

## A More Perfect (NFL Players) Union: Secret “Side Deals,” the NFLPA, and the Duty of Fair Representation

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### INTRODUCTION

Over the past few years, the National Football League (NFL) and the National Football League Players’ Association (NFLPA) have seemed—at least publicly—to be consistently at each other’s throats. Since the last NFL Collective Bargaining Agreement (CBA) was ratified in 2011, the relationship between the two entities has suffered through court battles,<sup>1</sup> arbitration hearings,<sup>2</sup> controversially unilateral actions by the NFL without NFLPA input,<sup>3</sup> and constant fighting in the press between the players and NFL Commissioner Roger Goodell.<sup>4</sup>

Based on recent events, however, it appears that some NFL players have found another target for their discontent over the terms of their employment: their own union. In late 2016 to early 2017, Mike Pennel and Lane Johnson, two NFL players who tested positive for substances that violated the NFL’s Performance-Enhancing Drugs and Substances of Abuse policies, sued the NFL based on allegations that their appellate rights were violated.<sup>5</sup> But notably, these players also sued the NFLPA, claiming that

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1. See Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n, 820 F.3d 527, 531-32 (2d Cir. 2016) (examining Tom Brady’s suspension appeal). See also Alfred C. Yen, *The Puzzle of Deflategate: Private Agreements and the Possibility of Biased Justice*, 16 VA. SPORTS & ENT. L.J. 51, 51 (2016) (also examining “Deflategate”).

2. See Matthew Futterman, *NFL Withheld Millions from Players*, WALL STREET J. (Feb. 23, 2016, 10:29 AM), <http://www.wsj.com/articles/nfl-withheld-millions-from-players-1456189111> (noting that the NFL was ordered to return \$100 million to the pool of revenue it shares with its players).

3. See, e.g., Andrew Brandt, *Union Can’t Get a Word In*, SPORTS ILLUSTRATED (Dec. 9, 2014), <http://mmqb.si.com/2014/12/09/nflpa-personal-conduct-policy-negotiation> (noting that sometimes months pass without any communications between the two sides).

4. See Matt Bonesteel, *Drew Brees says NFL Players ‘Don’t Have any Faith’ in Roger Goodell*, WASH. POST (Nov. 8, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/11/08/drew-brees-says-nfl-players-dont-have-any-faith-in-roger-goodell/>; Andrew Brandt, *Rodgers on Roger*, SPORTS ILLUSTRATED (Aug 24, 2016), <http://mmqb.si.com/mmqb/2016/08/24/nfl-aaron-rodgers-green-bay-packers-roger-goodell-business-of-football>; Bob Condotta, *Seahawk Richard Sherman Rips Roger Goodell, Officiating, says NFL ‘Isn’t Fun Anymore’ — and more*, SEATTLE TIMES (last updated Nov. 15, 2016, 10:31 PM), <http://www.seattletimes.com/sports/seahawks/seahawk-richard-sherman-rips-roger-goodell-officiating-says-nfl-isnt-fun-anymore-and-more/>.

5. Complaint at 2, Pennel v. Nat’l Football League Players Ass’n, No. 5:16-cv-02889 (N.D. Ohio Nov. 29, 2016); Amended Complaint at 17, Johnson v. Nat’l Football League Players Ass’n, No. 5:17-cv-00047 (N.D. Ohio Feb. 14, 2017).

the players' union colluded with the NFL to change the appellate rights they are legally entitled to under the terms of the two drug testing policies.<sup>6</sup>

These lawsuits have uncovered an interesting twist to the ongoing drama between the NFL and the NFLPA: alleged secret "side deals" between the two collective bargaining units to modify terms of the two drug policies without going through the proper channels to modify the agreements.<sup>7</sup> These "side deals," which the NFL and the NFLPA allegedly withheld from Johnson and Pennel's attorneys,<sup>8</sup> are apparently neither memorialized nor even written down.<sup>9</sup>

Based on allegations of these side deals and other allegations of NFLPA misconduct, Johnson and Pennel sued not only the NFL, but also the NFLPA for a breach of the duty of fair representation.<sup>10</sup> Johnson and Pennel have claimed that the NFLPA has failed in its duty to adequately represent the NFL players that make up its organization by covertly working with the league to change the terms of the drug testing policies and keeping those changes secret from the players.<sup>11</sup> While Pennel settled his lawsuit shortly after filing it,<sup>12</sup> Johnson's lawsuit is still ongoing.<sup>13</sup>

While a professional athlete's action to sue his own union is not unprecedented,<sup>14</sup> proving a breach of the duty of fair representation is

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6. Complaint, *supra* note 5, at 5; Amended Complaint, *supra* note 5, at 22, 24.

7. Transcript of Proceedings at 6-7, Pennel v. Nat'l Football League Players Ass'n, No. 5:16-cv-02889 (N.D. Ohio Dec. 1, 2016).

8. See Amended Complaint, *supra* note 5, at 16 (interestingly—though likely not coincidentally—the same attorney filed both the Pennel and Johnson lawsuits: Stephen S. Zashin).

9. See Transcript of Proceedings, *supra* note 7, at 14 (asking if it had been reduced to writing).

10. Complaint, *supra* note 5; Amended Complaint, *supra* note 5, at 24.

11. Complaint, *supra* note 5, at 7; Amended Complaint, *supra* note 5, at 24.

12. See Brian Jones, *Mike Pennel Settles Appeal, Suspended by NFL*, CBS SPORTS (Dec. 6, 2016, 11:34 PM), <https://www.cbssports.com/nfl/news/mike-pennel-settles-appeal-suspended-by-nfl/> (reporting that Pennel agreed to drop his lawsuit in exchange for the NFL reducing his suspension from ten games to four games).

13. See Johnson v. Nat'l Football League Players Ass'n, No. 5:17-CV-0047, 2017 WL 2882119, at \*4 (N.D. Ohio 2017) (the *Johnson* case was transferred to the Southern District of New York on July 6, and is currently pending).

14. See Michael McCann, *Lane Johnson's Bold Move to Sue his Own Union is Rare, but not Unprecedented*, SPORTS ILLUSTRATED (Jan. 11, 2017), <https://www.si.com/nfl/2017/01/11/lane-johnson-suspension-lawsuit-nfl-nflpa-peds> (noting various examples of lawsuits filed by both retired and active NFL players against the NFLPA). See, e.g., Atwater v. Nat'l Football League Players Ass'n, 626 F.3d 1170, 1185 (11th Cir. 2010) (affirming a trial court's order holding that a player's claims against the NFL and NFLPA for providing inaccurate financial advice that led to the player investing in a Ponzi scheme were preempted by § 301 of the Labor Management Relations Act); Peterson v. Kennedy, 771 F.2d 1244, 1248 (9th Cir. 1985) (affirming a trial court's order overturning a jury verdict in favor of a player against the NFLPA and two of its lawyers who had provided the player with incorrect advice regarding an injury protection clause in his contract); Ballard v. Nat'l Football League Players Ass'n, 123 F.Supp.3d 1161, 1164 (E.D. Mo. 2015) (dismissing a group of former players' lawsuit against the NFLPA alleging that the NFLPA's failure to protect players from the risk of concussions was a breach of the duty of fair representation); Boogard v. Nat'l Hockey League Players Ass'n., No. 2:12-cv-9128, 2013 U.S. Dist. LEXIS 38840, at \*2 (C.D. Cal. 2013) (dismissing a duty of fair representation by the estate of a former professional hockey player based on the union's failure to file a grievance against the

notoriously difficult. Courts have frequently stated that an “enormous burden” is required to prove union liability under this legal theory.<sup>15</sup> But at the same time, courts have also not looked fondly on so-called “secret deals” between employers and unions that take away rights of employees both individually and collectively.<sup>16</sup> As such, if other instances come up in the near future where more players are affected by these side deals, the NFLPA may face serious questions and legal battles from its membership body.

Part I of this Article looks at the judge-made duty of fair representation doctrine and how it is applied both generally and in the context of collectively bargained arbitration hearings.<sup>17</sup> Part II of this Article then analyzes the *Pennel* and *Johnson* lawsuits, and explores the players’ allegations of these secret “side deals” that have affected their appellate rights under the NFL drug policies.<sup>18</sup> Part III of this Article then questions the NFLPA’s potential liability for entering into these side deals with the NFL and whether the high bar for a breach of fair representation claim can be met given both what has been revealed by the *Pennel* and *Johnson* cases and what may be revealed in the future.<sup>19</sup>

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National Hockey League after the player overdosed on pain medication prescribed by team physicians); *Chuy v. Nat’l Football League Players’ Ass’n*, 495 F. Supp. 137, 139 (E.D. Penn. 1980) (denying the plaintiff’s action to collect attorney’s fees from the NFLPA for a successful action against his club-employer after the NFLPA had refused to take up a grievance on his behalf). According to one commentator, former baseball player Barry Bonds would have had a strong case against the Major League Baseball Players Association for a breach of the duty of fair representation if he had sued them after he was “blackballed” from the league in the 2007-2008 offseason. See Anthony Torrente, *Baseball and the Law: America’s National Pastime: The Dark Side of Professional Baseball: The Fall of Barry Bonds*, 5 ALB. GOV’T L. REV. 352, 354 (2012). It is also arguable that Maurice Clarett, a football player who unsuccessfully attempted to sue the NFL to overturn a restriction barring him from the NFL because he had not yet spent at least three years in college, should have sued his union along with the league as the union did not defend him even though the age rule in question was at the time not codified in the NFL CBA. See *Clarett v. Nat’l Football League*, 369 F.3d 124, 127 (2d Cir. 2004) (applying the nonstatutory labor exemption to bar Clarett’s antitrust claim despite noting that “the eligibility rules do not appear in the text of the collective bargaining agreement”). See also Brando Simeo Starkey, *The Veil of Fair Representation: Maurice Clarett v. The National Football League*, 37 U. BALT. L.F. 17, 35 (2006); *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 962 (2d Cir. 1987) (noting that if collectively bargained terms like the draft and salary cap that discriminated against new players were illegal, “the proper action would be one for breach of the duty of fair representation,” not antitrust).

15. *Nicholls v. Brookdale Univ. Hosp. & Med. Ctr.*, No. 05-CV-2666, 2005 U.S. Dist. LEXIS 14144, at \*20 (E.D.N.Y. 2005) aff’d 204 Fed. Appx. 40 (2d Cir. 2006).

16. See *Rupcich v. UFCW Int’l Union, Local 881*, 833 F.3d 847, 855 (7th Cir. 2016).

17. See *infra* Part I.

18. See *infra* Part II.

19. See *infra* Part III.

## I. THE DUTY OF FAIR REPRESENTATION

A. *The Duty of Fair Representation Generally*

“The duty of fair representation is defined by a body of judge-made law that has developed around the fiduciary-type duty a union owes the workers it serves as bargaining agent.”<sup>20</sup> This doctrine serves to “regulate[] union conduct in both negotiating and administering the collective bargaining agreement” that is jointly agreed upon by labor and management.<sup>21</sup> In its most basic form, the doctrine serves to ensure that unions “represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents.”<sup>22</sup>

Duty of fair representation actions are also extremely difficult to prove, as to show that their union breached the duty of fair representation, employees must prove that their union’s actions or omissions are either (1) “arbitrary;” (2) “discriminatory;” or (3) “in bad faith.”<sup>23</sup> Arbitrary decisions by unions are decisions that “arise from caprice or [are] without reason,” and are “so far outside a ‘wide range of reasonableness’ . . . as to be irrational.”<sup>24</sup> Similarly, the duty requires that unions act in a non-discriminatory way by ensuring that “all its members stand[s] on no different footing,”<sup>25</sup> and to act in good faith in its dealings with its membership body.<sup>26</sup>

While unions are said to have a duty to their employees “to represent them adequately as well as honestly and in good faith,”<sup>27</sup> employees face an “enormous burden” to prove a union’s breach of the duty of fair representation.<sup>28</sup> Employees must show “substantial evidence of fraud, deceitful action or dishonest conduct” as “requisite elements” of any duty of fair representation claim.<sup>29</sup> Further, the employee must show that the union’s activities were more than simply a “tactical error” as “negligence on

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20. Michael J. Goldberg, *The Duty of Fair Representation: What the Courts Do In Fact*, 34 BUFF. L. REV. 89, 91 (1985).

21. *Id.*

22. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202 (1944).

23. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Only one of these three factors must be proven to prove a breach of the duty. *Driver v. U.S. Postal Serv.*, 328 F.3d 863, 868-69 (6th Cir. 2003).

24. *Airline Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (citation omitted)); *Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1211 n.3 (6th Cir. 1981).

25. *Steele*, 323 U.S. at 207.

26. *See Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 46-48 (1998) (holding that the Screen Actors Guild did not act in bad faith in negotiating clause).

27. *O’Neill*, 499 U.S. at 75.

28. *Nicholls*, 2005 U.S. Dist. LEXIS 14144 at \*19-20. *See also Dillard v. Seiu Local 32BJ*, No. 15 Civ. 4132, 2015 U.S. Dist. LEXIS 152502, at \*10 (S.D.N.Y. 2015).

29. *Humphrey v. Moore*, 375 U.S. 335, 348 (1964); *Amalgamated Ass’n St., Elec. Ry. & Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 299 (1971).

the union's part does not give rise to a breach" so "long as the union acts in good faith."<sup>30</sup>

However, causes of action based on this duty are seen as controversial, since suing based on this duty "pits the individual employee against the combined forces of the union and the employer."<sup>31</sup> Because a breach of the duty is so difficult to prove, an employee's treatment by his union can easily be unfair without being illegal.<sup>32</sup> Further, unions claim that defending these lawsuits is a needless use of resources that could be used to fight an employer's unfair conduct.<sup>33</sup> As such, courts give unions wide deference to represent their membership given "the wide latitude that negotiators need for the effective performance of their bargaining responsibilities."<sup>34</sup>

### *B. Potential Liability Regarding Collectively Bargained Arbitration Hearings*

In the context of collectively bargained grievance arbitration hearings, employees have a high standard to meet to prove that a hearing was conducted unfairly.<sup>35</sup> Courts have consistently held that when a dispute is resolved in accordance with a CBA, judicial review of an arbitration hearing is "very limited" and generally restricted to instances where the arbitration award was procured by "corruption, fraud, or undue means," or where the arbitrator was impartial, refused to hear material evidence, or exceeded his power as granted by the CBA.<sup>36</sup>

Similarly, the bar for a union breach of the duty of fair representation in the context of arbitration hearings is set extremely high.<sup>37</sup> In a recent Second Circuit decision involving an alleged breach of the duty of fair representation in regards to an arbitration hearing, a musician for the Buffalo Philharmonic Orchestra contended that his union inadequately represented him during an arbitration hearing with his employer by failing

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30. *Barr v. United Parcel Serv., Inc.*, 868 F.2d 36, 43-44 (2d Cir. 1989); *Cook v. Pan Am. World Airways, Inc.*, 771 F.2d 635, 645 (2d Cir. 1985) (quoting *Capobianco v. Brink's, Inc.*, 543 F. Supp. 971, 975 (E.D.N.Y. 1982)).

31. *Goldberg*, *supra* note 20, at 92.

32. *Id.*

33. *Id.*

34. *O'Neill*, 499 U.S. at 78.

35. *See Roy v. Buffalo Philharmonic Orchestra Soc'y*, 682 F.App'x 42, 45 (2d Cir. 2017) ("Except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review.") (quoting *LJL 33rd St. Assocs., LLC v. Pitcairn Props. Inc.*, 725 F.3d 184, 195 (2d Cir. 2013)).

36. *Id.* at 44. Such guidelines are procured from the Federal Arbitration Act (FAA), which federal courts look to as a set of guidelines in labor arbitration hearings even though it "does not apply to arbitrations conducted pursuant to the Labor Management Relations Act." *Id.* *See also* Nat'l Football League Mgmt. Council, 820 F.3d at 545 n.13.

37. *Roy*, 682 F.App'x at 46-47.

to “properly cross-examine . . . witnesses, raise objections and introduce evidence” in the arbitration hearing.<sup>38</sup> However, the court found that these claims did not “come close to demonstrating improper intent, purpose, or motive, or egregious behavior” and were instead merely at worst “[t]actical errors [which] are insufficient to show a breach of the duty of fair representation.”<sup>39</sup>

Normally, where grievance procedures exist in collective bargaining agreements, employees heard under this procedure are bound by the results of the grievance hearing even if the hearing is lost due to poor judgment by union officials.<sup>40</sup> An exception to this general rule applies only when a worker can prove that his or her union breached its duty of fair representation by not acting “with complete good faith and honesty, and to avoid arbitrary conduct.”<sup>41</sup> Such claims would even survive preemption by the National Labor Relations Act (NLRA), as the duty of fair representation exists “as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.”<sup>42</sup>

Even a union’s decision not to take an employee’s grievance to arbitration at all may not constitute a breach of its duty of fair representation, as the duty requires the union only to “undertake a reasonable investigation to defend a union member, . . . not an error-free one.”<sup>43</sup> Unions are given wide discretion in deciding whether to even arbitrate a grievance and are allowed the ability to “act according to [their] own reasonable interpretation of the collective bargaining agreement.”<sup>44</sup> The key question is whether the union’s decisions were “irrational,” as “‘mere negligence or poor judgment’ alone is not sufficient to prove breach of duty.”<sup>45</sup>

Matters become complicated when an employee chooses to file a “hybrid” action where the employee claims a breach of the duty of fair representation against the union while also seeking vacatur of an arbitration award under § 301 of the Labor Management Relations Act (LMRA).<sup>46</sup> The courts have held that in such hybrid actions, the employee is tasked with

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38. *Id.*

39. *Id.* at 47; *see Barr*, 868 F.2d at 43.

40. *See Goldberg*, *supra* note 20; *Vaca*, 386 U.S. at 184.

41. *Vaca*, 386 U.S. at 177 (citing *Humphrey*, 375 U.S. at 342).

42. *Id.* at 182.

43. *Blesedell v. Chillicothe Tel. Co.*, 811 F.3d 211, 220 (6th Cir. 2016).

44. *Landry v. The Cooper/T. Smith Stevedoring Co.*, 880 F.2d 846, 854 (5th Cir. 1989).

45. *Blesedell*, 811 F.3d at 221 (citing *Danton v. Brighton Hosp.*, 335 F.App’x 580, 586 (6th Cir. 2009)).

46. 29 U.S.C. § 185(a) (1947). For an example of a hybrid action in the sports law context see *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001).

proving that the union breached its duty of fair representation *and* that the arbitration was handled improperly; if one action fails, the employee “cannot succeed against either party.”<sup>47</sup>

However, there is judicial precedent showing that unions can be found liable for mishandling arbitration proceedings under certain scenarios. For example, in *Allen v. Allied Plant Maintenance Co. of Tennessee*,<sup>48</sup> the Sixth Circuit found that a union’s actions in conspiring with the employer to get a biased arbitrator on an arbitration panel would constitute a breach of the duty of fair representation.<sup>49</sup>

More recently, the Seventh Circuit held in *Rupcich v. United Food & Commercial Workers Int’l Union, Local 881*,<sup>50</sup> that a union that ignores the “plain text” of a collectively bargained agreement in a way that alters an employee’s “fundamental rights” could be found to have acted in an arbitrary fashion in representing that employee.<sup>51</sup> In this case, a union chose not to pursue or even settle a grievance filed by a fired employee despite the relevant CBA stating that the union “shall” take certain steps when an employer files a grievance.<sup>52</sup>

During oral argument in *Rupcich* at the Seventh Circuit, the union’s attorney conceded that the union did not feel they needed to follow the grievance procedure due to the union and employer’s “long-standing practice of bypassing Step 1 in cases of termination.”<sup>53</sup> The court found that this “side-arrangement” between the union and the employer, which according to the Seventh Circuit “purports to remove contractual avenues of review for grievances at the Union’s whim,” is an action that “is contrary to ‘national labor policy’ and ‘unenforceable as a matter of law.’”<sup>54</sup> As such, the Seventh Circuit found that the reliance on this side agreement in deciding not to take up the employee’s grievance could be found by a jury to be irrational.<sup>55</sup>

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47. See *Bagsby v. Lewis Bros. Inc. of Tenn.*, 820 F.2d 799, 801 (6th Cir. 1987) (so long as the claims against the employer and union are interdependent, as they usually are); see also *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990).

48. 881 F.2d 291 (6th Cir. 1989).

49. *Id.* at 296-97.

50. 833 F.3d 847 (7th Cir. 2016).

51. *Id.* at 855.

52. *Id.*

53. *Id.*

54. See *id.* at 855-56 (citing *Merk v. Jewel Food Stores Div. of Jewel Cos., Inc.*, 945 F.2d 889, 894 (7th Cir. 1991)); see also *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138, 1140, 1143 (2d Cir. 1994) (finding that a union’s “secret agreement” with the employer that modified the employees’ seniority rights following a merger was a breach of the duty of fair representation as any modification to the CBA required “meeting with Union membership to discuss demands, approval by the Union’s Joint Council and Area Conference before submission to the employer and . . . ratification by vote of the membership” as per the union’s bylaws).

55. *Rupcich*, 833 F.3d at 856.

## II. PENNELL AND JOHNSON'S CLAIMS AGAINST THE NFLPA

The issue of the duty of fair representation is particularly meaningful in the sports context right now due to two recently filed hybrid § 301/DFR cases by NFL players against both the NFL and the NFLPA in relation to arbitration hearings for drug testing appeals.<sup>56</sup> In both cases, NFL players have alleged that the NFLPA has breached its duty of fair representation by improperly colluding with the NFL in secret “side deals” to change items of the NFL drug testing policies related to the players’ rights to appeal positive tests and suspensions.<sup>57</sup>

In the first of these cases, Green Bay Packers defensive lineman Mike Pennell received a letter from the NFL on November 8, 2016 informing him that he faced discipline for violating the NFL’s substance abuse policy for testing positive for banned drugs.<sup>58</sup> As this was Pennell’s second offense, he faced a ten game suspension pending his appeal.<sup>59</sup> Pennell then sued the NFL and NFLPA in the United States District Court for the Northern District of Ohio, alleging that the NFL and the NFLPA “failed to abide by the arbitrator selection and assignment provisions and procedure set forth in the” NFL Drug Policy Arbitration Agreement.<sup>60</sup>

Section 4.1 of the NFL’s Policy and Program on Substances of Abuse requires that the NFL and the NFLPA “jointly select . . . no fewer than three but no more than five arbitrators to act as hearing officers for appeals” of prescribed disciplinary action under the drug policy.<sup>61</sup> This group of arbitrators would then “designate one of its members to . . . be responsible for assignment of appeals.”<sup>62</sup> That “Notice Arbitrator” would then schedule each of the other members to be available during each Tuesday during the playing season,<sup>63</sup> and a player’s appeal would be heard by that one arbitrator barring any objections based on neutrality.<sup>64</sup>

But according to the complaint, Pennell was informed by the NFL Management Council that only two arbitrators were available to hear appeals.<sup>65</sup> In light of this discrepancy, Pennell asked the court to enjoin the NFL and the NFLPA from proceeding with the appeal hearing and appoint a

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56. See Complaint, *supra* note 5, at 2-3; Amended Complaint, *supra* note 5, at 38.

57. See Transcript, *supra* note 7, at 6-8; Amended Complaint, *supra* note 5, at 24-25, 45-46.

58. Eric Heisig, *Green Bay Packers Defensive Tackle Sues NFL over Substance Abuse Discipline Appeal*, CLEVELAND PLAIN DEALER (Nov. 29, 2016), [http://www.cleveland.com/court-justice/index.ssf/2016/11/green\\_bay\\_packers\\_defensive\\_en.html](http://www.cleveland.com/court-justice/index.ssf/2016/11/green_bay_packers_defensive_en.html).

59. Jones, *supra* note 12.

60. Complaint, *supra* note 5.

61. *Id.* at 4.

62. *Id.*

63. *Id.*

64. Transcript, *supra* note 7, at 27.

65. Complaint, *supra* note 5, at 5.

third arbitrator to the panel under the guidelines of the Federal Arbitration Act (FAA).<sup>66</sup> Pennel claimed that this “lapse in express provisions of the [drug] Policy regarding the method of naming and appointing an arbitrator” for his appeal constituted a breach of the duty of fair representation by the NFLPA in regards to its handling of his arbitration hearing.<sup>67</sup>

Interestingly, in a hearing for this case by telephone, Pennel’s attorney Stephen S. Zashin claimed that according to position papers submitted by the NFL and the NFLPA, there are various “side agreements or side deals” regarding the drug policy “that were apparently agreed upon but never provided to any of the players in this particular case.”<sup>68</sup> These “side deals” apparently included “modifications to the substances of abuse policy, which deal directly with the issues concerning Mr. Pennel that are specifically identified in the policy.”<sup>69</sup> When Zashin asked for “information relative to those side deals” as part of issued discovery, the NFL and NFLPA refused to hand over that information.<sup>70</sup> Zashin also claimed that the NFLPA “refused in virtual totality to provide Mr. Pennel with any information relative to his defense in this particular proceeding” and that any complaint Pennel raised to NFLPA staff fell “on deaf ears.”<sup>71</sup>

In this hearing, NFLPA attorney David L. Greenspan defended the union by stating that the NFL and the NFLPA by mutual consent “determined that two arbitrators were sufficient to do the work of hearing these drug policy appeals” in light of the small amount of drug policy appeals actually prosecuted.<sup>72</sup> However, Greenspan could not answer whether this modification was actually written down, and stated that he did not know whether the modification had been raised to the NFLPA board of player representatives for approval.<sup>73</sup> Greenspan also argued that the production of evidence regarding these “side deals” would be barred by the drug policy, which states that “a player is not entitled to production of or access to records, reports or other information concerning other players or the policy’s bargaining history” in presenting an appeal.<sup>74</sup>

Responding to Greenspan’s testimony, the presiding judge, Judge John R. Adams, expressed deep concern about the lack of a formalized agreement given the “implications for a player” and his “right to a fair hearing.”<sup>75</sup> He

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66. *Id.* at 7.

67. *Id.*

68. Transcript, *supra* note 7.

69. *Id.* at 7.

70. *Id.*

71. *Id.* at 10.

72. *Id.* at 13.

73. Transcript, *supra* note 7, at 14.

74. *Id.* at 34.

75. *Id.* at 16.

stated that the NFLPA was essentially arguing that it and the NFL had “basically come to some other agreement that we will not follow the plain language of our agreement.”<sup>76</sup> In the end, Judge Adams summed up the NFL and NFLPA’s arguments in the hearing as: “[We] have an agreement that says that these are the terms of the agreement. They’re valid and they’re binding, but we can modify the agreement and we don’t have to disclose the modification to anyone essentially.”<sup>77</sup>

Judge Adams said that this argument struck him as “almost a lack of fundamental fairness” that “cries out for some sort of hearing.”<sup>78</sup> Judge Adams then ruled that barring a mutual agreement to a continuance, he would schedule a hearing for the following Monday on the request for a temporary restraining order and allow Pennel limited discovery on the issue.<sup>79</sup>

This hearing never happened, as the NFL settled with Pennel shortly after this telephone hearing, agreeing to drop Pennel’s suspension from ten games to four games.<sup>80</sup> But just one month later, Philadelphia Eagles offensive tackle Lane Johnson sued the NFL and the NFLPA to vacate an arbitration award confirming Johnson’s 10-game suspension for violating the NFL Policy on Performance-Enhancing Substances.<sup>81</sup>

Johnson—again represented by Stephen S. Zashin—argued many of the same points as Pennel, claiming that the NFL and the NFLPA had failed to provide information about arbitrator selection and other procedural matters regarding the arbitration hearing.<sup>82</sup> Like Pennel, Johnson claimed that only two arbitrators were assigned to hear appeals, which contradicted the written terms of not only the substance abuse policy, but also the Policy on Performance-Enhancing Drugs.<sup>83</sup> He also claimed that the arbitrator assigned to hear his case “refused to provide Johnson with basic information necessary to assert his defense,” and that when the arbitrator did order the NFL to produce “any other testing laboratory ‘protocols’ referenced in the Policy . . . that were applicable to the testing of samples such as the testing

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76. *Id.* at 31.

77. *Id.* at 37.

78. Transcript, *supra* note 7, at 37-38.

79. *Id.* at 38, 41.

80. Jones, *supra* note 12.

81. Amended Complaint, *supra* note 5, at 55. While Johnson already served most of his suspension at the time his lawsuit was filed, the lawsuit was filed in part to “recoup money Johnson has lost during his suspension, reinstate the future guaranteed money in Johnson’s contract that was voided by his suspension and to repair Johnson’s reputation.” Josh Paunil, *Eagles Wake-Up Call: Inside Lane Johnson’s Lawsuit*, PHILA. MAG. (Nov. 30, 2016, 6:00 PM), <http://www.phillymag.com/birds247/2016/11/30/philadelphia-eagles-lane-johnson-lawsuit-nfl-nflpa-suspension-steve-zashin/#4W2Pt58pUvbxv6k7.99>.

82. Amended Complaint, *supra* note 5, at 16.

83. *Id.* at 30.

that was done of the sample provided by Johnson,” the NFL refused to provide that information.<sup>84</sup>

Just as Pennel did in his earlier suit, Johnson sued not only the NFL but also the NFLPA for a breach of the duty of fair representation.<sup>85</sup> Johnson’s suit picked up where Pennel left off, claiming that the NFLPA entered into “side deals” with the NFL that were “substantive and material deviation[s]” from the performance-enhancing drug testing policy under which Johnson was suspended.<sup>86</sup> Johnson, like Pennel, claimed that when he asked the NFL to see the details of these side agreements, the NFL either blankly refused to turn over this information or told him to get the information from the NFLPA, who then told him to get the information from the NFL.<sup>87</sup>

However, Johnson added additional information regarding more of these “side deals,” focusing not just on the methods by which arbitrators were selected, but also alleging other variations from the policy “[e]liminating or effectively eliminating” the Chief Forensic Toxicologist (CFT) position required by the terms of the policy, and “[r]edefining the period of time a player can be kept in the reasonable cause testing program.”<sup>88</sup> Johnson claimed that the NFLPA failed to “enter into a writing to memorialize the deviations from the express terms of the 2015 Policy, or even notify its membership of the deviations,” which according to Johnson, would be a violation of Section 6.05 of the NFLPA Constitution.<sup>89</sup>

Johnson followed up with additional information about these side agreements in his brief opposing the NFLPA’s motion to dismiss the duty of fair representation claim.<sup>90</sup> In a table claiming to “trace[] the NFLPA’s misconduct to Johnson’s injuries,” Johnson argued that the NFLPA refused to provide evidence of a side agreement to change the CFT, who is responsible for certifying all of the positive test results.<sup>91</sup> According to Johnson, the CFT identified in Appendix B of the Policy, Dr. Bryan Finkle, retired about one year before Johnson’s positive test, which allegedly left the drug testing program without a CFT at the time of Johnson’s drug test on July 12, 2016.<sup>92</sup>

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84. *Id.* at 17.

85. *Id.* at 1.

86. *Id.* at 24-25.

87. Paunil, *supra* note 81.

88. Amended Complaint, *supra* note 5, at 25.

89. *Id.*

90. Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss & Supplemental Memorandum in Support of its Motion to Dismiss at 5, *Johnson v. Nat’l Football League Players Ass’n*, No. 17-cv-00047 (N.D. Ohio Jan. 6, 2017) [hereinafter Plaintiff’s Memorandum].

91. *Id.* at 4-5. The parties each do have the power to discharge and replace the CFT “provided that written notice is given by the discharging party one year prior to discharge.” NFL POLICY ON PERFORMANCE ENHANCING DRUGS § 2.2 (2015) [hereinafter NFL PES].

92. Amended Complaint, *supra* note 5, at 11, 22.

The NFLPA later provided a May 7, 2015 letter from the NFL memorializing an agreement for the Directors of the University of California, Los Angeles (UCLA) Olympic Analytical Laboratory and the Sports Medicine Research and Testing Laboratory to fulfill some, but not all, of the CFT's responsibilities until a new CFT was to be named.<sup>93</sup> No evidence exists that the NFL or the NFLPA ever found a replacement CFT; in fact, it is possible that the position was simply eliminated in a side deal between the league and the union.<sup>94</sup>

On July 6, 2017, the United States District Court for the Northern District of Ohio granted the NFL and the NFLPA's motion to transfer the case to the Southern District of New York, while denying their respective motions to dismiss without prejudice.<sup>95</sup> In doing so, the court chose "to address solely the issue of transfer," with the parties free to raise or renew the other motions on the docket—including the motions to dismiss—"if permitted by the transferee court."<sup>96</sup> In early August 2017, the Southern District of New York denied all pending motions and scheduled a case

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93. Letter from Adolpho A. Birch III, Sr. Vice President of Labor Policy & League Affairs, NFL Management Council, to Tom DePaso, General Counsel, NFL Players Association (May. 7, 2015) (on file with author). This letter indicates that the UCLA laboratory would "1) review and certify laboratory results, . . . 2) certify the results of 'B' sample analyses . . . and 3) verify analytical findings provided by the testing laboratories," but that "all other responsibilities of the [CFT] as set forth in the Policy shall not be in effect." *Id.* This would presumably cover Johnson's claim to this effect. *Id.* Other roles of the CFT presumably left unfilled included the responsibilities to: (1) "audit the operation of the testing laboratories, including the implementation of procedures, laboratory analysis of specimens and documentation;" (2) "consult with the Independent Administrator and Collection Vendor as appropriate;" and (3) "provide advice and consultation to the Parties in connection with other matters including existing and proposed analytical methods and anti-doping research." *Id.*

94. McCann, *supra* note 14.

95. *Johnson*, 2017 WL 2882119, at \*4. As rationale for the change of venues, the court cited the dramatic events of *NFLPA v. NFL*, where both the NFL and NFLPA raced to the Southern District of New York and the District of Minnesota to file their Deflategate-related lawsuits. *Id.* at \*3. In that case, the Minnesota court transferred the case to the Southern District of New York *sua sponte*, having seen "little reason for this action to have been commenced in Minnesota *at all*," since the player involved (Tom Brady) "plays for a team in Massachusetts; the Union is headquartered in Washington, D.C.; the NFL is headquartered in New York; the arbitration proceedings took place in New York; and the award was issued in New York." *Id.* at \*2. The NFLPA's filing in Minnesota likely related to their string of collective bargaining-related victories in that venue, including the union's victory in convincing the court to overturn Minnesota Vikings' running back Adrian Peterson's suspension just five months earlier. See *Nat'l Football League Player's Ass'n v. Nat'l Football League*, 88 F.Supp.3d 1084, 1091-92 (D. Minn. 2015), *rev'd*, 831 F.3d 985 (8th Cir. 2016) (vacating Peterson's arbitration award on the grounds that a newly enacted domestic violence policy could not apply retroactively to give the Commissioner the power to punish Peterson for past offenses); Mike Florio, *Minnesota Judge "Strongly Suspects" NFLPA was Forum Shopping*, PRO FOOTBALL TALK (Jul. 30, 2015, 3:59 PM), <http://profootballtalk.nbcsports.com/2015/07/30/minnesota-judge-strongly-suspects-nflpa-was-forum-shopping/>.

96. *Johnson*, 2017 WL 2882119, at \*1 n. 1.

management conference, where the NFLPA would be allowed to file a new motion to dismiss.<sup>97</sup>

### III. POTENTIAL NFLPA LIABILITY

NFL players like Johnson and Pennel, who look to sue their own union, undoubtedly face significant difficulty in trying to prove that the NFLPA breached their duty of fair representation.<sup>98</sup> As stated earlier, plaintiffs seeking to prove a breach of this duty have an “enormous burden” to show that their union’s conduct was either (1) arbitrary; (2) discriminatory; or (3) in bad faith where mere “negligence on the union’s part does not give rise to a breach.”<sup>99</sup> Showing that the union breached its duty of fair representation becomes even harder in the context of arbitration hearings—like the appeals faced by both Johnson and Pennel—as the union must only show that its handling of the arbitration hearing was “reasonable,” not “error-free.”<sup>100</sup>

However, the existence of these side deals could spell trouble for the NFLPA. Based on the Seventh Circuit’s recent decision in *Rupcich*, side agreements that contradict the “plain text” of a collectively bargained agreement in a way that “alters an employee’s fundamental rights” can be found to be sufficiently arbitrary to show a breach of the duty of fair representation despite the “considerable discretion” afforded to unions in their handling of grievance matters.<sup>101</sup>

Based on both Johnson and Pennel’s pleading documents, the NFL and the NFLPA have entered into such side agreements that have modified—at minimum—collectively bargained provisions regarding arbitrator selection,

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97. See Order, *Johnson v. Nat’l Football League Players Ass’n*, No 17-cv-5131 (S.D.N.Y. Aug. 1, 2017) (denying Plaintiff’s Refiled Motion to Vacate Arbitration Award Under the Federal Arbitration Act, Defendant’s Motion to Compel Plaintiff to Comply With Initial Standing Order, & Defendant’s Motion to Strike Plaintiff’s Reply In Support Of the Motion to Vacate Arbitration Award & scheduling initial conference); see also NFLPA Letter Motion for Conference for Permission to Move to Dismiss at 1, 3 *Johnson v. Nat’l Football League Players Ass’n*, No. 17-cv-5131 (S.D.N.Y. Aug. 4, 2017) (requesting a pre-motion conference and permission to move to dismiss); *id.* at 3 (granting the Motion). Leading up to this order, the parties were instructed to file a joint letter addressing the status of the case to date and what motions were still pending before the court. See generally Letter from Stephen S. Zashin, Jeffrey L. Kessler, & Daniel L. Nash to Judge Richard J. Sullivan (Jul. 28, 2017). This letter contained the interesting factoid that in April 2017, Johnson made a written settlement demand to the NFL and NFLPA, which was rejected by both parties. *Id.* at 4. According to this letter, the NFL, “does not believe this is an appropriate case for settlement.” *Id.* This is somewhat in contrast to the *Pennel* case, which was settled just one week after the case was filed. See Jones, *supra* note 12 (the difference is likely due to the fact that Johnson has already served his suspension and is seeking money damages, while Pennel was still in the process of appealing his suspension).

98. See McCann, *supra* note 14 (noting that it is an uphill battle to prove this claim).

99. See *Barr*, 868 F.2d at 44-45; *Cook*, 771 F.2d at 645 (citing *Vaca*, 386 U.S. at 190).

100. *Blesedell*, 811 F.3d at 220.

101. *Rupcich*, 833 F.3d at 855.

verification and certification of testing results, and controls over testing facilities.<sup>102</sup>

But perhaps the most important part here is that these agreements were allegedly kept from both Johnson and Pennel by the union and the league.<sup>103</sup> Side deals to modify collectively bargained terms are not inherently bad or illegal, and collectively bargained agreements do not have to be in writing and may even be modified orally regardless of whether the agreement is in writing.<sup>104</sup> At the same time, this deference towards collective bargaining rights tends to stop when oral modifications to a collective bargaining agreement are done in secret by unions and employers. Regardless of the innocence of the terms of the side deals, *Rupcich*—and Judge John R. Adams’s reaction to finding out about the NFL and the NFLPA side deals in the Pennel hearing<sup>105</sup>—indicates the great distain that courts generally show towards these secret agreements.<sup>106</sup>

Indeed, Judge Adams’s reaction is supported by decades of precedent. Even beyond *Rupcich*, several courts have refused to enforce secret oral side agreements that “undermine the written collective bargaining

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102. See Transcript, *supra* note 7; Amended Complaint, *supra* note 5, at 49.

103. See Amended Complaint, *supra* note 5, at 49.

104. See U.S. Soccer Fed’n., Inc. v. U.S. Women’s Nat’l Soccer Team Players Ass’n, 190 F.Supp.3d 777, 785 (E.D. Ill. 2016) (“[A] collective bargaining agreement may be partly or wholly oral and a written collective bargaining agreement may be orally modified”). In one of the more famous instances of a collectively bargained side deal in sports; examining the rule challenged in *Clarett* which required football players to spend three years in college before becoming eligible for the NFL draft was held to be exempt from antitrust laws despite not at the time appearing in the text of the NFL CBA). “Although the eligibility rules do not appear in the text of the collective bargaining agreement, the NFL Constitution and Bylaws that at the time of the agreement’s adoption contained the eligibility rules are mentioned in three separate provisions relevant to our discussion.” *Clarett*, 369 F.3d at 127. In that action, the NFLPA—in an amicus brief that in large part supported the NFL against *Clarett*—the NFLPA stated that the union had “agreed to waive its right to bargain over, and agreed not to sue over, certain provisions of the NFL Constitution and Bylaws in effect as of that time,” and the was included in these provisions as “identified in a contemporaneous side letter between the NFLPA and the NFL.” *Id.* This side letter was not included with the amicus brief and the other “certain provisions of the NFL Constitution and Bylaws” that the union agreed to not sue over are unknown. Brief of Amicus Curiae Nat’l Football League Players Ass’n at 3, *Clarett*, 369 F. 3d 124 (2d Cir. Apr. 16, 2004). For more discussion on the NFLPA’s amicus brief in *Clarett* and its own ethereal CBA modification, see Sam C. Ehrlich, *Clarett’s Shadow: How a 14-Year-Old Case Will Impact NBA Age Rule Bargaining*, 19 TEX. REV. ENT. & SPORTS L. (forthcoming 2018).

105. Transcript, *supra* note 7, at 31.

106. See generally Pamela K. Bookman & David L. Noll, *Articles: Ad Hoc Procedure*, 92 N.Y.U. L. REV. (forthcoming Nov. 2017). The most obvious policy rationale behind the courts’ uneasiness about secret side deals to change collectively bargained appellate procedure is that it creates a type of “ad hoc” procedure that leads to questions about the fairness and neutral nature of the proceedings at hand. *Id.* at 176. If evidence exists that the NFL and NFLPA have entered into secret side deals that modify even innocent terms of the appellate procedure contained in the drug policies, it is not a stretch to consider that other side deals may secretly exist—or at least could be made—that create this sort of “ad hoc” procedure that may, in a sense, predetermine outcomes for certain players. See *id.* (noting that “ad hoc” procedure presents a deep challenge).

agreement” on the basis of public policy.<sup>107</sup> In *Gatliff Coal Co. v. Cox*,<sup>108</sup> the Sixth Circuit adopted verbatim a labor law variation of the parol evidence rule created by the District Court of the Eastern District of Kentucky that excludes evidence of an oral agreement that contradicts the terms of a written collective bargaining agreement.<sup>109</sup>

Nearly fifty years later, the Seventh Circuit held to this precedent in *Merk*, holding that “collective bargaining agreements must be more secure than garden variety contracts” and thus “national labor policy forbids introduction of prior or contemporaneous secret agreements to contradict fundamental terms of a ratified collective bargaining contract.”<sup>110</sup> Indeed, the Seventh Circuit noted that the union’s “deliberate policy of secrecy” was “crucial to [the court’s] analysis” of facts that “clearly illuminate the grave dangers posed by a backroom deal that is secretly negotiated between union officials and company management without the knowledge or consent of the union rank and file.”<sup>111</sup>

In *Local 509, Missouri-Kansas-Nebraska-Oklahoma District Council, Int’l Ladies Garment Workers Union v. Annshire Garment Co.*,<sup>112</sup> the United States District Court for the District of Kansas refused to enforce an oral side agreement to a collective bargaining agreement, stating:

The Court cannot improve upon the views announced in *Gatliff Coal Co. v. Cox* . . . for the application of a national labor policy to insulate written collective bargaining agreements from the sham or oral side agreement attack. To be sure, there are two possible evils

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107. See *Merk*, 945 F.2d at 894; see also *Lewis*, 25 F.3d at 1143 (affirming an award for \$5.3 million against a union and employer who reached a secret agreement that resulted in a change to the employees’ seniority rights under the CBA without taking “steps to obtain a proper modification” as required by union bylaws).

108. 152 F.2d 52 (6th Cir. 1945).

109. See *Id.* at 53-56; see also *Int’l. Union. v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983) (holding that while interpreting terms in a collective bargaining agreement, “the court should review the interpretation ultimately derived from its examination of the language, context and other indicia of intent for consistency with federal labor policy.”).

110. *Merk*, 945 F.2d at 894. The Seventh Circuit sharply criticized the district court opinion (written by Judge Richard A. Posner sitting by designation) granting summary judgment for the employer and union, stating that the district court, by “[i]gnoring a long line of precedent . . . allowed introduction of the oral reopener to vary the terms of the written CBA.” *Id.* at 895. Notably for the purposes of this Article, the Seventh Circuit focused heavily on the secrecy of the side deal, mentioning that neither party “dispute[d] that the oral reopener was, at the behest of Union officials, deliberately concealed from the union membership” and holding that the “real danger” posed by the secret agreement in question “stems from its secrecy and not simply from its oral character.” *Id.* The Seventh Circuit also noted that in a precursor to the litigation in front of them, the district court threw out a counterclaim by the employer alleging that the union breached the oral side agreement under the labor variation of the parol evidence rule, ruling that the rule “is particularly important in the context of labor relations, lest union leaders engage in side agreements unknown to the rank and file membership.” *Id.*

111. *Id.* at 896, 899.

112. 65 L.R.R.M. 2769 (D. Kan. 1967).

to consider in connection with such a national labor policy. One is the overzealous or unprincipled union negotiator who will induce a management signature to a collective bargaining agreement with side assurances that management will not have to comply with certain controverted provisions. The other is management who will avoid certain obligations required by the executed collective bargaining agreement and attempt to justify such action by an alleged oral side agreement that compliance will not be required notwithstanding the clear and unambiguous requirement of the written collective bargaining agreement. To suppress industrial strife based on this type of controversy national labor policy requires that the clear and unambiguous requirements of the written collective bargaining agreement be immune from attack found on a covert side agreement.<sup>113</sup>

While alone a Kansas district court's opinion may not carry much precedential weight in the Southern District of New York, this specific language has been cited by the Seventh Circuit,<sup>114</sup> the National Labor Relations Board,<sup>115</sup> and twice by the Supreme Court of Washington.<sup>116</sup>

However, there are a few factors that may make the NFLPA's actions regarding Pennel and Johnson distinguishable from this precedent. First, as the NFLPA pointed out in their reply brief supporting their motion to dismiss the *Johnson* case, while Johnson cited Section 6.05 of the NFLPA Constitution "about amendments to collectively bargained agreements being presented to the Board of Player Representatives for a vote" in his opposition brief, "he omit[ted] the rest of 6.05," which states in relevant part:

Nothing in this Section or in this Constitution shall prohibit the Executive Director, in consultation with the President, from entering into side letters and/or other documents, including the

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113. *Id.* at 2772. The court also noted that a similar labor law variation of the parol evidence rule has been applied in the Fourth Circuit, Third Circuit, and "several" district courts. *See* *Lewis v. Lowry*, 322 F.2d 453, 456 (4th Cir. 1963); *Lewis v. Mears*, 297 F.2d 101, 105 (3rd Cir. 1962); *Lewis v. Young & Perkins Coal Co.*, 190 F. Supp. 838, 841 (W.D. Ky. 1960); *Lewis v. Coleman*, 257 F. Supp. 38, 45 (S.D.W. Va. 1966); *see also Tuscan Dairy Farms, Inc.*, 25 F.3d at 1143. It should be noted that to the author's knowledge, it is possible for plaintiffs to win with this type of claim even if the lead plaintiff's last name is not Lewis.

114. *Merk*, 945 F.2d at 894-95.

115. *See* Local 86, Brotherhood of Painters, 216 N.L.R.B. 1127, 1129 n.6 (1975); *see also* N.D.K. Corp., 278 N.L.R.B. No. 151, 1 (1986). "The National labor policy requires that evidence of oral agreements be unavailing to vary the provisions of a written collective-bargaining agreement valid on its face." *Id.*

116. *See* *Rest. Emps. et al. v. Morris Rhodes et al.*, 580 P.2d 611, 614 (Wash. 1978); *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 640 P.2d 1051, 1056 (Wash. 1982).

resolution of grievances, which clarify or interpret the provisions of any existing Collective Bargaining Agreement or are necessary for the orderly implementation and administration of a Collective Bargaining Agreement.<sup>117</sup>

Given these terms, it would seem that entering into these side agreements is not a violation of the NFLPA Constitution so long as the side agreements are to “clarify or interpret” the CBA “or are necessary for the orderly implementation and administration of” the CBA.<sup>118</sup>

But the words “clarify or interpret” are key terms here.<sup>119</sup> When the NFL and the NFLPA enter into agreements to directly change terms of collectively bargained agreements, like the drug policies, are those agreements serving to “clarify or interpret” the policies, or outright changing the terms of the policies?<sup>120</sup> The words “clarify” and “interpret” are limited; a judge or jury could reasonably see these expressions as only granting the parties the ability to enter agreements to resolve ambiguities in the language of the policy, rather than giving the power to outright change the plain language of the policies’ terms. For instance, while a change from three arbitrators to two may be a relatively inconsequential change given the scope of the entire policy, the three arbitrator clause is unambiguous and the change made in the context of the side letters could not be seen as merely “clarifying” or “interpreting” the CBA’s preexisting terms.

Further, while the NFL Substance Abuse Policy states that modification requires only “the mutual consent of the Parties,”<sup>121</sup> the NFL Policy on Performance-Enhancing Substances contains no modification clause.<sup>122</sup>

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117. See Defendant’s Reply Memorandum in Further Support of Its Motion to Dismiss at 7 n.10, *Johnson v. Nat’l Football League Players Ass’n*, No. 5:17-cv-00047 (N.D. Ohio Apr. 10, 2017); 2007 NFL CONST. art. VI, § 6.05.

118. 2007 NFL CONST. art. VI, § 6.05.

119. *Id.*

120. See *Crafts v. General Motors Corp.*, 192 F. Supp. 2d 310, 319-20 (D.C. Del. 2002) (finding that a “Clarification Agreement” entered into by the union and employer “did not merely clarify” the terms of the CBA because it “was a departure” from the “well-known meaning” of the changed terms, but finding that the union’s right to make side agreements that changed collectively bargained terms was preserved by a clause in the Local Agreement that empowered the parties “to make mutually satisfactory *modifications, additions, deletions, or waivers*”) (emphasis added). Limited case law exists in the labor law sphere for interpreting such a provision, but courts’ treatment of the words “clarify” and “interpret” in administrative law may offer a clue as to how a court would view this clause. *Id.* According to the Fourth Circuit, “when an amendment alters, even ‘significantly alters,’ the original statutory language, this does ‘not necessarily’ indicate that the amendment institutes a change in the law.” *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004) (citing *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999)). At the same time, courts “look[] to statements of intent” made by the crafters of the statutory language to determine “whether an amendment clarifies or changes an existing law.” *Id.*

121. 2016 NFL Substance Abuse Policy, § 1.1.8.

122. See 2016 NFL PES (noting that there is no modification clause).

Contradictory, the NFL's CBA specifically states that the "Agreement may not be changed, altered, or amended other than by a *written* agreement signed by authorized representatives of the parties."<sup>123</sup> Since the Policy on Performance-Enhancing Drugs does not contain a modification clause, and the modification clause in the Substance Abuse Policy is ambiguous, the courts will likely treat these agreements as part of the CBA. Where the modification terms are ambiguous (the Substance Abuse Policy) or non-existent (the Policy on Performance-Enhancing Drug), courts will simply defer to the terms of the CBA to explain the intent of the parties.<sup>124</sup> Since the CBA explicitly requires written modifications, and if this is the case, the NFLPA may have breached the "plain text" of the CBA by entering into these oral side agreements with the NFL to change the terms of either drug policy.<sup>125</sup>

In response, the NFLPA would likely point to the rule established by the Seventh Circuit in *Merk* and *Rupcich*, which established that only the side deals that alter an employee's "*fundamental* rights" are the type of deals that are "contrary to 'national labor policy' and 'unenforceable as a matter of law.'"<sup>126</sup> In contrast to *Rupcich*, where the union's side deal with the employer took away her grievance rights in totality, the side deals alleged by Pennel and Johnson merely alter the players' grievance rights in a fairly insignificant fashion.<sup>127</sup> While both the Substance Abuse Policy and the Policy on Performance-Enhancing Drugs require three to five arbitrators to be available to hear an appeal,<sup>128</sup> only one arbitrator is necessary as only one arbitrator actually hears each appeal.<sup>129</sup> While only having one or two

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123. 2011 NFL CBA art. 70, § 9 (emphasis added).

124. See *Int'l. Union*, 716 F.2d at 1480 ("Where ambiguities exist, the court may look to other words and phrases in the collective bargaining agreement for guidance."); see also *United Steelworkers of Am. v. Gen. Steel Indus., Inc.*, 499 F.2d 215, 219 (8th Cir. 1974) (ruling that separately bargained insurance, pension, and supplemental insurance benefit plans were governed by the arbitration agreements in the basic agreement because they were referred to in the basic agreement). The NFL CBA refers to the Policy on Anabolic Steroids and Related Substances (the prior name for the Policy on Performance-Enhancing Drugs) and the Policy and Program on Substances of Abuse in Art. 4 § 9(e), Art. 39 § 7(b), Art. 42 § 6, and Art. 51 § 1. 2011 NFL CBA art. 4, § 9(e); *id.* art. 39, § 7(b); *id.* art. 42, § 6; *id.* art. 51, § 1.

125. See 2011 NFL CBA art. 70, § 9.

126. See *Merk*, 945 F.2d at 894; *Rupcich*, 833 F.3d at 855.

127. *Rupcich*, 833 F.3d at 855.

128. 2016 NFL Substance Abuse Policy, § 4.1; NFL PES § 9. In his motion to vacate the arbitration award, Johnson further argued that these policies combined required the NFL and NFLPA to retain *separate* arbitrators for each policy, meaning that none of the arbitrators retained for one policy can also be arbitrators for the other policy. Plaintiff's Memorandum in Support of his Refiled Motion to Vacate Arbitration Award at 6 n.10, *Johnson v. Nat'l Football League Players Ass'n*, No. 5:17-cv-00047 (N.D. Ohio Mar. 17, 2017). Nothing in the plain text of the Policies supports this allegation. See *generally* 2016 NFL Substance Abuse Policy; see also 2016 NFL PES. Nevertheless, retaining only two arbitrators for the two policies combined would still breach the plain text of both policies. 2016 NFL Substance Abuse Policy, § 4.1; NFL PES, § 9.

129. See Complaint, *supra* note 5, at 17.

arbitrators available to hear these appeals may inconvenience players or raise the possibility of an unresolved conflict of interest, neither of these events happened in either the *Johnson* or *Pennel* cases, and the modification did not go nearly so far as to take away the players' grievance rights completely.<sup>130</sup>

At the same time, some of the other modifications alleged by Johnson may indeed go as far as to affect the players' fundamental rights of appeal granted to them in the drug testing policies.<sup>131</sup> In his complaint, Johnson alleged that when he requested "any other testing laboratory 'protocols' referenced in the Policy . . . that were applicable to the testing of samples such as the testing that was done of the sample provided by Johnson," the NFL refused to provide that information, possibly due to a discovery-related side deal made with the NFLPA.<sup>132</sup> Presumably, Johnson could then use this information to challenge any possible procedural deficiencies with the testing process, giving him a weapon beyond simply trying to show that he did not actually test positive for a banned substance.

While the likelihood of success of such a claim seems fairly tenuous, it is important to remember that in 2012, professional baseball players Ryan Braun and Eliezer Alfonzo had drug suspensions overturned on appeal based on successful arguments that laboratory protocols regarding the chain of custody of the testing samples were flawed and handled incorrectly.<sup>133</sup>

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130. See Amended Complaint, *supra* note 5 at 40-41 (showing that Johnson argued, in his amended complaint, that the arbitrator in his appeal, James Carter of Wilmer Hale, had a conflict of interest due to his firm's previous dealings with the NFL). Indeed, former FBI Director Robert S. Mueller was retained to investigate the NFL's conduct in handling Ray Rice's domestic abuse allegations while he was a partner at Wilmer Hale. Defendant's Memorandum in Opposition to Motion to Vacate Arbitration Award at 4, *Johnson v. Nat'l Football League Players Ass'n*, No. 5:17-cv-00047 (N.D. Ohio Apr. 14, 2017). However, according to the NFL and NFLPA Johnson did not object to Carter's service as arbitrator at the time of the hearing, and thus his objection in this lawsuit to Carter's placement as arbitrator is likely barred. *Id.* at 16; see *Williams v. Nat'l Football League*, 495 Fed.App'x 894, 898 (10th Cir. 2012) (quoting *Garfield & Co. v. Wiest*, 432 F.2d 849, 853 (2d Cir. 1970)). "It is well settled that disgruntled losers cannot first raise their objections after an award has been made." *Id.* It is worth noting that Johnson disagrees with the NFL and NFLPA's claim that he has waived this objection; he argued in a reply brief that the issues he raised with the arbitrator selection process and the fact that the NFL and NFLPA allegedly held information about this process from him at the outset of the selection of Carter as arbitrator keeps intact his objection at the litigation stage. Plaintiff's Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Vacate Arbitration Award at 14-17, *Johnson v. Nat'l Football League Players Ass'n*, No. 5:17-cv-00047 (N.D. Ohio Apr. 28, 2017).

131. See generally Amended Complaint, *supra* note 5 (indicating that the NFL's modification may have affected Johnson's fundamental rights).

132. *Id.* at 17.

133. Adam McCalvy, *Braun Wins Appeal of 50-Game Suspension*, MLB.COM (Feb. 23, 2012), <http://m.mlb.com/news/article/26813960/>; Barry M. Bloom, *MLB Lifts 100-Game Suspension for Alfonzo*, MLB.COM (May 14, 2012), <http://m.mlb.com/news/article/31248778/>. It is also notable—though perhaps not relevant to the Johnson case—that the arbitrator who overturned both Braun and Alfonzo's appeals, Shyam Das, was named as the NFL's third appeals arbitrator shortly after Pennel filed his lawsuit. *Id.*; see Letter from Adolpho A. Birch III, Sr. Vice President of Labor Policy & League Affairs, NFL Management Council, & Tom DePaso, General Counsel, NFL Players Association, to

Johnson may or may not have been able to make a similar successful argument had he been provided the information he requested. The fact remains that he, or any other player filing a hybrid § 301/duty of fair representation claim, would still have to prove that they would have won the arbitration hearing but for the union's breach of duty, which is extremely difficult to prove.<sup>134</sup> But the fact that Johnson was denied this information relatively shows that the "side deals" did affect his attorneys' ability to do their due diligence while defending their client.<sup>135</sup>

Therefore, the *mere existence* of these side deals—along with their clearly clandestine nature—raises serious questions about what else may have been modified by the NFL and the NFLPA without the knowledge of the NFLPA membership body. If, for example, the NFLPA agreed in one of these side deals to "go easy" on the NFL in certain cases to gain ground for more high-profile players, this would show a discriminatory action that would be a clear breach of the duty of fair representation.<sup>136</sup> Or if the NFLPA agreed to change a more fundamental term of the drug policy that affects the players on more subtle grounds and refused to tell players about this change—even when asked—this conduct could easily be considered to be "so far outside a 'wide range of reasonableness' . . . as to be rational."<sup>137</sup>

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Arbitrator Shyam Das (Dec. 1, 2016) (on file with author); *see also* Defendants' Status Report at 1, *Pennel v. Nat'l Football League Players Ass'n*, No. 1:16-cv-02889 (N.D. Ohio Dec. 2, 2016). MLB removed Das as the league's independent arbitrator shortly after Das issued the Braun and Alfonzo decisions, while "vehemently disagree[ing]" with Das's reasoning. Bob Nightengale, *MLB Fires Longtime Arbitrator Shyam Das*, USA TODAY (May 14, 2012), <http://content.usatoday.com/communities/dailypitch/post/2012/05/shyam-das-mlb-arbitrator-fired-ryan-braun/1>.

134. *See* *Wood v. Int'l Bhd. of Teamsters*, 807 F.2d 493, 502 (6th Cir. 1986) ("With respect to conduct apart from the arbitration, the Union is liable for damages only if its breach was a 'but-for' cause of those damages."); *see also* *Anderson v. United Paperworkers Int'l. Union*, 641 F.2d 574, 580 n. 8 (8th Cir. 1981) ("In a number of recent cases, courts have held unions not liable for breaches of their duty of fair representation absent evidence that but for the union's conduct the employee would not have been injured.") (citing *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1017-20 (3rd Cir. 1977); *Self v. Drivers, Chauffeurs, Warehousemen and Helpers Local Union 61*, 620 F.2d 439, 443 (4th Cir. 1980); *Soto Segarra v. Sea-Land Serv., Inc.*, 581 F.2d 291, 298 (1st Cir. 1978); *De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281, 290 (1st Cir. 1970), *cert. denied*, 400 U.S. 877 (1970)); *see also* *Rupcich*, 833 F.3d at 856-58 (finding that the plaintiff's abandoned case was much stronger than another case that the union recently took to arbitration; and thus, "a reasonable juror could find . . . that had [the union] followed its CBA-mandated grievance procedure and proceeded to arbitration, [the plaintiff] would have probably prevailed in getting her job back"). However, if the player can show that they could not explore the possibility of a breach of protocol because of a secret side deal between the union and league that denied them access to the required information, then the "national labor policy" disfavoring such deals may overrule the strong deference granted to unions by the courts in these situations. *See Local 509, ILGWU*, 65 L.R.R.M. at 10-11.

135. *See* *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 313 (7th Cir. 1981) (noting that in the "few cases involving nondisclosure of evidence or perjury" in arbitration hearings, "courts have recognized the applicability of the due diligence requirement.").

136. *Vaca*, 386 U.S. at 190 (citation omitted).

137. *Airline Pilots Ass'n, Int'l*, 499 U.S. at 67; *see Ruzicka*, 649 F.2d at 1211 n.3.

At this time such an analysis is mere speculation; it remains unknown as to what evidence of any other “side deals” may be uncovered in the future.

#### CONCLUSION

Over a half-century of case law has made it clear: it is extremely difficult to prove that a union breached their duty of fair representation, as the courts give unions extreme deference in their actions. However, as this article has shown, the NFLPA could be at risk of breaching their duty based on the secret oral side deals they have entered into with the NFL to change certain elements of the collectively bargained drug testing policies without going through the proper channels.

Although the side deals that have become public are still fairly innocent in nature, it is unknown whether the language changed is anywhere close to “fundamental” enough for the NFLPA to be at risk of facing any liability.<sup>138</sup> But there is still much that is unknown. As more details continue to emerge, the NFL players that make up the NFLPA’s membership may start to take a hard look at what exactly their union is doing for them. If other disgruntled players pick up on what Pennel and Johnson have discovered and subsequently discover more “side deals” beyond what has been revealed already, the NFLPA could be facing battles on two separate fronts in the coming years. As professional football faces the likelihood of yet another lockout when the CBA expires in 2021, the NFLPA will have to make some challenging decisions on how exactly they want to represent their membership bodies not only in publicly scrutinized collective bargaining negotiations but also in secret “side” negotiations.<sup>139</sup>

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138. See *Rupcich*, 833 F.3d at 855 (noting that side arrangements can be “unenforceable as a matter of law”).

139. See Laurel Pfahler, *Bengals’ Winston: Players ‘Need to be Ready’ for 2021 Work Stoppage*, DAYTON DAILY NEWS (Aug. 24, 2016), <http://www.daytondailynews.com/sports/bengals-winston-players-need-ready-for-2021-work-stoppage/lx2ioCchShT51ApHFfQ10I/>; Jeremy Fowler, *Ramon Foster Expects 2021 Work Stoppage Over Drug Policy*, ESPN.COM (Aug. 22, 2016), [http://www.espn.com/nfl/story/\\_/id/17366384/pittsburgh-steelers-player-rep-nfl-players-save-2021-lockout](http://www.espn.com/nfl/story/_/id/17366384/pittsburgh-steelers-player-rep-nfl-players-save-2021-lockout); David Steele, *Another NFL Lockout inevitable as long as Owners Keep Ripping Off Players*, SPORTING NEWS (Feb. 23, 2016), <http://www.sportingnews.com/nfl/news/nfl-lockout-owners-players-money-labor-contract-arbitration/1q04k1rg8pdxp1b134yfqh4ib5>.