations of bias against the Hearing Officer. To vacate an arbitration award, bias must be "direct, definite, and capable of demonstration." *Bettman*, 1994 WL 738835 at *12. Plaintiff has alleged that the mere existence of the relationship

between the Hearing Officer and the NFL demonstrates bias that requires vacation of the award. But arbitrators "often have interests that overlap with the matter they are considering." *Florasynth, Inc. v. Pickholz,* 750 F.2d 171, 173 (2d Cir. 1984). Plaintiff sets forth no evidence to suggest that this fact impacted the resolution of the players' appeals. *Bettman*, 1994 WL 738835 at *17-18. Because plaintiff has not shown any actual or definite prejudice arising from the appointment of an arbitrator pursuant to the terms of a collectively-bargained agreement, it cannot vacate the arbitrator's award based on conculsory allegations of bias. *Id.*

As *Bettman* shows, plaintiff's reliance on *Morris v. New York Football Giants, Inc.*, 575 N.Y.S. 2d 1013 (N.Y. 1991) and *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 716 (E.D.N.Y.) is misplaced. Both cases involved specific evidence of direct prior involvement in the underlying dispute by the commissioner. *See* Pl.'s Mem. In Supp. of Mot. for Prelim. Inj. at 28. In *Morris*, the commissioner had previously served as outside counsel to the NFL and had advocated in support of the policy challenged in the arbitration. *See Morris*, 575 N.Y.S. 2d 1013, 1016-17. In *Erving*, the commissioner was a partner in the law firm representing the team that was a party to the dispute. *See Erving*, 349 F. Supp. At 719. Neither of these cases presents facts analogous to this dispute because plaintiffs make no allegation that Mr. Pash had any involvement in the alleged wrongdoing of the NFL. *Bettman*, 1994 738835 at *18-19.

Here, although plaintiff's brief makes vague suggestions that the Hearing Officer had "direct involvement" in the alleged failure to warn of which they complain, nowhere in the Complaint, Motion, or any of the supporting declarations is there any citations to

evidence supporting such a claim. Plaintiff alleges that the Hearing Officer's alleged bias is his status as the NFL's senior legal officer—a fact that plaintiff has been well aware of since it agreed to the terms of the CBA. *See* Pl.'s Mem. In Supp. of Mot. for Prelim. Inj. at 29. Plaintiff also alleges that bias can be shown because Mr. Birch, who plaintiff claims had a "duty" to warn the players about StarCaps specifically, worked in the same department as the Hearing Officer. This, too, was well known by plaintiff when the arbitration process being challenged was agreed upon in the CBA; indeed, as noted, these facts – including the fact that they planned to challenge Mr. Birch's alleged "failure to warn" in the hearing itself – were well known to the players' counsel and yet *they specifically requested that Mr. Pash serve as the Hearing Officer*.

Had plaintiff wanted to avoid this sort of arrangement, it could have bargained for a different system during negotiation of the CBA. However, having elected to adjudicate disputes under the Policy through this system, plaintiff is obligated to accept its outcomes. And, in any event, the law is clear that plaintiff cannot obtain vacatur of an arbitration award issued under a CBA with such speculative and unsupported allegations of bias, particularly in the context of a motion for injunctive relief. Under these circumstances, plaintiff cannot establish evidence of bias sufficient to vacate the labor arbitration awards. Plaintiff thus has no likelihood of success in prevailing on this claim.

B. The Remaining *Dataphase* Factors Do Not Support A Preliminary Injunction

As defendant NFL demonstrated in its motion to vacate the order entered in *Williams*, none of the remaining *Dataphase* factors supports the entry of a preliminary

injunction in this case. *See* Def. Mot. at 28-35. At bottom, plaintiff's primary claim is that the players will suffer irreparable harm to their careers and personal reputations if they are not granted an injunction. But this identical argument was advanced and rejected under the same circumstances in *NFLPA*, and likewise must be rejected here. *NFLPA*, 724 F. Supp. at 1028. If plaintiff could establish an entitlement to injunctive relief based on a player's lost playing time, prestige, and the impact of his suspension on his team's playoff chances, every suspension under the Policy would justify a preliminary injunction. To the extent they exist, these effects are an inherent result of the suspension process. Adopting plaintiff's characterization of irreparable harm would render preliminary injunctions for NFL steroid suspensions the rule, rather than the "drastic and extraordinary remedy" contemplated by Federal Rule 65. *Vision-Ease Lens*, 322 F. Supp. 2d at 992.

For this reason, there is no merit to plaintiff's claim that the injunction would simply preserve the "status quo." To the contrary, an order enjoining the enforcement of the NFL *changes* the status quo in significant ways that the law makes clear is not permissible. Most significantly, the injunction would fundamentally alter the NFL CBA *as agreed upon by the parties* and thereby improperly inject this Court into the NFL's labor relations. The parties agreed, and for almost two decades they have followed the practice, to consistently enforce the Policy – including the "strict liability" rule – to all players throughout the League. Allowing particular players to exempt themselves from the Policy would not preserve the status quo, it would send a message that players can

manipulate the timing of their suspensions to accommodate their own needs regarding the competition on the field, while other players on other teams are playing by the rules.

For this reason, and for those stated in defendant's motion to vacate, the irreparable harm, public interest, and balance of hardship factors do not support plaintiff's request for a preliminary injunction. *See* Def. Mot. to Vacate at 28-35. Plaintiff's motion should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiff's motion for a preliminary injunction.

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Respectfully submitted,

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