No. 09-214

IN THE

Supreme Court of the United States

JON SNOW, AND OTHER SIMILARLY SITUATED INDIVIDUALS,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASS'N; THE NATIONAL FOOTBALL LEAGUE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

TEAM 2 ORIGINAL BRIEF
COUNSEL FOR RESPONDENTS

QUESTIONS PRESENTED

I. Whether the NCAA amateurism and eligibility bylaws are protected as a matter of law from attack under Section 1 of the Sherman Act when the purpose and objective of the Act are not satisfied?

II. Whether Petitioner's state law claims of negligence are preempted as a matter of law under Section 301 of the Labor Management Relations Act when Petitioner's rights arise from the Collective Bargaining Agreement and the resolution sought requires analysis of its terms?

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STANDARD OF REVIEW

The correct standard of review is *de novo* as both issues are faced with questions of mixed law and fact. *Williams v. Taylor*, 529 U.S. 362, 384 (2000).

STATEMENT OF THE CASE

A. Statement of Facts

This case concerns Petitioner, Jon Snow, former quarterback of Tulania University and the New Orleans Saints (hereinafter, "Saints") of the National Football League (hereinafter, "NFL"). R. 13. During Petitioner's extensive and impressive collegiate career, he permitted Apple Inc., to use his image and likeness for their Apple Emoji Keyboard in an effort to appeal to college football fans and encourage the purchase and use of Apple products. R. 13.

Immediately after Petitioner agreed to allow Apple to use his image and likeness, Apple paid Petitioner $1,000.00 and promised him an additional $1 royalty fee for each consumer download of their Apple Emoji Keyboard using his image and likeness. R. 13.

During the first term of the agreement, Petitioner generated approximately $3,500.00. R. 13. The head of Tulania University compliance, received complaints from other student athletes about Petitioner's violation of receiving unfair compensation. R. 13. Thereafter, the National Collegiate Athletic Association (hereinafter, "NCAA") was notified and suspended Petitioner indefinitely for violating NCAA bylaw 12.5.2.1. R. 13.

In response, Petitioner entered the NFL draft and was picked up by the Saints. R. 13. During his rookie season, doctors and trainers employed by the Saints prescribed Petitioner multiple painkillers to manage pain from small head collisions and minor ankle injuries. R. 13. Petitioner was never given disclosure on the side effects and risks posed with each medication. R. 13. Petitioner alleges he was given rushed treatment and sent back to the field. R. 13. Well

into Petitioner's second season he was diagnosed with permanent nerve damage in his ankle and an enlarged heart. R. 13. Moreover, Petitioner developed an addiction to painkillers. R. 13.

B. Procedural History

The Complaint. Petitioner, on behalf of himself and on behalf of all others similarly situated, brought separate actions against both the NCAA and the NFL in the United States District Court for the Southern District of Tulania. R. 4. In the interest of judicial efficiency, the two actions were consolidated. R. 13.

The first action involved NCAA bylaw 12.5.2.1 which defines that a student athlete may lose eligibility if the student athlete accepts remunerations for use of the student athlete's name, image or likeness, or if the student athlete promotes or advertises a commercial product or service in any way. R. 4. In this action, Petitioner alleged the bylaw violated Section 1 of the Sherman Act (hereinafter, "the Act"). R. 4.

In the second action against the NFL, Petitioner alleged the NFL was liable for negligent distribution and encouragement of excessive painkiller prescriptions in violation of the Controlled Substances Act, the Food, Drugs, and Cosmetics Act, and California Pharmacy Laws. R. 13, 22. More specifically, Petitioner alleged the NFL was negligent in its retention and hiring of medical personnel and thus, pursued negligent per se and negligent misrepresentation causes of action. R. 9.

The District Court. The District Court denied the NCAA's and the NFL's motions to dismiss. R. 26. As for the action against the NCAA, the District Court concluded the Act did apply to NCAA bylaws and thus, found a rule of reason analysis must be applied to determine the validity of bylaw 12.5.2.1. R. 14, 17, 19. With regard to the action brought against the NFL, the District Court explained that each element of Petitioner's complaint could be addressed

without any reference to the NFL Collective Bargaining Agreement (hereinafter, "CBA"). R. 22. As such, the District Court held that Petitioner's causes of action were not preempted by the CBA and therefore, denied the motion to dismiss. R 26.

The Fourteenth Circuit. The Fourteenth Circuit reversed the decision of the District Court and dismissed the actions against both the NCAA and the NFL. R. 11. On the basis of *stare decisis*, the Fourteenth Circuit concluded NCAA bylaws regarding amateurism and eligibility are necessary to preserve the student athlete product. R. 6. Finally, the Fourteenth Circuit held that Petitioner's negligent claims were preempted because to determine whether the NFL was negligent would require the Court to interpret and apply the CBA. R. 11.

SUMMARY OF THE ARGUMENT

This case is about a resentful ex-football player attempting to: (1) change decades of sound law regarding NCAA amateurism and eligibility bylaws; and (2) ignore a well established CBA designed to protect his rights as a player in the NFL.

This Court should affirm the Fourteenth Circuit's dismissal of Petitioner's antitrust claim for the following two reasons. First, NCAA bylaw 12.5.2.1 is not governed by the Act as the bylaw is not aimed at any commercial activity of the NCAA but is instead explicitly non-commercial because of its focus to promote fair competition within the NCAA and to protect the unique product of the "student-athlete". There is no commercial market for the "student-athlete" as there is no supply and demand for this product, one of the most important aspects of a commercial market.

Second, even if this Court finds the Act does apply to NCAA bylaw 12.5.2.1, the bylaw withstands a per se rule and rule of reason analysis. The per se rule is inapplicable to the bylaw given the bylaw is not anti-competitive on its face. In fact, amateurism and eligibility bylaws are

presumed to be procompetitive. The bylaw also withstands the rule of reason analysis because the Petitioner has failed to prove: (1) a substantial anticompetitive effect that harms consumers in a relevant market; and (2) there are less anticompetitive means to reasonably achieve the procompetitive goals. Further, the NCAA has met its burden of demonstrating some procompetitive rationale attached to bylaw 12.5.2.1. Therefore, these bylaws are protected from attack under the Act.

In 1947, Congress enacted the Labor Management Relations Act Section 301 (hereinafter "Section 301"). The preemptive nature behind Section 301 is evidenced by the two-prong test any petitioner must overcome in order to prevail. Failure at either stage requires preemption. The legal screen is set to filter out two classes of claims. The first, all claims where in the rights asserted were conferred by the CBA. The second, all claims where the alleged independent rights are substantially dependent on analysis of the terms of the CBA.

The Petitioner fails, not one but both of these prongs. Here, the Petitioner's right to medical care is not a general right like that of the public, but is a right to a private team physician expressly created by the CBA and as such must be preempted. Even if this Court was inclined to allow a negligence claim to proceed, it would need to interpret Articles 39, 43, and 44 in order to analyze whether Petitioner met his burden of proof regarding the first two elements of a negligence cause of action. This interpretation of the CBA mandates preemption.

Preemption protects the reliance interest of parties to the CBA and promotes industrial peace. Here, the Petitioner entered into a legally binding contract and agreed to the benefits of special medical treatment provided by the Saints. In exchange for the right, he promised to the grievance procedures within the CBA. Because all parties to the CBA relied on its terms and

those terms need to be interpreted uniformly in the interest of equity, Petitioner's claims should be preempted.

ARGUMENT

I. AS A MATTER OF LAW, NCAA AMATEURISM AND ELIGIBILITY BYLAWS ARE PROTECTED FROM ATTACK UNDER SECTION 1 OF THE SHERMAN ACT.

The Fourteenth Circuit properly granted the NCAA's motion to dismiss Petitioner's claim as the Act does not apply to NCAA bylaw 12.5.2.1 given that there is no commercial purpose in the bylaw. Instead, the bylaw's purpose is to promote fair competition within NCAA member schools and to protect the unique product of the "student-athlete." Even if this Court holds the Act applies to the bylaw, the bylaw withstands the per se rule and rule of reason analysis.

A. Given the purpose and objective of Section 1 of the Sherman Act, the Act is inapplicable to claims brought against NCAA amateurism and eligibility bylaws.

Pursuant to the Act, "every contract . . . in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." 15 U.S.C.S. § 1. This Court previously explained "the [Act] . . . was aimed at preserving free and unfettered competition as the rule of trade," and the end goal was to prevent restraints on competition in business and commercial transactions which tend to control the market. *See Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); *See also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940). Further, in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, this Court explained there is no question "the [Act] regulates only transactions that are *commercial* in nature." 359 U.S. 207, 213 (1959) (emphasis added).

Following the direction of this Court, the Sixth Circuit explained, in order for a claim to fall within the purview of the Act, there must be commercial activity involved. *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008). The proper inquiry in determining whether a commercial

activity is involved is whether the challenged actions of defendant involve a commercial activity, not whether defendant is engaged in a commercial business. *Id.*

In *Bassett*, the plaintiff, an assistant football coach at the University of Kentucky, resigned after an allegation that he violated NCAA rules concerning improper inducements during recruiting of prospective student-athletes. *Id.* at 429. Based on the allegations, the NCAA issued a show cause order affecting plaintiff's ability to be hired in athletically related positions at NCAA member schools. *Id.* The plaintiff claimed enforcement of the show cause order violated the Act. *Id.* at 430. The Sixth Circuit affirmed the lower court's dismissal of the case, reasoning the NCAA rules at issue were "explicitly non-commercial" and instead were "designed to promote and ensure competitiveness among the NCAA member schools." *Id.* 433-34. As such, the Court held the NCAA's enforcement of the rules did not fall within the purview of the Act. *Id.* at 434.

Several other courts have followed this same reasoning—the Act does not apply to amateurism and eligibility rules. *See Jones v. NCAA*, 392 F. Supp. 295, 303 (D.Mass. 1975) (finding there is no commercial marketplace that needs protecting from eligibility rules nor has the plaintiff demonstrated how eligibility rules are connected to any commercial activities of the NCAA); *See also Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D.Tenn. 1990) (finding the main purpose of eligibility rules is to protect the unique product of the "student-athlete" and not to provide a commercial advantage to the NCAA); *See also Smith v. NCAA*, 139 F.3d 180, 185-186 (3rd Cir. 1998) (holding the Act does not apply to eligibility rules as they are not related to the commercial activities of the NCAA but instead "seek to ensure fair competition in intercollegiate athletics").

Similar to *Bassett* and the aforementioned courts, here, NCAA bylaw 12.5.2.1 concerns amateurism and eligibility and is therefore not commercial in nature as it was created with the non-commercial purpose of promoting fair competition within collegiate athletics and protecting the unique product of the "student-athlete." This rule promotes fair competition within intercollegiate athletics by allowing for the equal distribution of talent. If student athletes were allowed compensation, blurring the line between amateurs and professionals, the high revenue profiting schools would spend large amounts of money to recruit the best players. Comparatively, low revenue schools may appear unattractive to prospective student-athletes thus impacting some schools' competitiveness. Protecting the unique product of "amateurism" allows the prospective student-athlete to continue to have a wide variety of colleges to choose from without being blinded by the incentive of money.

A rule that violated the Act is exemplified in *NCAA v. Board of Regents*, where the College Football Association (hereinafter, "CFA"), entered into an agreement with National Broadcasting Co. (hereinafter, "NBC") to increase broadcasting of NCAA games. 468 U.S. 85, 94-95 (1984). This agreement directly violated the NCAA's current plan (hereinafter, "the Plan") limiting the amount of games that could be televised and set out a "minimum aggregate compensation" for the televising of the games that totaled upwards $131 million. *Id.* at 91-93. As a result, the NCAA announced disciplinary action would be taken against the CFA if the contract was performed. *Id.* at 95. The CFA then brought suit to prevent the NCAA from initiating any disciplinary action. *Id.* This Court held the restraint constituted an "unreasonable restraint on trade" because the Plan limited the output of televised games and fixed the price. *Id.* at 99-100. Further, this Court explained limits on output and price-fixing touch the heart of an unreasonable

restraint on trade. *Id.* Thus, this Court held the challenged Plan fell within the purview of the Act. *Id.*

NCAA bylaw 12.5.2.1 is distinguishable from the challenged Plan adopted by the NCAA in *Board of Regents*. In that case, the limitation on output and price-fixing directly affected the supply and demand aspect of a commercial market. In a commercial market where the demand is high and the supply low, the price tends to increase. Unlike the Plan in *Board of Regents* that expressly limited the supply of televised NCAA football games and spiked the price, here the amateurism and eligibility bylaws do not spike the price or affect any supply and demand in a commercial market. These rules directly affect NCAA student-athletes for which there is no commercial market. There is no price attached to a student-athlete that is dependent on a supply and demand algorithm. The Petitioner may argue that scholarships attach a price to the student-athlete. This argument, however, is unpersuasive as scholarships are based on the member school's cost of attendance not supply and demand of student-athletes. *See Banks v. NCAA*, 977 F.2d 1081, 1091 (7th Cir. 1992).

Amateurism and eligibility bylaws are non-commercial as they do not affect any commercial market nor are they connected to any NCAA commercial activity. Instead, these bylaws focus on promoting fair competition within collegiate athletics and protecting the unique product of the "student-athlete." As such, these bylaws fall outside the purview of the Act.

B. Even if this Court finds the Act applicable to NCAA amateurism and eligibility bylaws, the bylaws withstand a per se rule and rule of reason analysis.

Regardless of whether this Court determines the Act is applicable to NCAA amateurism and eligibility bylaws, the decision of the Fourteenth Circuit to dismiss this case should be affirmed as NCAA bylaw 12.5.2.1 withstands a per se rule and rule of reason analysis.

i. *NCAA bylaw 12.5.2.1 is presumed to be procompetitive therefore, a per se rule is not applicable.*

In 1958, this Court explained there are certain restraints on trade that are conclusively presumed unreasonable and thus, illegal without further inquiry where the restraint has a "pernicious effect on competition and lack[s] any redeeming virtue." *Northern Pac. Ry. Co*., 356 U.S. at 5. Additionally, this Court previously explained it is only appropriate to apply the per se rule where the court has enough experience with the specific kind of restraint to readily predict with certainty the restraint will not survive a rule of reason analysis. *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 343-44 (1986).

Based on this reasoning, it would be inappropriate to apply the per se rule to NCAA bylaws regarding amateurism and eligibility for the following three reasons. First, these bylaws contain redeeming virtue, because they are in place for the primary purposes of promoting fair competition and protecting the unique product of the "student-athlete." The fact that this Court and several other Circuit and District Courts have given these purposes great weight in analyzing the validity of the rules under the Act, demonstrates that courts understand these bylaws do maintain significant virtue. *See Board of Regents*, 468 U.S. at 100-01; *See also Smith*, 139 F.3d at 187; *See also McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988); *See also Jones*, 392 F. Supp. at 304; *See also Banks*, 977 F.2d at 1091; *See also O'Bannon v. NCAA*, 802 F.3d 1049, 1073 (9th Cir. 2015).

Second, this Court's limited experience with NCAA amateurism and eligibility bylaws does not allow this Court to predict with certainty the restraint will not survive a rule of reason analysis. Conversely, given the long history of upholding amateurism and eligibility bylaws by the Circuit and District Courts, it would be contradictory to find that as a matter of law, these rules are per se unreasonable and in violation of the Act.

Third, in *Board of Regents*, this Court explained "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics." 468 U.S. at 117. In establishing the presumption, this Court explicitly stated that eligibility rules along with other specific rules are those restraints which fit directly in the mold of this presumption. *Id.* Here, NCAA bylaw 12.5.2.1 is a rule regarding amateurism and eligibility and as such, the rule is presumed to be procompetitive.

As NCAA bylaw 12.5.2.1 is not anti-competitive on its face with no redeeming virtue but is instead presumed to be procompetitive, it is inappropriate to apply the per se rule to this case and therefore, this Court should analyze the bylaw under the rule of reason analysis.

ii. *The procompetitive effects of NCAA bylaw 12.5.2.1 outweigh any anticompetitive restraints necessary to preserve the product of collegiate student-athletics.*

Even if this Court finds that the bylaw falls within the per se rule, this Court has nevertheless held that such restraints are necessary with regard to NCAA bylaws in order to preserve the unique product of "amateurism" and therefore, a rule of reason analysis will always be required. *Board of Regents*, 468 U.S. at 100-01.

This Court in *Ohio v. Am. Express Co.*, laid out the three-step analytical approach utilized in analyzing a restraint on trade under the rule of reason: (1) first, the burden rests with the plaintiff to "prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market"; (2) second, the burden shifts to the defendant to demonstrate some procompetitive rationale attached to the restraint; and (3) finally, the burden shifts back to the plaintiff to show there are less anticompetitive means that can reasonably achieve the procompetitive efficiencies. 138 S. Ct. 2274, 2284 (2018). After proper analysis of NCAA bylaw

12.5.2.1 under the rule of reason, the bylaw should be upheld and the decision of the Fourteenth Circuit Court affirmed.

First, the Petitioner has failed to meet his initial burden of proving the bylaw has a substantial anticompetitive effect in a relevant market. In this initial burden, the Petitioner must properly allege a cognizable market, and failure to do so is proper grounds for a dismissal of his Sherman Act claim. *NHL Player's Ass'n. v. Plymouth Waters Hockey Club*, 325 F.3d 712, 719-720 (6th Cir. 2003) (quoting *Big Bear Lodging Ass'n. v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir. 1999).

Second, even if this Court finds there is a cognizable market, the NCAA meets its burden of demonstrating there is a procompetitive justification for the alleged restraint. For thirty years, without challenge, all courts faced with the issue, have "[struck] down challenges to NCAA amateurism and eligibility bylaws." R at 6.

Almost all the cases upholding amateurism and eligibility bylaws did so because of the procompetitive justification of ensuring fair competition within NCAA member schools and protecting the unique product of the "student-athlete." *See Smith*, 139 F.3d at 182, 187 (upholding an NCAA bylaw prohibiting student-athletes from participating in intercollegiate athletics while enrolled in a graduate program other than the undergraduate institution attended because the restraint was aimed at furthering fair competition and the survival of the intercollegiate "student-athlete"); *See also McCormack*, 845 F.2d at 1340, 1344-45 (holding NCAA rules limiting compensation to student-athletes do not violate antitrust laws because the rules are necessary to differentiate the distinct product of the "student-athlete" from the professional); *See also Jones*, 392 F. Supp. at 297-298, 304 (upholding NCAA amateurism bylaws which make a student-athlete ineligible to compete in intercollegiate athletics if the

student-athlete receives compensation for his athletic abilities because the rule furthers the NCAA's legitimate goal of promoting the unique product of "amateurism"); *See also Banks*, 977 F.2d at 1091 (upholding "no-draft" and "no-agent" rules as necessary to preserve the unique product of "amateurism"); *See also O'Bannon*, 802 F.3d at 1073 (concluding NCAA compensation rules serve the purpose of preserving the unique product of "amateurism").

Similar to the above-cited cases, NCAA bylaw 12.5.2.1 is a rule governing amateurism and eligibility and is in turn necessary to promote fair competition within intercollegiate athletics and preserve the unique product of the "student-athlete". NCAA bylaw 12.5.2.1 renders any student-athlete who receives remuneration ineligible to compete in intercollegiate athletics. This bylaw directly promotes fair competition within intercollegiate athletics because if student-athletes are allowed to receive remuneration, NCAA member schools would expend large amounts of money to attract the best student-athletes to their schools. In turn, this would unequally distribute competition among the member schools as the lowest revenue profiting schools would become unattractive to the best student-athletes.

Further, the NCAA bylaw preserves the unique product of the "student-athlete." To be a student-athlete one must be an amateur in the sport and an amateur is "one who engages in a . . . sport as a pastime rather than as a profession." *Amateur*, Merriam-Webster Dictionary (New ed. 2016). This standard and everyday meaning illustrates that an amateur does not receive compensation since the engagement is not done as a profession where one would expect compensation. As such, these procompetitive justifications satisfy the NCAA's burden at this step in the rule of reason analysis.

Finally, the Petitioner cannot and will not be able to meet the final burden of finding less anticompetitive means to achieve the procompetitive goals given the unique nature of

intercollegiate athletics. The only alternative to the prohibition against student-athletes being paid is for the student-athlete to be paid. In *O'Bannon*, the Court explained that any payment, no matter the size, crosses the line from amateur to professional. 802 F.3d at 1078-79. The Court was concerned with where pay would lead the product of intercollegiate athletics. *Id.* More specifically, the Court noted there will continue to be challenges to compensation limitations with "no defined stopping point" thereby obliterating the unique product of "amateurism." *Id.*

Similarly, here, the only potential alternative the Petitioner could claim would be to allow the student-athlete to receive remunerations. As such, this would have the same affect as the concerns laid out in *O'Bannon*. Furthermore, if student-athletes were permitted to receive remunerations, such allowance would open the door for many other potential issues. There is no set algorithm or plan to allow for fair compensation to student-athletes across the NCAA. The NCAA would be faced with the problem of determining how to compensate individual players. Even more, the NCAA would have to address how to compensate student-athletes among all sports programs. Another concern being how women sports will be treated. It is no secret that women athletics do not bring in the same revenue as men athletics, so if the payment is based on revenue, the NCAA might face Title IV issues. Given that these concerns have not effectively been addressed it would be inappropriate to allow some student-athletes to now receive remunerations as the opening of this door will only lead to many more problems for the NCAA.

In conclusion, NCAA bylaw 12.5.2.1 withstands both a per se rule and rule of reason analysis and therefore, this Court should affirm the decision of the Fourteenth Circuit to dismiss this case.

II. AS A MATTER OF LAW, PETITIONER'S ALLEGED STATE LAW NEGLIGENCE CLAIMS MUST BE PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT.

In *Allis-Chalmers Corp. v. Lueck*, this Court opined, questions relating to what the parties to a CBA agreed, including remedies for breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or liability in tort. 471 U.S. 202, 211 (1985). The Legislature enacted Section 301 to protect reliance interest of parties to a CBA, and the courts have supported that purpose by creating federal case law that favors uniformity and industrial peace.

A. Petitioner wrongfully alleges state law negligence claims, when in fact the rights that exist between these parties, arise from, and the resolution sought requires analysis of the CBA terms and therefore must preempted.

In light of this purpose, the Court in *Decoe v. GMC*, developed a two-step approach for determining whether Section 301 preemption applies. 32 F.3d 212, 216 (6th Cir. 1994). First, the Court must ascertain whether the right claimed by plaintiff was created by the CBA or state law. *Id.* Second, the Court must examine whether proof of the state law claim requires interpretation of the CBA. *Id.* If, at either step this Court must look to the CBA, preemption is required. *Id.*

i. *Preemption is required as a matter of law because the underlying right from Petitioner's challenge is created by the CBA.*

First, the right claimed by Petitioner is created by the CBA even though he brings a state law negligence claim. The pertinent part of Section 1(a) of Article 39 of the CBA creates players' rights to medical care and treatment, stating "each Club will have a board-certified orthopedic surgeon as one of its Club physicians, and all other physicians retained by a club to treat players shall be board-certified in their field of medical expertise." Moreover, Section 2 states, "all athletic trainers employed by clubs to provide service to players, must be certified by the National Athletic Trainers Association and must have a degree from an accredited four-year

college or university, in addition to a physical therapist who is certified as a specialist in physical therapy to assist players in care and rehabilitation of their injuries."

Finally, Section 3 creates an accountability and care committee wherein subsection (d) states:

> "[I]f any player submits a complaint to the Committee regarding club medical care, the complaint shall be referred to the NFL and the player's club, which determine an appropriate response or corrective action. Nothing in this article, or any other article in the agreement, shall be deemed to pose or create any duty or obligation upon either the NFL or NFLPA regarding diagnosis, medical care, and/or treatment of any player."

Article 39 explicitly creates the player's right to medical care and whom that medical care comes from. Here, Petitioner's right arises from the CBA because without the CBA the players would not have contracted for a board-certified medical team at their disposal. This right is separate from that of the general public to seek medical care. Article 39 addresses whom teams must hire in order to comply with the CBA and those strict guidelines provide who is allowed to treat, diagnose, and rehabilitate the players. Because Article 39 outlines the hiring procedure of these professionals and Petitioner's claim stems from his access to those professionals, his right arises from Article 39 of the CBA.

Moreover, Section 3(d) expressly creates the player's right to submit a complaint regarding any medical care involving the player's team. Here, Petitioner alleges the NFL's negligence caused an injury when an employee of the Saints prescribed him painkillers. This shows a *team* employee caused Petitioner's injury and his right to a complaint is expressly stated in this Section because it covers any diagnosis, medical care, and treatment of any player. Petitioner did not follow the procedures laid out in Section 3(d) of Article 39 and file a complaint with the accountability and care committee, as was his express right to do. Nor did he follow Article 44 to file an injury grievance or Article 43 a non-injury grievance. In practice, these

articles, when properly followed, put the individual clubs and the NFL on notice of alleged negligent behavior so they can rectify the situation. Again, these are processes that Petitioner contracted for.

Because the right arises from Article 39 of the CBA, this Court must find preemption is required and grant the NFL's motion to dismiss.

ii. ***Preemption is required as a matter of law because this Court must interpret the CBA to determine necessary elements of Petitioner's claim.***

Even if this Court accepts Petitioner's state law negligence claim is not a right created by the CBA, Petitioner still fails the second prong of *DeCoe*. Where the resolution of a state-law-claim is substantially dependent on analysis of the terms of the CBA, or inextricably intertwined with it, the claim must be preempted. *Allis-Chalmers*, 471 U.S. at 220. Further, as this Court stated in *Franchise Tax Board v. Construction Laborers Vacation Trust*, the preemptive force of Section 301 is so powerful as to displace entirely any state cause of action for violation of a CBA. 463 U.S. 1, 23 (1983); *But see Lingle v. Norge Divison of Magic Chef, Inc.*, 486 U.S. 399, 409-10 (1988) (where this Court cautioned not every tort claim relating to employment is subject to preemption under Section 301 stating, "even if dispute resolution pursuant to a [CBA], on . . . one hand, and state law, on the other hand, require addressing the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for [Section] 301 preemption purposes").

In order to prove the NFL was negligent when the Saints' doctors and trainers prescribed painkillers to Petitioner, he must prove: (1) The NFL owed him a reasonable duty of care; (2) the NFL breached their reasonable duty of care; (3) the breach was the cause in fact and proximate cause of his injury; and (4) Petitioner suffered actual damages. *See Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001).

a. Interpreting Who Owes a Duty

An example of a negligence claim intertwined with the CBA is established in *Stringer v. NFL*, where Stringer, a player for the Minnesota Vikings, died from complications of heatstroke developed from practice. 474 F. Supp. 2d 894, 898 (2007). In response, Stringer's estate sued the NFL alleging a breach of its duty to NFL players to use ordinary care. *Id.* at 898. Plaintiff's claim was based on a negligence theory, alleging the NFL created a duty when they issued heatstroke guidelines in its Game Operations Manual. *Id.* at 904. The NFL raised preemption as a defense because in order to determine a duty, the Court would need to analyze the CBA. *Id.* at 900. The Court found Plaintiff's claim was substantially dependent on, and inextricably intertwined with the CBA and must be preempted because to determine who owed Stringer a duty, the Court needed to analyze and interpret the CBA. *Id.* at 910-11.

Petitioner brings a negligence claim just like *Stringer*. Petitioner claims the NFL owes a duty by allegedly violating the Controlled Substance Act, the Food, Drugs, and Cosmetics Act, and California Pharmacy Laws. Merely alleging a standard set by these statutes does not establish it was the NFL who owed Petitioner a duty of care.

In order to prove the NFL owed Petitioner a reasonable duty of care, this Court must interpret the duties created under Article 39 of the CBA. In *Stringer* the actions of the NFL were more apparent because the NFL took affirmative steps in posting the hot weather guidelines. But here, even identifying how the NFL owed a duty requires interpretation of the CBA because the NFL was not the employer of the Club physicians, it did not prescribe any medications, nor administer medical care to the players. This is important because even in *Stringer* where the NFL took affirmative steps the Court still found the claim was substantially dependent on interpretation of the CBA. Here, the Court must analyze and interpret Article 39 to create a duty

on the NFL. At a minimum the following articles need interpretation: Section 1 regarding which medical physicians must be hired, Section 1(c) as to who bares the payroll of the medical physicians, Section 1(d) establishing a league medical director, Section 3(d) expressly disclaiming any obligations to the league regarding diagnosis, medical care, and treatment of players. Because the resolution of Petitioner's first element in a negligence claim is substantially dependent and inextricably intertwined upon the analysis of Article 39, preemption applies.

An illustration of an independent claim is demonstrated in *Brown v. NFL*, where the Court held the lineman's negligence claim was not preempted because a mere reference to the CBA does not lead the Court to conclude the claim is inextricably intertwined with the CBA nor would the Court be led to believe the CBA requires interpretation. 219 F. Supp. 2d 372, 385-87 (S.D.N.Y. 2002). The Court further reasoned that the referee acting in a public place also owed a duty to the crowd, not just to the lineman. *Id.*

In *Brown* the Court held the CBA did not create the duty to the general public because it was independently owed, whereas, here it is the CBA that establishes players are owed the duty of medical care not because the players are part of the general public. Additionally, the Court would have to interpret if the duty extended from the doctor to the NFL by analyzing the terms of the CBA. This is the type of dependency that requires preemption.

b. Interpreting Breach of the Duty

Further the Petitioner's negligence claim fails to establish the NFL breached the duty of care. Even if this Court accepted the Petitioner's argument that the NFL owed a duty independently by those statutes, it could not establish there was a breach without interpreting the CBA. Again, this Court would need to analyze the aforementioned articles of the CBA to have created an employer-employee relationship in order to make the NFL liable for the medical

physicians alleged violations of those statutes. Substantial interpretation mandates preemption again.

There are employees of the NFL, and in the event of a breach of a duty of care by an employee, the NFL may be held liable. For example, in *Brown*, a lineman for the Cleveland Browns, was struck in the eye by an NFL referee's penalty flag, causing a career ending injury. *Id.* at 376. The liability of the NFL turned on the theory of *respondeat superior* because the referee was an employee of the NFL and therefore, liability could be established by the employer-employee relationship. *Id*.

Brown is distinguishable from this case because the referee was an employee of the NFL that caused the lineman's injury. Here, Petitioner's injury did not occur by an agent or instrument of the NFL because the team doctors are not agents of the NFL. The doctors are employed by the individual teams, paid by the individual teams, travel with the individual teams, and administer care specifically within the individual teams. Because the NFL did not contract for the risk and there is no employer-employee or principal-agent relationship the NFL should be dismissed as a party to this action.

Petitioner's claim must be preempted because this Court cannot address Petitioner's claim without interpreting the CBA to establish a duty, nor that there was a breach of the duty.

B. Preemption of Petitioner's alleged claims effectuates Section 301's purpose because allowing parties to freely contract in reliance on the terms of the CBA fosters industrial peace.

The following history provides the policy backdrop in which this preemption decision should be juxtaposed. The Constitution charged Congress with the responsibility of protecting the nation's commercial and economic health by fostering an arena of free trade amongst the states. *See* U.S. Const. art. I, § 8, cl. 3; *See also Boston Stock Exch. v. State Tax Comm'n*, 429

U.S. 318, 328 (1977). The power of the commerce clause was granted to Congress in order to encourage and protect commerce from interference by the individual states. *Id.* Further, this Court has specifically ratified the importance of Congress' regulation of labor-management issues in commerce. *See Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957). Responsibly, Congress did so by promulgating Section 301.

Reports from the Congressional debates regarding Section 301 provide the act has broad application to employers, labor organizations, and interested employees. *Id.* at 454. This Court has specifically noted the following language from the Senate report, "'Statutory recognition of the collective bargaining agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.'" *Id.* This Court also interpreted Section 301's purpose was to provide uniformity and accountability when assessing what promises parties to labor contracts have made to one another. *See Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994).

i. *Section 301 preemption affirms the parties' rights and liabilities as freely contracted for in the CBA.*

Section 301 is cohesive with the abundant history and *stare decisis* regarding freedom of contract. The courts have repeatedly held freedom of contract as guaranteed by the Constitution because a person is at liberty to make decisions and promises necessary by contract in order to carry out his or her own livelihood. *See Chicago, B. & Q.R. Co. v. McGuire*, 219 U.S. 459, 566 (1911); *See also Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897); *See also Lochner v. New York*, 198 U.S. 45, 49 (1905); *See also Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (explaining, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved"); *See also Am. Int'l. Specialty Lines Ins.*

Co. v. Res-Care, Inc., 529 F.3d 649, 662 (5th Cir. 2008) (opining courts may not arbitrarily interfere with the agreements made between parties absent a strong public policy reason); *But see Sec'y of Labor, United States Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (noting that parties to employment contracts may not agree to waive the standards set by the Fair Labor Standards Act because those standards were developed in policy to protect poorly positioned employees from their employers).

Courts look for more than injury as a policy to disrupt freedom of contract. For example in *Chicago*, the railroad company was trying to evade liability for injury to one of its own employees through a claim of right that had been expressly granted by state statute. 219 U.S. at 560. The applicable statute intentionally prohibited contracts that acted to relieve the railroad from its statutory liability. *Id.* The railroad company claimed the employee had contracted into an insurance fund, and in doing so had agreed that payout of such insurance barred him from any future recovery against the corporation. *Id.* at 566. The Court took particular issue as a matter of policy that the railroad company acted retroactive to the statute when creating the fund, and the fund was paid for primarily by employees thus negating any real cost of liability to the railroad. *Id.* The applicable statute intentionally prohibited contracts that acted to relieve the railroad company from its statutory liability. *Id.* at 560.

The policy reasons of the Court for the decision in *Chicago* do not exist in this case. In *Chicago*, the Iowa legislature had expressly created the statute with the intent of preventing liability-evasive behavior from railroads. Here, the statutes Petitioner alleges create a duty were not designed to create liability within the NFL, a non-treating third party. Even where plaintiff alleges violation of the Controlled Substance Act, the Food, Drugs, and Cosmetics Act, and

California Pharmacy Laws, those statutes were not directly aimed at the NFL, as were the statutes in *Chicago*.

Additionally, in *Chicago* the railroads, as employers, were trying to evade taking care of injured employees, but here the NFL through the CBA was trying to insure the teams, as employers, were providing care for the players, the employees. As a third party establishing standards of care within the league, the NFL is more closely akin to the legislature in *Chicago* than the Railroad employer.

Woven into the essence of contracts is the ability of parties to mitigate their risks. The NFL mitigated the risk to the league by including language in Article 39 Section 3(d) such as "nothing in this article shall be deemed to impose a duty." Whereas the players mitigated their risk in Article 39 Section 3(c)(iv) by bargaining for clauses in the contract that guarantee feedback to the league regarding medical care, and by exercising their rights to file complaints under Articles 43 and 44 of the CBA. The individual teams accepted the duties and the risks established in providing medical care by agreeing to the CBA. Allowing parties to avoid preemption creates unknown risk and undermines the CBA. In the future, the NFL may hesitate to insure teams employ medical physicians if doing so unjustly exposes them to endless risk of liability.

ii. ***Preemption stabilizes the CBA by providing industrial peace, uniformity, and equity to all parties to the agreement.***

The preemptive force of Section 301 coupled with the underlying freedom of contract, fosters both Congress' and the courts' goals of uniformity and equity. This Court emphasized the importance in uniformity by maintaining Section 301 has broad application not just to express contract claims but to claims based on rights implied and dependent upon the agreements made between parties. *See Textile Workers*, 353 U.S. at 457; *See also Allis-Chambers*, 471 U.S. at 219

(explaining the importance of not allowing parties to evade their contracted obligations under the CBA by relabeling them as some other claim of right). This emphasizes that the parties act in good faith in the forming and execution of contracts and may rely on its terms.

Importantly, preemption allows parties to rely on a uniform interpretation of contract terms under the federal law, where those terms might have a different meaning under state law. *Mattis v. Massman*, 355 F.3d 902, 905 (6th Cir. 2004). The notion that the same contract terms could hold different meanings for the parties depending on which law would apply and in which state a petitioner brought a claim, would undermine the bargaining process with unreliable results. *Id.* Reliable results foster equity amongst the parties. This is especially important here because there are many different parties to the CBA, all located in different jurisdictions. Uniform application of the CBA ensures that teams and players are provided the same rights and obligations that do not change just because a party is in a different state. Here, preemption is appropriate because it supports uniformity and stabilizes the benefits created by the CBA.

CONCLUSION

Wherefore, for the foregoing reasons, the NCAA and the NFL respectfully request this Court affirm the holding of the United States Court of Appeals for the Fourteenth Circuit that: (1) NCAA amateurism and eligibility bylaws are not in violation of Section 1 of the Sherman Act; and (2) Petitioner's common law claims against the NFL are preempted by Section 301 of the Labor Management Relations Act.

Dated this 4th day of February, 2019.

Respectfully submitted,

Team 2
Counsel for Respondents

APPENDIX

I. 2011 NFL COLLECTIVE BARGAINING AGREEMENT

ARTICLE 39: PLAYERS' RIGHTS TO MEDICAL CARE AND TREATMENT

Section 1. **Club Physician:**
(a) **Medical Credentials.** Each Club will have a board-certified orthopedic surgeon as one of its Club physicians, and all other physicians retained by a club to treat players shall be board-certified in their field of medical expertise. Each Club will also have at least one board-certified internist, family medicine, or emergency medicine physician (non-operative sports medicine specialist). Any Club medical physician (internist, family medicine or emergency medicine) hired after the effective date of this Agreement must also have a Certification of Added Qualification (CAQ) in Sports Medicine; any head team physician (orthopedic or medical) hired after the effective date of this Agreement must have a CAQ in Sports Medicine; and any current team physician promoted to head team physician after the effective date of this Agreement has until February 2013 to obtain a CAQ in Sports Medicine or relinquish the position.

(b) **Team Consultants.** All Clubs shall have the consultants with the following certifications: (i) Neurological: All Clubs are mandated to have a neurological consultant. The Club neurological consultant must be board certified in neurosurgery, neurology, sports medicine, emergency medicine, or physiatry. If the designated physician is board certified in physiatry, he/she must demonstrate extensive experience in mild and moderate brain trauma; (ii) Cardiovascular: Board certified in cardiovascular disease; (iii) Nutrition (athletes): licensed; (iv) Neuropsychologist: Ph.D and certified/licensed.

(c) **Doctor/Patient Relationship.** The cost of medical services rendered by Club physicians will be the responsibility of the respective Clubs, but each Club physician's primary duty in providing player medical care shall be not to the Club but instead to the player-patient. This duty shall include traditional physician/patient confidentiality requirements. In addition, all Club physicians and medical personnel shall comply with all federal, state, and local requirements, including all ethical rules and standards established by any applicable government and/or other authority that regulates or governs the medical profession in the Club's city. All Club physicians are required to disclose to a player any and all information about the player's physical condition that the physician may from time to time provide to a coach or other Club representative, whether or not such information affects the player's performance or health. If a Club physician advises a coach or other Club representative of a player's serious injury or career threatening physical condition which significantly affects the player's performance or health, the physician will also advise the player in writing. The player, after being advised of such serious injury or career-threatening physical condition, may request a copy of the Club physician's record from the examination in which such physical condition was diagnosed and/or a written explanation from the Club physician of the physical condition.

(d) **NFLPA Medical Director.** The NFL recognizes that the NFLPA Medical Director has a critical role in advising the NFLPA on health and safety issues. Accordingly, the NFL agrees that the NFLPA Medical Director shall be a voting member of all NFL health and safety committees,

including but not limited to the NFL Injury & Safety Panel and its subcommittees and shall have access to all of the same data, records and other information provided to the NFL Medical Advisor and/or any other members of such committees.

(e) **Home Game Medical Coverage-Neutral Physician:** All home teams shall retain at least one RSI physician who is board certified in emergency medicine, anesthesia, pulmonary medicine, or thoracic surgery, and who has documented competence in RSI intubations in the past twelve months. This physician shall be the neutral physician dedicated to game-day medical intervention for on-field or locker room catastrophic emergencies.

Section 2. **Club Athletic Trainers:** All athletic trainers employed or retained by Clubs to provide services to players, including any part time athletic trainers, must be certified by the National Athletic Trainers Association and must have a degree from an accredited four-year college or university. Each Club must have at least two full-time athletic trainers. All part-time athletic trainers must work under the direct supervision of a certified athletic trainer. In addition, each Club shall be required to have at least one full time physical therapist who is certified as a specialist in physical therapy to assist players in the care and rehabilitation of their injuries.

Section 3. **Accountability and Care Committee:**
(a) The parties agree to establish an Accountability and Care Committee, which will provide advice and guidance regarding the provision of preventive, medical, surgical, and rehabilitative care for players by all clubs during the term of this Agreement. The Committee shall consist of the NFL Commissioner and the NFLPA Executive Director (or their designees). In addition, the Commissioner and Executive Director shall each appoint three additional members of the Committee, who shall be knowledgeable and experienced in fields relevant to health care for professional athletes.

(b) The Committee shall meet in person or by conference call at least three times per year, or at such other times as the Commissioner and Executive Director may determine.

(c) The Committee shall: (i) encourage and support programs to ensure outstanding professional training for team medical staffs, including by recommending credentialing standards and continuing education programs for Team medical personnel; sponsoring educational programs from time to time; advising on the content of scientific and other meetings sponsored by the NFL Physicians Society, the Professional Football Athletic Trainers Association, and other relevant professional institutions; and supporting other professional development programs; (ii) develop a standardized preseason and postseason physical examination and educational protocol to inform players of the primary risks associated with playing professional football and the role of the player and the team medical staff in preventing and treating illness and injury in professional athletes; (iii) conduct research into prevention and treatment of illness and injury commonly experienced by professional athletes, including patient care outcomes from different treatment methods; (iv) conduct a confidential player survey at least once every two years to solicit the players' input and opinion regarding the adequacy of medical care provided by their respective medical and training staffs and commission independent analyses of the results of such surveys; (v) assist in the development and maintenance of injury surveillance and medical records

systems; and (vi) undertake such other duties as the Commissioner and Executive Director may assign to the Committee.

(d) If any player submits a complaint to the Committee regarding Club medical care, the complaint shall be referred to the League and the player's Club, which together shall determine an appropriate response or corrective action if found to be reasonable. The Committee shall be informed of any response or corrective action. Nothing in this Article, or any other Article in this Agreement, shall be deemed to impose or create any duty or obligation upon either the League or NFLPA regarding diagnosis, medical care and/or treatment of any player.

(e) Each Club shall use its best efforts to ensure that its players are provided with medical care consistent with professional standards for the industry.

Section 4. **Player's Right to a Second Medical Opinion:** A player will have the opportunity to obtain a second medical opinion. As a condition of the Club's responsibility for the costs of medical services rendered by the physician furnishing the second opinion, such physician must be board-certified in his field of medical expertise; in addition, (a) the player must consult with the Club physician in advance concerning the other physician; and (b) the Club physician must be furnished promptly with a report concerning the diagnosis, examination and course of treatment recommended by the other physician. A player shall have the right to follow the reasonable medical advice given to him by his second opinion physician with respect to diagnosis of injury, surgical and treatment decisions, and rehabilitation and treatment protocol, but only after consulting with the club physician and giving due consideration to his recommendations.

Section 5. **Player's Right to a Surgeon of His Choice:** A player will have the right to choose the surgeon who will perform surgery provided that: (a) the player will consult unless impossible (e.g., emergency surgery) with the Club physician as to his recommendation regarding the need for, the timing of and who should perform the surgery; (b) the player will give due consideration to the Club physician's recommendations; and (c) the surgeon selected by the player shall be board-certified in his field of medical expertise. Any such surgery will be at Club expense; provided, however, that the Club, the Club physician, trainers and any other representative of the Club will not be responsible for or incur any liability (other than the cost of the surgery) for or relating to the adequacy or competency of such surgery or other related medical services rendered in connection with such surgery.

Section 6. **Standard Minimum Preseason Physical:** Each player will undergo the standardized minimum preseason physical examination and tests outlined in Appendix K, which will be conducted by the Club physician(s) as scheduled by the Club. No Club may conduct its own individual testing for anabolic steroids and related substances or drugs of abuse or alcohol.

Section 7. **Substance Abuse:**
(a) **General Policy.** The parties agree that substance abuse and the use of anabolic steroids are unacceptable within the NFL, and that it is the responsibility of the parties to deter and detect substance abuse and steroid use and to offer programs of intervention, rehabilitation, and support to players who have substance abuse problems.

(b) **Performance-Enhancing Substances.** (i) The Policy on Anabolic Steroids and Related Substances, as it existed during the 2010 season (and any subsequent amendments thereto) applied in full force and effect up to and including September 16, 2014. (ii) Effective September 17, 2014, the Policy on Performance-Enhancing Substances as executed that day (and any amendments thereto) shall apply and remain in effect, except as otherwise agreed in writing by the parties.

(c) **Substances of Abuse.** (i) The Policy and Program on Substances of Abuse, as it existed during the 2010 season (and any subsequent amendments thereto) applied in full force and effect up to and including September 18, 2014. (ii) Effective September 19, 2014, the Policy and Program on Substances of Abuse executed that day (and any amendments thereto) shall apply and remain in effect, except as otherwise agreed in writing by the parties.

ARTICLE 43: NON-INJURY GRIEVANCE

Section 1. **Definition:** Any dispute (hereinafter referred to as a "grievance") arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this Agreement, the NFL Player Contract, the Practice Squad Player Contract, or any applicable provision of the NFL Constitution and Bylaws or NFL Rules pertaining to the terms and conditions of employment of NFL players, will be resolved exclusively in accordance with the procedure set forth in this Article, except wherever another method of dispute resolution is set forth elsewhere in this Agreement.

Section 2. **Initiation:** A grievance may be initiated by a player, a Club, the Management Council, or the NFLPA. A grievance must be initiated within fifty (50) days from the date of the occurrence or non-occurrence upon which the grievance is based, or within fifty (50) days from the date on which the facts of the matter became known or reasonably should have been known to the party initiating the grievance, whichever is later. A player need not be under contract to a Club at the time a grievance relating to him arises or at the time such grievance is initiated or processed.

Section 3. **Filing:** Subject to the provisions of Section 2 above, a player or the NFLPA may initiate a grievance by filing a written notice by certified mail, fax, or electronically via .pdf with the Management Council and furnishing a copy of such notice to the Club(s) involved; a Club or the Management Council may initiate a grievance by filing written notice by certified mail, fax, or electronically via .pdf with the NFLPA and furnishing a copy of such notice to the player(s) involved. The notice will set forth the specifics of the alleged action or inaction giving rise to the grievance. If a grievance is filed by a player without the involvement of the NFLPA, the Management Council will promptly send copies of the grievance and answer to the NFLPA. The party to whom a Non-Injury Grievance has been presented will answer in writing by certified mail, fax, or electronically via .pdf within ten (10) days of receipt of the grievance. The answer will set forth admissions or denials as to the facts alleged in the grievance. If the answer denies the grievance, the specific grounds for denial will be set forth. The answering party will provide a copy of the answer to the player(s) or Club(s) involved and the NFLPA or the Management Council as may be applicable. See also Section 14 below regarding electronic exchange of Standard Grievance Correspondence.

Section 4. **Ordinary and Expedited Appeal:** If a grievance is not resolved after it has been filed and answered, either the player(s) or Club(s) involved, or the NFLPA, or the Management Council may appeal such grievance by filing a written notice of appeal with the Notice Arbitrator and mailing copies thereof to the party or parties against whom such appeal is taken, and either the NFLPA or the Management Council as may be appropriate. If the grievance involves a suspension of a player by a Club, the player or NFLPA will have the option to appeal it immediately upon filing to the Notice Arbitrator and a hearing will be held by an arbitrator designated by the Notice Arbitrator within seven (7) days of the filing of the grievance. The NFLPA and the NFL will engage in good faith efforts to schedule grievances involving suspension of a player by a Club prior to the Club's next scheduled game. In addition, the NFLPA and the Management Council will each have the right of immediate appeal and hearing within seven (7) days with respect to four (4) grievances of their respective choice each calendar year. The arbitrator(s) designated to hear such grievances will issue their decision(s) within five (5) days of the completion of the hearing. Pre-hearing briefs may be filed by either party and, if filed, will be exchanged prior to hearing.

Section 5. **Discovery and Prehearing Procedures:**
(a)(i) Any party may seek bifurcation of a grievance to assert a claim of untimeliness. Bifurcation motions shall be presented in writing to the other party and the arbitrator in the moving party's answer or at any time no later than seven (7) days prior to the scheduled hearing on the merits of the grievance. If an arbitrator has not yet been assigned to hear the grievance then the moving party shall file the motion with the No- tice Arbitrator, who will decide the motion or assign it to a member of the Non-Injury Grievance Arbitration panel. A party's decision to pursue a bifurcated hearing may not delay the processing of a hearing scheduled on the merits of the grievance. For any motions made at least thirty (30) days before a hearing on the merits of the grievance, the parties will use their best efforts to schedule the bifurcated hearing at least ten (10) days before the scheduled hearing on the merits of the grievance. In any case where a timely motion for bifurcation is made, but a bifurcated hearing is not held, the arbitrator shall decide the issue of timeliness during the hearing on the merits. (ii) If a defense of untimeliness is not raised at least seven (7) days before the scheduled hearing on the merits of the grievance, the parties will be precluded from arguing that defense. However, where a party learns of facts supporting the defense fewer than seven days prior to the hearing, during the hearing, or in a post-hearing deposition, the party must present the defense to the opposing party and arbitrator within seven (7) days of when the facts supporting the defense became known or reasonably should have been known to the party. An assertion at the hearing, or subsequent to the hearing, of a newly-discovered untimeliness defense will enable either party to present additional testimony, including the opportunity to recall witnesses or call new witnesses. (iii) If a grievance is ultimately dismissed based on a finding of untimeliness, the arbitrator shall issue a written decision limited to that issue, and such ruling shall be final.

(b) No later than fourteen (14) days prior to the date set for any hearing, each party will submit to the other copies of all documents, reports and records relevant to the dispute. Failure to submit such documents, reports and records no later than fourteen (14) days prior to the hearing will preclude the non-complying party from sub- mitting such documents, reports and records into evidence at the hearing, but the other party will have the opportunity to examine such

documents, reports and records at the hearing and to introduce those it desires into evidence, except that relevant documents submitted to the opposing party less than fourteen (14) days before the hearing will be admissible provided that the proffering party and the custodian(s) of the documents made a good faith effort to obtain (or discover the existence of) said documents or that the document's relevance was not discovered until the hearing date. In the case of an expedited grievance pursuant to Section 4, such documentary evidence shall be ex- changed on or before two (2) days prior to the date set for the hearing unless the arbitrator indicates otherwise.

Section 6. **Arbitration Panel:** There will be a panel of four (4) arbitrators, whose appointment must be accepted in writing by the NFLPA and the Management Council. The parties will designate the Notice Arbitrator within ten (10) days of the execution of this Agreement. In the event of a vacancy in the position of Notice Arbitrator, the senior arbitrator in terms of service as a Non-Injury Grievance Arbitrator will succeed to the position of Notice Arbitrator, and the resultant vacancy on the panel will be filled ac- cording to the procedures of this Section. Either party to this Agreement may discharge a member of the arbitration panel by serving written notice upon the arbitrator and the other party to this Agreement from July 10 through July 20 of each year, but at no time shall such discharges result in no arbitrators remaining on the panel. If an arbitrator has been discharged, he or she shall retain jurisdiction for any case in which the hearing has commenced. If either party discharges an arbitrator, the other party shall have two (2) business days to discharge any other arbitrator. If the parties are unable to agree on a new arbitrator within thirty (30) days of any vacancy, the Notice Arbitrator shall submit a list of ten (10) qualified and experienced arbitrators to the NFLPA and the Management Council. Within fourteen (14) days of the receipt of the list, the NFLPA and the Management Council shall select one arbitrator from the list by alternately striking names until only one remains, with a coin flip determining the first strike. The next vacancy occurring will be filled in similar fashion, with the party who initially struck first then striking second. The parties will alternate striking first for future vacancies occurring thereafter during the term of this Agreement. If either party fails to cooperate in the striking process, the other party may select one of the nominees on the list and the other party will be bound by such selection.

Section 7. **Hearing:**
(a) Each arbitrator will designate a minimum of twelve (12) hearing dates per year, exclusive of the period July 1 through September 10 for non-expedited cases, for use by the parties to this Agreement. Upon being appointed, each arbitrator will, after consultation with the Notice Arbitrator, provide to the NFLPA and the Management Council specified hearing dates for such ensuing period, which process will be repeated on a regular basis thereafter. The parties will notify each arbitrator thirty (30) days in advance of which dates the following month are going to be used by the parties. The designated arbitrator will set the hearing on his next reserved date in the Club city unless the parties agree otherwise. If a grievance is set for hearing and the hearing date is then postponed by a party within thirty (30) days of the hearing, the postponement fee of the arbitrator will be borne by the postponing party unless the arbitrator determines that the postponement was for good cause. Should good cause be found, the parties will bear any postponement costs equally. If the arbitrator in question cannot reschedule the hearing within thirty (30) days of the postponed date, the case may be reassigned by the Notice Arbitrator to another panel member who has a hearing date available within the thirty (30) day period. At the

hearing, the parties to the grievance and the NFLPA and Management Council will have the right to present, by testimony or otherwise, and subject to Section 5, any evidence relevant to the grievance. All hearings will be transcribed.

(b) If a witness is unable to attend the hearing, the party offering the testimony shall inform the other party of the identity and unavailability of the witness to attend the hearing. At the hearing or within fourteen (14) days thereafter, the parties will agree upon dates to take testimony of unavailable witnesses, which dates will be within forty-five (45) days of the parties' receipt of the hearing transcript. The record should be closed sixty (60) days after the hearing date unless mutually extended notwithstanding any party's failure to present post-hearing testimony within the above-mentioned time period. If a witness is unavailable to attend the hearing, the witness' testimony may be taken by telephone conference call if the parties agree. In instances in which the parties agree that the material facts giving rise to the grievance are not in dispute, the arbitrator shall have the authority to decide the merits of the case solely on the written submissions of the parties. In cases where the amount claimed is less than $25,000, the parties may agree to hold the hearing by telephone conference call. If either party requests post- hearing briefs, the parties shall prepare and simultaneously submit briefs except in grievances involving non-suspension Club discipline where less than $25,000 is at issue, in which cases briefs will not be submitted, unless requested by the arbitrator.

(c) In each instance in which briefs are not submitted, within fourteen (14) days of the closing of the record, either party may submit to the Arbitrator prior opinions for the arbitrator's consideration in issuing the decision. Briefs must be submitted to the arbitrator no later than sixty (60) days after receipt of the last transcript.

Section 8. **Arbitrator's Decision and Award:** The arbitrator will issue a written decision within thirty (30) days of the submission of briefs, but in no event shall he or she consider briefs filed by either party more than sixty (60) days after receipt of the last transcript, unless the parties agree otherwise. The decision of the arbitrator will constitute full, final and complete disposition of the grievance, and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement, provided, however, that the arbitrator will not have the jurisdiction or authority: (a) to add to, subtract from, or alter in any way the provisions of this Agreement or any other applicable document; or (b) to grant any remedy other than a money award, an order of reinstatement, suspension without pay, a stay of suspension pending decision, a cease and desist order, a credit or benefit award under the Bert Bell/Pete Rozelle NFL Player Retirement Plan, or an order of compliance with a specific term of this Agreement or any other applicable document, or an advisory opinion pursuant to Article 50, Section 1(c). In the event the arbitrator finds liability on the part of any party, he or she shall award Interest beginning one year from the date of the last regular season game of the season of the grievance.

Section 9. **Time Limits:** Each of the time limits set forth in this Article may be extended by mutual written agreement of the parties involved. If any grievance is not processed or resolved in accordance with the prescribed time limits within any step, unless an ex- tension of time has been mutually agreed upon in writing, either the player, the NFLPA, the Club or the Management Council, as the case may be, after notifying the other party of its intent in writing, may proceed to the next step.

Section 10. **Representation:** In any hearing provided for in this Article, a player may be accompanied by counsel of his choice and/or a representative of the NFLPA. In any such hearing, a Club representative may be accompanied by counsel of his choice and/or a representative of the Management Council.

Section 11. **Costs:** Subject to Section 7, all costs of arbitration, including the fees and expenses of the arbitrator and the transcript costs, will be borne equally between the parties. Notwithstanding the above, if the hearing occurs in the Club city and if the arbitrator finds liability on the part of the Club, the arbitrator shall award the player reasonable expenses incurred in traveling to and from his residence to the Club city, lodging, and meal expenses in accordance with Article 34.

Section 12. **Payment:** If an award is made by the arbitrator, payment will be made with- in thirty (30) days of the receipt of the award to the NFL or Club, to the player, or jointly to the player and the NFLPA provided the player has given written authorization for such joint payment. The time limit for payment may be extended by mutual consent of the parties or by a finding of good cause for the extension by the arbitrator. Where payment is unduly delayed beyond thirty (30) days, double Interest will be assessed from the date of the decision. The arbitrator shall retain jurisdiction of the case for the purpose of awarding post-hearing interest pursuant to this Section.

Section 13. **Grievance Settlement Committee:** A grievance settlement committee consisting of representatives of the NFLPA and representatives of the Management Council shall meet annually between the end of the regular season and the annual arbitration scheduling conference. The committee shall engage in good faith efforts to settle or bifurcate any pending grievances. No evidence will be taken at such meetings, except parties involved in the grievance may be contacted to obtain information about their dispute. If the committee resolves any grievance by mutual agreement of its members, such resolution will be made in writing and will constitute full, final and complete disposition of the grievance and will be binding upon the player(s) and the Club(s) involved and the parties to this Agreement.

Section 14. **Standard Grievance Correspondence:**
(a) Standard Grievance Correspondence is defined as and includes the following documents: Injury and Non-Injury Grievance filings; answers; appeals; arbitration selection letters; hearing setup letters; discovery letters and documents; correspondence regarding neutral physician examination(s), including requests by the neutral physician for tests, films or other documents; hearing, deposition, or other general scheduling letters; withdrawal letters; pre- and post-hearing briefs; and settlement and release agreements.

(b) Standard Grievance Correspondence may be sent via .pdf e-mail; all parties shall use their best efforts to send Standard Grievance Correspondence via e-mail.

(c) The NFL and NFLPA will provide each other with a list of designated e-mail addresses for the receipt of Standard Grievance Correspondence. The subject line of any Standard Grievance Correspondence sent via e-mail shall include the full name of the player(s), the name of the Club(s) involved and the date of filing.

(d) The parties shall agree to additional procedures to govern the electronic transmission of Standard Grievance Correspondence, as may be warranted.

ARTICLE 44: INJURY GRIEVANCE

Section 1. **Definition:** An "Injury Grievance" is a claim or complaint that, at the time a player's NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract. All time limitations in this Article may be extended by mutual agreement of the parties.

Section 2. **Filing:** Any player and/or the NFLPA must present an Injury Grievance in writing to a Club, with a copy to the Management Council, within twenty-five (25) days from the date it became known or should have become known to the player that his contract had been terminated. The grievance will set forth the approximate date of the alleged injury and its general nature. If a grievance is filed by a player without the involvement of the NFLPA, the Management Council will promptly send copies of the grievance and the answer to the NFLPA.

Section 3. **Answer:**
(a) The Club to which an Injury Grievance has been presented will answer in writing within ten (10) days. If the answer contains a denial of the claim, the general grounds for such denial will be set forth. The answer may raise any special defense, including but not limited to the following: (1) That the player did not pass the physical examination administered by the Club physician at the beginning of the preseason training camp for the year in question. This defense will not be available if: (i) the Player was injured during offseason workouts at the club facility under the direction of a club official prior to not passing the physical examination or (ii) the player participated in any team drills following his physical examination or in any preseason or regular season game; provided, however, that the Club physician may require the player to undergo certain exercises or activities, not team drills, to determine whether the player will pass the physical examination; (2) That the player failed to make full and complete disclosure of his known physical or mental condition when questioned during a physical examination by the Club; (3) That the player's injury occurred prior to the physical examination and the player knowingly executed a waiver or release prior to the physical examination or his commencement of practice for the season in question which specifically pertained to such prior injury; (4) That the player's injury arose solely from a non-football-related cause subsequent to the physical examination; (5) That subsequent to the physical examination the player suffered no new football-related injury; (6) That subsequent to the physical examination the player suffered no foot- ball-related aggravation of a prior injury reducing his physical capacity below the level existing at the time of his physical examination as contemporaneously recorded by the Club physician.

(b) The Club or the Management Council must advise the grievant and the NFLPA in writing no later than seven (7) days before the hearing of any special defense to be raised at the hearing. Failure to provide such notice will preclude the Club and Management Council from arguing that defense. However, where the Club and Management Council learn of facts supporting a special defense fewer than seven days prior to the hearing, during the hearing or in a post-hearing deposition, the Club and the Management Council must present notice of that special defense to

the arbitrator and opposing party within seven (7) days of when the facts supporting that defense became known or reasonably should have become known to the Club and/or Management Council. An assertion at the hearing, or subsequent to the hearing, of a newly-discovered special defense will enable either party to present additional testimony, including the opportunity to recall witnesses or call new witnesses.

Section 4. **Neutral Physician:**
(a) The player must present himself for examination by a neutral physician in the Club city or the Club city closest to the player's residence within twenty (20) days from the date of the filing of the grievance. This time period may be extended by mutual consent if the neutral physician is not available. Neither Club nor player may submit any medical records to the neutral physician, nor may the Club physician or player's physician communicate with the neutral physician. The neutral physician will not become the treating physician nor will the neutral physician examination involve more than one office visit without the prior approval of both the NFLPA and Management Council. The neutral physician may not review any objective medical tests unless all parties mutually agree to provide such results. The neutral physician may not perform any diagnostic tests unless all parties consent. The neutral physician is required to submit to the parties a detailed medical report of his examination.

(b) In cases in which the player alleges that he suffered a closed head injury or concussion with resulting cognitive deficit, somatic symptoms and/or other concussion symptoms, the player must present himself for cognitive functioning testing and/or other appropriate testing and examination by a neutral neuropsychologist in either the city nearest the player's residence or the Club city. Absent medical limitations, the unavailability of the neuropsychologist or the unavailability of medical records, such testing and examination must occur within thirty (30) days from the date of the filing of the grievance. The neutral neuropsychologist will be provided with all medical records of closed head trauma and/or concussions including baseline testing, within the possession of Club and player. All other requirements and limitations set forth in this Article regarding the neutral physician process shall apply to such testing and examination except that if a neutral neuropsychologist's examination spans multiple days, it will be considered one office visit. The neutral neuropsychologist must prepare and submit a detailed report regarding his examination and the player's cognitive functioning and other symptoms, if any, of concussion or closed head injury affecting the player's ability to return to play at the date of the examination. If the neutral neuropsychologist in his sole discretion determines that the player should be examined by another physician of appropriate specialization in order to complete his neutral physician report, the neuropsychologist shall have the authority to refer such player for such additional examination. In such circumstances, the report of the neutral neuropsychologist shall be designated as the neutral physician report and may incorporate any findings or opinion of the referral doctor.

(c) In order to facilitate settlement of grievances, the parties periodically will consult with neutral physicians by telephone conference call to obtain preliminary opinions as to the length of time, if any, after their examinations before players would be physically able to perform contract services. The NFLPA will use its best efforts to make the neutral physicians in each Club city equally available to the players who file Injury Grievances.

(d) The arbitrator will consider the neutral physician's findings conclusive with regard to the physical condition of the player and the extent of an injury at the time of his examination by the neutral physician. The arbitrator will decide the dispute in light of this finding and such other issues or defenses which may have been properly submit- ted to him. In cases in which the player is alleging that he suffered a closed head injury or concussion with resulting cognitive deficit, somatic symptoms and/or other concussion symptoms the report of the neutral neuropsychologist shall be considered conclusive with regard to the player's cognitive functioning and other objective findings as well as the extent of the injury at the time of the examination.

Section 5. **Neutral Physician List:**
The NFLPA and the Management Council will maintain a jointly-approved list of neutral physicians, including at least two orthopedic physicians and two neuropsychologists in each city in which a Club is located. This list will be subject to review and modification between February 1 and April 15 of each year, at which time either party may eliminate any two neutral physicians from the list by written notice to the other party. When vacancies occur, the NFLPA and the Management Council will each submit a list of three (3) replacements to the other party within thirty (30) days for each NFL city where a vacancy exists. If the parties are unable to agree on a replacement, within ten (10) days they will select a neutral for each city by alternately striking names. The party to strike a name first will be determined by a flip of a coin. If either party fails to cooper- ate in the striking process the other party may select one of the nominees on its list, and the other party will be bound by such selection. The next vacancy occurring will be filled in similar fashion with the party who initially struck first then striking second. The par- ties will alternate striking first for future vacancies occurring thereafter during the term of this Agreement.

Section 6. **Appeal:** An Injury Grievance may be appealed to an arbitrator by filing of written notice of appeal with the Chairperson of the arbitration panel at least seven (7) days prior to the Settlement Committee meeting, but no later than the Injury Grievance scheduling meeting.

Section 7. **Arbitration Panel:** There will be a panel of five (5) arbitrators, whose appointment must be accepted in writing by the NFLPA and the Management Council. The parties shall designate the Chairperson of the panel. In the event of a vacancy in the position of the Chairperson of the panel, the senior Injury Grievance Arbitrator will succeed to the position of Chairperson of the panel, and the resultant vacancy on the panel will be filled according to the procedures of this Section. Either party to this Agreement may discharge a member of the arbitration panel by serving written notice upon the arbitrator and the other party to this Agreement from July 10 through July 20 of each year, but at no time shall such discharges result in no arbitrators remaining on the panel. If either party discharges an arbitrator, the other party shall have two (2) business days to discharge any other arbitrator. If an arbitrator has been discharged he or she shall retain jurisdiction for any case in which the hearing has commenced. Any vacancies occurring on the arbitration panel will be filled as follows: If the parties are unable to agree to a new arbitrator within thirty (30) days of the occurrence of the vacancy, the Chairperson of the panel shall submit a list of ten (10) qualified and experienced arbitrators to the NFLPA and the Management Council. Within fourteen (14) days of the receipt of the list, the NFLPA and the Management Council shall select one arbitrator from the list by alternately striking names until only one remains, with a coin flip deter- mining the first strike. The next

vacancy occurring will be filled in similar fashion, with the party who initially struck first then striking second. The parties will alternate striking first for future vacancies occurring thereafter during the term of this Agreement. If either party fails to cooperate in the striking process, the other party may select one of the nominees on the list and the other party will be bound by such selection.

Section 8. **Hearing:**
(a) Each arbitrator shall designate a minimum of twelve hearing dates per year, exclusive of the period July 1 through September 10, for use by the parties to this Agreement. Upon being appointed, each arbitrator will, after consultation with the Chairperson, provide to the NFLPA and the Management Council specified hearing dates for each of the ensuing six months, which process will be repeated on a semiannual basis thereafter. The parties will notify each arbitrator thirty (30) days in advance of which dates the following month are going to be used by the parties. The designated arbitrator will set the hearing on his or her next reserved date in the Club city, unless the parties agree otherwise. If a grievance is set for hearing and the hearing date is then postponed by a party within thirty (30) days of the hearing, the postponement fee of the arbitrator will be borne by the postponing party, unless the arbitrator determines that the postponement was for good cause. Should good cause be found, the parties will bear any postponement costs equally. If the arbitrator in question cannot reschedule the hearing within thirty (30) days of the postponed date, the case may be reassigned by the Chair- person to another panel member who has a hearing date available within the thirty (30) day period. At the hearing, the parties to the grievance and the NFLPA and Management Council will have the right to present, by testimony or otherwise, any evidence relevant to the grievance. The NFLPA and the Management Council have the right to attend all grievance hearings. All hearings shall be transcribed.

(b) If a witness is unable to attend the hearing, the party offering the testimony shall inform the other party of the identity and unavailability of the witness to attend the hearing. At the hearing or within fourteen (14) days thereafter, the party offering the testimony of the unavailable witness must offer the other party two possible dates within the next forty-five (45) days to take the witness' testimony. The other party shall have the opportunity to choose the date. The record should be closed sixty (60) days after the hearing date unless mutually extended notwithstanding any party's failure to present post-hearing testimony within the above-mentioned time period. If a witness is unavailable to come to the hearing, the witness' testimony may be taken by telephone conference call if the parties agree. In cases where the amount claimed is less than $25,000, the parties may agree to hold the hearing by telephone conference call.

(c)(i) Any party may seek bifurcation of a grievance to assert a claim of untimeliness. Bifurcation motions shall be presented in writing to the other party and the arbitrator in the moving party's answer or at any time no later than seven (7) days prior to the scheduled hearing on the merits of the grievance. If an arbitrator has not yet been assigned to hear the grievance then the moving party shall file the motion with the Chairperson of the Arbitration panel, who will decide the motion or assign it to a member of the Injury Grievance Arbitration panel. A party's decision to pursue a bifurcated hearing may not delay the processing of a hearing scheduled on the merits of the grievance. For any motions made at least thirty (30) days before a hearing on the merits of the grievance, the parties will use their best efforts to schedule the

bifurcated hearing at least ten (10) days before the scheduled hearing on the merits of the grievance. In any case where a timely motion for bifurcation is made, but a bifurcated hearing is not held, the arbitrator shall decide the issue of timeliness during the hearing on the merits. (ii) If a defense of untimeliness is not raised at least seven (7) days before the scheduled hearing on the merits of the grievance, the parties will be precluded from arguing that defense. However, where a party learns of facts supporting the defense less than seven days prior to the hearing, during the hearing, or in a post-hearing deposition, the party must present the defense to the opposing party and arbitrator within seven (7) days of when the facts supporting the defense became known or reasonably should have been known to the party. (iii) If a grievance is ultimately dismissed based on a finding of untimeliness, the arbitrator shall issue a written decision limited to that issue, and such ruling shall be final and binding.

(d) Post-hearing briefs must be submitted to the arbitrator no later than sixty-five (65) days after receipt of the last transcript. The arbitrator will issue a written decision within thirty (30) days of the submission of briefs but shall not consider briefs filed by either party more than sixty-five (65) days after receipt of the last transcript, unless the parties agree otherwise. The arbitrator's decision will be final and binding; provided, however, that no arbitrator will have the authority to add to, subtract from, or alter in any way any provision of this Agreement or any other applicable document. In the event the arbitrator finds liability on the part of the Club, he or she shall award Interest beginning one year from the date of the last regular season game of the season of injury.

Section 9. **Expenses:** Expenses charged by a neutral physician will be shared equally by the Club and the player. All travel expenses incurred by the player in connection with his examination by a neutral physician of his choice will be borne by the player. The parties will share equally in the expenses of any arbitration engaged in pursuant to this Article; provided, however, the respective parties will bear the expenses of attendance of their own witnesses. Notwithstanding the above, if the hearing is held in the Club city and if the arbitrator finds liability on the part of the Club, the arbitrator shall award the player reasonable expenses incurred in traveling to and from his residence to the Club city, lodging and meal expenses in accordance with Article 34. The arbitrator may award the player payments for medical expenses incurred or which will be incurred in connection with that injury.

Section 10. **Pension Credit:** Any player who receives payment for three or more regular season games (or such other minimum number of regular season games required by the Bert Bell/Pete Rozelle NFL Retirement Plan for a year of Credited Service) during any year as a result of filing an Injury Grievance or settlement of a potential Injury Grievance will be credited with one year of Credited Service under the Bert Bell/Pete Rozelle NFL Player Retirement Plan for the year in which he was injured.

Section 11. **Payment:**
(a) If an award is made by the arbitrator, payment will be made within thirty (30) days of the receipt of the award to the player or jointly to the player and the NFLPA, provided the player has given written authorization for such joint payment. The time limit for payment may be extended by mutual consent of the parties or by a finding of good cause for the extension by the arbitrator. Where payment is unduly delayed beyond thirty (30) days, double Interest will be assessed

against the Club from the date of the decision. The arbitrator shall retain jurisdiction of the case for the purpose of awarding post-hearing interest pursuant to this Section.

(b) Any player who does not qualify for group health insurance coverage in a given Plan Year under the NFL Player Insurance Plan as a result of being terminated while physically unable to perform and who receives payment for at least one (1) regular or post-season game via an injury grievance award or injury settlement for that Plan Year shall receive a payment in an amount determined by multiplying the number of months in that Plan Year for which he would have been eligible for coverage had he qualified for group health insurance coverage in that Plan Year by the premium the Player Insurance Plan charged for COBRA coverage during that period.

Section 12. **Presumption of Fitness:** If the player passes the physical examination of the Club prior to the preseason training camp for the year in question, having made full and complete disclosure of his known physical and mental condition when questioned by the Club physician during the physical examination, it will be presumed that such player was physically fit to play football on the date of such examination.

Section 13. **Playoff Money:** If the arbitrator finds that an injured player remained physically unable to perform the services required of him by his contract during the NFL postseason playoffs and if the Club in question participated in the playoffs that season, the player will be entitled to and the arbitrator shall award, such playoff money as though he had been on the Injured Reserve list at the time of the playoff games in question, should he otherwise qualify for such pay pursuant to Article 37.

Section 14. **Information Exchange:** The NFLPA and the Management Council must confer on a regular basis concerning the status of pending Injury Grievances and the attribution of any Injury Grievance exposure to Team Salary under Article 13. Any communications pursuant to this Section are inadmissible in any grievance hearing.

Section 15. **Discovery:** No later than fourteen (14) days prior to the hearing, each party will submit to the other copies of all documents, reports and records relevant to the Injury Grievance hearing. Failure to submit such documents, reports and records no later than fourteen (14) days prior to the hearing will preclude the non-complying party from submitting such documents, reports and records into evidence at the hearing, but the other party will have the opportunity to examine such documents, reports and records at the hearing and to introduce those it so desires into evidence, except that relevant documents submitted to the opposing party less than ten (10) days before the hearing shall be admissible provided the offering party and the custodian(s) of the documents made good faith effort to obtain (or discover the existence of) such documents or that the documents' relevance was not discovered until the hearing.

Section 16. **Grievance Settlement Committee:** A grievance settlement committee consisting of representatives of the NFLPA and representatives of the NFL shall meet annually between the end of the regular season and the annual arbitration scheduling conference. The committee shall engage in good faith efforts to settle or bifurcate any pending Injury Grievances. No evidence will be taken at such meetings, except parties involved in the grievance may be contacted to obtain information about their dispute. If the committee resolves any grievance by mutual

agreement of its members, such resolution will be made in writing and will constitute full, final and complete disposition of the grievance and will be binding upon the player(s) and the Club(s) involved and the parties to this Agreement.

Section 17. **Settlement Agreements:** Grievances settled prior to the issuance of an arbitration award will be memorialized in the standard Settlement and Release Agreement, which may include a notification of grievant's right to file a Workers' Compensation Claim, if applicable, as set forth in Appendix L. This form may be amended and/or supplemented if the parties agree and/or if required by state law.

Section 18. **Standard Grievance Correspondence:** The provisions of Article 43, Section 14 shall apply to Injury Grievances.