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May 8, 2017

By Electronic Case Filing

Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *Dent v. National Football League*, No. 15-15143
Date of Argument: Dec. 15, 2016

Dear Ms. Dwyer:

Pursuant to FRAP 28(j), appellee writes to inform the Court that appellants' union—the NFL Players Association (NFLPA)—recently filed a grievance against the NFL and its member clubs alleging violations of various duties under the existing collective bargaining agreement (CBA). Exhibit A. That grievance largely duplicates appellants' claims against the NFL here, confirming those claims are “inextricably intertwined” with applicable CBAs and preempted under §301 of the Labor Management Relations Act. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

Among other things, the grievance alleges that the NFL and clubs have “disregarded ... explicit CBA requirements as they apply to the proper, legal, medically ethical prescription, dispensing, and transportation of prescription painkillers.” Ex. A-3. It further alleges (at 7) that the NFL violated the CBA by “fail[ing] to meet its duty to use its ‘best efforts’ to ensure that the terms and conditions of the CBA” were followed by clubs, claiming that the NFL knew of “violations by medical personnel relating to ... painkillers” but did not respond reasonably.

Although the grievance focuses on conduct post-dating the 2011 CBA, its allegations underscore that appellants' negligence and fraud claims are preempted by §301, as each requires interpreting applicable CBAs. Appellee Br.18-20. As to appellants' negligence claims, just as the NFLPA asks of the arbitrator (Ex. A-7), a court would have to interpret various CBA provisions bearing on player health and safety—including provisions in effect for decades—to determine whether the NFL assumed a duty of care regarding player medical treatment, and if so whether it acted reasonably or negligently. As to appellants' fraud claims, a court could not determine whether appellants justifiably relied on statements or omissions by *the NFL* without considering that, as the grievance points out (at 2-3), the CBAs place many such duties on club *physicians*. Put simply, the grievance makes crystal clear that appellants' claims “inevitably will involve contract interpretation.” *Allis-Chalmers*, 471 U.S. at 218. That alone requires

preemption under §301. The grievance also confirms that appellants' claims are "grievable in important respects" (ER20) and should be dismissed for failure to exhaust. Appellee Br.49-53.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "P. D. Clement". The signature is fluid and cursive, with a large initial "P" and "D" followed by "Clement".

Paul D. Clement
Counsel for Appellee
National Football League

cc: All Counsel of Record (via CM-ECF)

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
Paul D. Clement

EXHIBIT A



NFL PLAYERS
ASSOCIATION

LEGAL DEPARTMENT

April 28, 2017

Larry Ferazani, Senior Vice President Labor Policy
Brook Gardiner, Vice President Labor Relations
National Football League
345 Park Avenue
New York, NY 10154

Re: Article 43 Non-Injury Grievance:

Violations of CBA Article 39 and Article 2 Involving Non-Compliance with Federal Law and Ethical Guidelines Regarding the Prescription, Notice of Informed Consent, and Administration of Federally Scheduled Drugs and Painkillers to NFL Players, filed on behalf of the members of the NFLPA against the NFL and its 32 member Clubs

Dear Larry and Brook:

On March 10, 2017, the United States District Court for the Northern District of California made publicly available the Second Amended Complaint filed in *Evans, et al. v. Arizona Cardinals, et al.*, 3:16-cv-01030-WHA (the "Complaint"). Upon review of the sworn testimony, emails and other admissions by NFL personnel, as well as other information concerning prescription and administration of painkillers, the involvement of the Drug Enforcement Administration in a criminal investigation, and the treatment of NFL players contained in the Complaint, the NFLPA became aware that since the adoption of the CBA on August 4, 2011 (the "CBA"), the NFL and its member Clubs have engaged in widespread, on-going violations of Article 39 "Players' Rights to Medical Care and Treatment" and Article 2, which requires the parties to "use their best efforts to faithfully carry out the terms and conditions of [the CBA] and to see that the terms and conditions...are carried out in full by...Clubs." Furthermore, information in the Complaint (for which the NFL/Clubs sought redaction in public filings) demonstrates that the NFL and its Clubs, including medical and legal personnel, have conspired to continue to violate the CBA and actively conceal such violations from the Players and their union, the NFLPA.

We wrote to the NFL (via Mr. Ferazani) on both April 5th and April 11th to enumerate these concerns and request that the NFL provide to the NFLPA all information related to these allegations by April 19th. The NFL did not provide any information or substantive response to those communications. As you know, in 2011, for the first time, the CBA explicitly required NFL medical professionals to comply with all federal, state and ethical guidelines when conducting their duties to provide medical care to the NFL Players. As we stated in our recent correspondence to you, the Complaint contains information





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indicating that the NFL and Clubs have violated their respective legal duties concerning the health and safety of NFL players. Indeed, the content of the Complaint raises serious issues about whether the NFL knew about potential and on-going criminal violations regarding prescription drugs, as well as troubling questions about the legality and medical ethics of the dispensing of painkillers by NFL medical personnel to players. The NFL's failure to respond to the NFLPA's concerns and specific requests for information (most recently the attached April 11th letter to Mr. Ferazani) regarding these vital matters does not enable the NFLPA to conclude that the NFL and the Clubs have met their CBA and other legal obligations. With respect to the NFL, this includes making best efforts to ensure compliance by Clubs and their medical personnel with federal, state, local laws and ethical/professional standards.

Therefore, for the reasons described below, on behalf of its members, the NFLPA hereby files this Non-Injury Grievance against the NFL and its 32 member Clubs pursuant to Article 43 of the CBA, and will ask the Arbitrator to grant the relief enumerated below.

A. THROUGH COLLECTIVE BARGAINING, THE PARTIES EXTENSIVELY ALTERED THE SECTION OF THE CBA THAT ADDRESSES "PLAYERS' RIGHTS TO MEDICAL CARE AND TREATMENT"

In 2011, the NFLPA and the NFL bargained extensively regarding matters of players' health and safety, and Article 39 "Players' Rights to Medical Care and Treatment," reflects several vital additions and clarifications to this area, including:

- For the first time, explicit acknowledgment that "each Club physician's primary duty in providing player medical care shall be not to the Club but instead to the player-patient;"
- For the first time, the requirement that "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;"
- For the first time, the requirement 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 member of such committees"; and



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- Explicit declaration that: “[e]ach Club shall use its best efforts to ensure that its players are provided with medical care consistent with professional standards for the industry.”

See respectively, Article 39 Sections 1(c), 1(d), 3(e). These provisions were an essential part of the parties’ bargain in the 2011 CBA.

Indeed, Articles 2 and 39 of the CBA expressly require that the NFL and its member Clubs, which are parties to the CBA, bear the clear responsibility for ensuring compliance – using their *best efforts* - by Club medical personnel (doctors, trainers, all healthcare personnel who treat players) with “all federal, state, local requirements, including all ethical rules...and professional standards.” As detailed below in excerpts from the Complaint, the NFL and its member Clubs have continuously, egregiously disregarded these explicit CBA requirements as they apply to the proper, legal, medically ethical prescription, dispensing, and transportation of prescription painkillers; indeed, facts contained in the Complaint specifically reflect that Clubs’ personnel considered the “competitive disadvantage” their teams would face if they did not improperly dispense prescription painkillers to players.

Additionally, apparently as part of the NFL’s attempt to conceal these on-going CBA violations from the NFLPA, the NFL failed to meet its clear obligation, pursuant to Article 39 Section 1(d), to include the NFLPA Medical Director as a voting member with full information access on “all health and safety committees,” such as one that by its very title – the NFL Prescription Drug Advisory Committee (“PDAC”) – dealt with prescription painkillers.

B. THE COMPLAINT REVEALS INFORMATION INDICATING WIDESPREAD, ON-GOING KNOWLEDGE & FACILITATION OF NON-COMPLIANCE BY THE NFL AND ITS CLUBS WITH THE CBA, AS WELL AS FEDERAL, STATE, LOCAL LAWS AND ETHICAL/PROFESSIONAL STANDARDS, IN VIOLATION OF CBA ARTICLE 39

The allegations in the Complaint identify numerous admissions by Club medical personnel of violating state and federal law (*see* excerpts below and Attachment A). Furthermore, the Complaint alleges that the Clubs and the League knew of, and were complicit in, Clubs’ and their medical personnel’s illegal conduct and/or violations of the CBA.



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The following excerpts from the Complaint, reflecting information gathered through depositions of NFL medical personnel and documents produced in discovery, reveal numerous instances of post-2011 CBA conduct that violates the law and/or ethical medical standards for the prescription, dispensing and transportation of prescription painkillers to players.

Significantly, the Complaint does not purport to be an exhaustive itemization of the evidence adduced to date in the *Evans* litigation, and the NFLPA has had no access to the *Evans* record, much less the opportunity to conduct discovery on its own. Moreover, although the NFLPA's grievance focuses upon NFL and Club conduct post-dating the 2011 CBA, the Complaint additionally alleges widespread misconduct pre-dating the 2011 CBA, with no indication that such misconduct has stopped. That said, the post-2011 CBA conduct described in the Complaint and recited below alone indicates present and on-going CBA violations of Article 39.

For example, the following paragraphs from the Complaint identify conduct that violates Article 39, Sections 1(c) & 3(e):

- Dr. Marzo (Bills' doctor) testified that, even after being informed that they could not travel with controlled substances in 2011, as late as 2014, he would still do so and administer that drug to a player. (¶ 95).
- Bud Carpenter, the Bills' long-time trainer, testified that doctors provided prescription medications at places other than where they were allowed to do so in violation of federal and state laws. He could not identify a single instance in which a player received any warning about a medication or consented to risks that had been identified to him before receiving the medication. He further testified that he wished things had been done differently. (¶ 249).
- For another example, on October 13, 2014, 27 teams responded to a survey and noted that an average of 26.7 players (more than half of the active roster) per team took at least one dose of Toradol per game. (¶ 119).
- And for the Steelers, the numbers only go higher. In a document dated March 1, 2013 from Lawrence Brown (on NFL letterhead) to Dr. Yates (Steelers' team doctor), attached hereto as Exhibit D, Dr. Brown notes that "there was documentation of dispensing by a non-physician [despite the numerous warnings that had been going around the League since the early 1990s, as documented herein]. Please re-evaluate to insure that this behavior is congruent with federal



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and state regulations.” It also notes that during the “calendar year 2012, the [Steelers] medical staff ... prescribed 7,442 doses of NSAIDs [again, 53-man roster] compared to League-wide average of 5,777 doses of NSAIDs per Club. Regarding controlled medications, [the Steelers] prescribed 2,123 doses of controlled medications compared to League-wide average of 2,270 doses of controlled medications per Club. By total doses, your Club ranks 10th in the greatest volume of NSAIDs provided by an NFL Club and 14th in the greatest volume of controlled medications provided by an NFL Club.” (¶ 123). Dr. Yates testified that even last season, he witnessed players lining up for the “T Train,” – Toradol injections before a game – something that had been occurring with the Steelers for at least the previous 15 years. (¶ 243).

- [E]ach team essentially adopted its own policy with regard to how it dealt with traveling with controlled substances, though the League did try to amend the CSA through a bill in the House of Representatives – H.R. 3724 – that would allow team doctors to travel with controlled substances. The bill never passed. In writing to his congressman on January 8, 2012 to support the bill, Cowboys’ doctor Daniel Cooper stated that “[f]or decades under current law [the CSA], team doctors have illegally (yet unknowingly) transported and administered medications to injured players while covering games away from home.” (¶ 224).
- In 2010, the DEA investigated the San Diego Chargers after a player was found with 100 doses of Vicodin in his possession. That same year, the DEA also investigated the New Orleans Saints regarding the theft of controlled substances. (¶ 214).¹

These admitted CBA violations by Club medical personnel are even more troubling in light of the fact that *all* Club medical staffs were explicitly reminded of their clear CBA obligations relating to medical care in a September 2013 joint communication from the NFL and NFLPA, which was disseminated in response to another instance of misconduct

¹ The DEA’s 2010 investigation of the Chargers and Saints was also detailed in a recent *Washington Post* article, which further chronicles Club physicians’ above-the-law mentality with regard to prescription drugs. For example, the article details a February 2011 presentation given to Club physicians by then-DEA deputy assistant administrator Joseph Rannazzisi, during which Club physicians complained about having to comply with federal laws that prohibit traveling with prescription drugs across state lines, which they had been doing for years. According to Rannazzisi, a physician from the Dallas Cowboys cavalierly exclaimed at the meeting that “[his] owner [*i.e.*, Jerry Jones] knows members of congress and he’ll get the law changed.” Rick Maese, *The DEA warned NFL doctors about drug laws in 2011. It didn’t go well.* Washington Post, Apr. 20, 2017.



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by a Club physician. Notwithstanding this notice, Club medical staffs have continued to willfully disregard their CBA obligations.

Relatedly, the excerpts from the Complaint cited below display serious violations of Article 39 Section 1(d) through the exclusion of the NFLPA Medical Director as a voting member with full access to all information on a health and safety committee, the PDAC, which was in existence as late as 2014:

- On information and belief, the Clubs created a committee – the NFL Prescription Drug Advisory Committee – to oversee the administration of controlled substances and prescription drugs to players in all the Clubs. The person in charge of the committee is Dr. Lawrence Brown and the committee, at least as of November 6, 2014, was comprised of the following persons who were attending its meetings: Lawrence Brown, MD; Charles Brown, MD; Louis Baxter, MD; Arun Ramappa, MD; Bertha Madras, PhD; Linda Cottler, PhD; Seddon Savage, MD; Bryan Finkle, PhD; J. Michael Walsh, PhD; Jeff Miller, NFL V.P. for Security who resigned in May 2016 from that position; Lawrence Ferazani, NFL Senior V.P. for Labor Litigation & Policy; Amy Jorgensen, Director, Health and Safety Policy for the NFL; Nicolette Dy, project coordinator for player health and safety issues for the NFL; Lanisha Frazier-Conerson, NFL Program Administrator for Substances of Abuse; Brandon Etheridge, General Counsel for the Baltimore Ravens who as of November 2014 was counsel to the NFL; Dr. Pellman; Christina Mack; Adolpho Birch, NFL Senior V.P. of Labor Policy & League Affairs (and a person who, in an August 25, 2010 e-mail from Dr. Pellman, the NFL’s medical advisor, is identified as Dr. Brown’s “liaison in the NFL office”); and Dr. Matava. The committee meets at least twice a year at the Combine and at the summer League meetings.

A document titled “NFL Prescription Drug Program Advisory Committee Major Findings and Recommendations” that, per its metadata, was created and last modified on September 7, 2014, concludes in relevant part that non-physician administration and/or dispensing of medications occurs at many Clubs (despite numerous documents mentioned herein, generated before that date and circulated amongst trainers and others, that state that non-physicians cannot do so – see, e.g., minutes from a February 11, 1995 NFLPS business meeting in which Dr. Brown “stated that it is illegal for trainers to dispense prescription drugs”) and that a correlation between injuries and prescribing behaviors could not be determined. It recommends that the relationship between Club physician prescribing and Club win-loss performance be assessed along with the



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relationship between opioid prescribing and other indicators of athlete or team performance. (¶¶ 141-142).

The NFLPA Medical Director was given *no* access and *no* information with respect to the PDAC. This not only violated (and circumvented) Article 39, Section 1(d), but also affirmatively and improperly concealed from the NFLPA facts underlying the NFL's and Clubs' respective violations of Article 2 and Article 39, Sections 1(c) and 3(e). As soon as the NFLPA became aware of the existence of this committee through the publishing of the Complaint, it immediately requested that the NFL remedy its violation by providing the NFLPA Medical Director with the CBA required status and access; the NFL's perfunctory response that the PDAC was no longer in existence and was not a health and safety committee when it did exist is, at the least, utterly disingenuous regarding the nature of the committee, and indicative of the NFL's on-going violative withholding of CBA required information from the NFLPA regarding this important area affecting thousands of players' health and safety.

C. THE NFL'S KNOWLEDGE & FACILITATION OF CBA NON-COMPLIANCE BY MEDICAL PERSONNEL VIOLATES ITS DUTY TO ENSURE BEST EFFORTS BY ITS MEMBER CLUBS TO COMPLY WITH CBA TERMS & CONDITIONS, IN VIOLATION OF CBA ARTICLE 2

In addition to the specifically enumerated health and safety obligations imposed on Clubs in Article 39, Article 2 Section 2 imposes on the NFL a "best efforts" obligation to ensure the Clubs' compliance with their Article 39 obligations:

Section 2. Implementation: The parties will use their best efforts to faithfully carry out the terms and conditions of this Agreement and to see that the terms and conditions of this Agreement are carried out in full by players and Clubs. The NFL and NFLPA will use their best efforts to see that the terms and conditions of all NFL Player Contracts are carried out in full by players.

The information in the Complaint demonstrates the NFL's on-going failure to meet its duty to use its "best efforts" to ensure that the terms and conditions of the CBA are "carried out in full" by its member Clubs. Indeed, the Complaint indicates that the NFL was clearly cognizant of on-going legal and ethical violations by medical personnel relating to the prescription, dispensing and transportation of painkillers to players, yet the NFL has taken *no* disciplinary action against Clubs and/or medical personnel who committed, and presumably still commit, such violations. Having recently punished the New England Patriots to the tune of forfeiting first- and fourth-round draft picks plus a



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\$1 million fine for alleged conduct relating to taking a tiny amount of air out of footballs, it is incomprehensible that the League has taken *no* action whatsoever against Clubs to redress and incentivize compliance with their Article 39 obligations towards the health and safety of NFL players.

In addition to the PDAC described above, the Complaint contains the following paragraphs which reveal that, as late as 2015, the NFL had on-going knowledge of violations through involvement with the NFL Physicians Society (NFLPS):

- The NFLPS is governed by an executive committee that regularly interacts with the League. For example, Dr. Anthony Yates (Steelers' doctor), who served on that committee from 2000 to 2015 and is a former NFLPS president, testified at his deposition that Elliott Pellman, in his capacity as medical advisor to the League, was a regular attendee of NFLPS executive committee meetings. He further testified that Dr. Brown also attended such meetings, including, for example, the February 11, 1995 meeting at the Westin Hotel in Indianapolis and the February 7, 1998 meeting at the Hyatt Regency Hotel in Indianapolis. Other League officials attended these meetings too, including Ed Teitge, who gave a 30 minute presentation on labor relations in the NFL at the aforementioned 1998 meeting; Adolpho Birch, who attended the February 21, 2003 meeting at the Westin Hotel in Indianapolis (along with Dr. Brown), and Commissioner Goodell, who attended the February 23, 2012 NFLPS executive board meeting. (¶ 88).
- Dr. Yates also testified that Dr. John York, an owner of the San Francisco 49ers who was also chairman of the owners' health and safety committee, would attend NFLPS meetings and events, including the 2013 executive committee meeting at the Combine. Dr. Yates called Dr. York "an important resource to and advocate for the team physicians and athletic trainers for all 32 clubs" at the 2013 NFLPS business meeting. (¶ 89).
- Dr. Matava (Rams' doctor) testified that, while president, he too attended owners' health and safety committee meetings and regularly visited the League's New York offices for meetings. Both he and Dr. Yates testified that, while serving as president of the NFLPS, they attended, and gave presentations regarding medications (including Toradol) at, owners' meetings, the Toradol meeting having occurred in March 2013. (¶ 91).
- The Commissioner attends NFLPS meetings; NFLPS executive committee members attend owners' meetings and NFL Management Council meetings, and



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lurking in the background of it all are Drs. Brown and Pellman, who go-between the doctors, Clubs and League. (¶ 131).

As reflected in the existence of the PDAC and the League's intimate involvement with the NFLPS, the League knew of, and was complicit in, Clubs' and their medical personnel's illegal and/or CBA violative conduct, and the information in the Complaint indicates that these multiple levels of CBA violations have been on-going for numerous years.

Pursuant to CBA Article 70, New York law governs the CBA, and the legal requirements inherent in "best efforts" are robust. Under New York law, courts have interpreted "best efforts" to require that a party exert its "total capabilities"—which in the NFL's case, is substantial—to fulfill its contractual promise. *Bloor v. Falstaff Corp.*, 454 F. Supp. 258, 266-67 (S.D.N.Y. 1978).² The NFL's continuing failure to use its best efforts to ensure that the Clubs' medical personnel, who are responsible for the health and safety of thousands of player-patients, meet governing laws and ethical medical standards for prescription painkiller use constitutes a fundamental violation of the governing principles contained in Article 2, Section 2. In fact, based merely on the limited information currently available to the NFLPA, it is clear that the NFL's conduct is far worse than a failure to use its total capabilities to ensure the Clubs' CBA compliance—the NFL's decision to take no action in the face of Clubs' widespread and long-standing disregard for the health and safety of NFL players is tantamount to condoning the Clubs' misconduct.

REMEDY/RELIEF

In order to remedy the numerous CBA violations described above, and in light of the NFL's failure to respond to the NFLPA's prior communications about these matters, the NFLPA will seek the following relief from the Arbitrator if the NFL denies the Union's grievance:

- (1) Specific findings by the Arbitrator that the NFL and its member Clubs have violated and continue to violate Article 39 and Article 2 of the CBA, including but

² See also *Burke v. Steinmann*, 03 Civ. 1390, 2004 U.S. Dist. LEXIS 8930 (S.D.N.Y. May 12, 2004) ("Contractual best efforts clauses require that the bound party work toward the object of the contract 'to the extent of his total capabilities'" (citing *Bloor*); *Cassini v. Jovan, Inc.*, 1987 WL 7733, at *1 (S.D.N.Y. Mar. 3, 1987) (referring to the *Bloor* court's interpretation of "best efforts" as "the leading analysis of what constitutes best efforts relating to contractual performance"). Other New York courts have similarly required "due diligence," "all reasonable methods," "reasonable efforts," "good faith business judgment," "genuine effort," "active exploitation in good faith," and "good faith in light of one's own capabilities." *Ashokan Water Servs.*, 11 Misc. 3d 686 (N.Y. Civ. Ct. 2006). Further, it is clear that "best efforts" requires more than merely good faith. *Kroboth v. Brent*, 625 N.Y.S.2d 748, 814 (N.Y. App. Div. 1995).



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not limited to, findings based upon the facts enumerated in this letter, as well as those learned through discovery and at the hearing.

- (2) An order of compliance directing the Clubs to comply with their CBA obligations to make best efforts to ensure that Club physicians and medical personnel comply with Article 39, including that players are provided with medical care consistent with professional standards and ethical rules for the industry, and that Club physician's primary medical duties are to the player-patients and not the Club. The order of compliance would include an enumeration of mandatory legal, professional, and ethical standards for Club physicians and medical personnel as established at the hearing through expert testimony and other evidence. The NFLPA will also seek a corresponding order requiring Clubs to cease and desist from violating Article 39, Section 3(e).
- (3) An order of compliance directing Clubs to terminate those Club physicians and medical personnel who are proven to have violated their CBA obligations to players. The NFLPA will also seek a corresponding order requiring Clubs to cease and desist from violating their CBA obligations by continuing to employ medical personnel who have violated their CBA obligations to players.
- (4) An order of compliance directing the NFL to adhere to its CBA obligation to make best efforts to see that the terms and conditions of Article 39 are carried out in full by Clubs. The order of compliance would require, among other things, that the NFL implement a discipline policy for Clubs that fail to meet all compliance and reporting duties regarding prescription painkillers per their Article 39 obligations; such NFL disciplinary policy for Clubs violating Article 39 must be consistent with the NFL's disciplinary policies and practices with respect to other Club violations of the CBA. The NFLPA will also seek a corresponding order requiring the NFL to cease and desist from violating its CBA obligation to make best efforts to see that the terms and conditions of Article 39 are carried out in full by Clubs.
- (5) An order of compliance directing the NFL to meet its obligations pursuant to Article 39, Section 1(d) mandating voting member status and access to all information for all health and safety committees for the NFLPA Medical Director. The Compliance Order would require on-going reporting obligations to the NFLPA and to the Arbitrator to ensure adherence to Section 1(d). The NFLPA will also seek a corresponding order requiring the NFL to cease and desist from violating Article 39, Section 1(d).



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- (6) An order of compliance that requires the Arbitrator to maintain on-going jurisdiction to ensure compliance with Article 39 and Article 2 of the CBA through the following means: periodic, prompt disclosure to the Arbitrator and the NFLPA of all records regarding use and dispensing of painkillers, including transmission of prescription data; and implement a bi-annual mandatory training program for all NFL medical personnel that includes attendance by NFLPA medical staff regarding issues of compliance with federal, state and medical ethical practices.
- (7) Such other relief available under the CBA based on the record developed at the arbitration and as the Arbitrator deems appropriate.

We look forward to your prompt response.

Very truly yours,

A handwritten signature in black ink that reads "Tom DePaso". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Tom DePaso
NFLPA General Counsel

cc: 32 Member Clubs of the NFL
DeMaurice F. Smith, Esq., NFLPA Executive Director
Heather M. McPhee, NFLPA Associate General Counsel



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ATTACHMENT A

Club	Admissions by Club Medical Personnel
Atlanta Falcons	<p>A memorandum obtained from the Atlanta Falcons memorializes a phone call between Rob Geoffroy, currently the Falcons' Vice President of Finance, Marty Lauzon, currently the Falcons' Director of Sports Medicine and Performance, Danny Long, currently an assistant trainer for the Falcons, and Mary Ann Fleming, NFL Director of Benefits, that states in relevant part that "the medication dispensation log contains no physician signatures; there is no control from the doctor to know exactly what has been given to players and what type of communication exists between the trainers and the physician; there is no evidence that the doctor actually knows what medication has been given to the players. This log is in the doctors' office, next to the safe, with the doctor having passing out medication before without signing or putting his initials next to the transaction." (SAC, ¶ 191).</p>
Minnesota Vikings	<p>In an e-mail dated January 7, 2008 to various team doctors and personnel, Minnesota Vikings head trainer Eric Sugarman stated "Here is week 17's fiasco The following items did not match up this week. 1. Total of 16 Ambien given out was recorded – however only 11 Ambien were missing from the kit. 2. Total of 21 Toradol shots were recorded – however only 20 Toradol shots were missing from the kit. 3. Total of 1 Diphenhydramine shots were missing with no record of dispensing. There have been several times where the drug sheet and restock sheet didn't match but it was easily reconciled that day. There have been two incidences of drugs that have not been accounted for at all. 1. 12/17/07 – Missing all 12 pills of cyclobenzaprine. 2. 12/23/07 – Missing all 10 pills of SMZ/TMP 800-160 mg. In the case of the SMZ/TMP the whole bottle itself was missing from the kit." (SAC, ¶ 194).</p>
Buffalo Bills	<p>Indeed, Dr. Marzo (Bills' doctor) testified that, even after being informed that they could not travel with controlled substances in 2011, as late as 2014, he would still do so and administer that drug to a player. (SAC, ¶ 95).</p> <p>Club doctors and trainers do not inform players of the health risks associated with mixing Medications in the volume and manner they are doing (referred to as "cocktailing"). These dangers are increased when the doctors and trainers know the Medications are often being mixed with Club-provided alcohol (e.g., Mr. Carpenter testified that beer would be waiting for players on the steps leading to their planes after games). (SAC, ¶ 127).</p> <p>Bud Carpenter, the Bills' long-time trainer, corroborated certain of the foregoing allegations at his deposition when he admitted under oath that he witnessed team doctors give players injections of prescription medications without telling them what the drug was they were receiving or its side effects, or for that matter, provide any related warnings and was not aware of anyone providing any warnings related to Toradol prior to 2010. He further testified that doctors provided prescription medications at places other than where they were allowed to do so in violation of federal and state laws. He could not identify a single instance in which a player received any warning about a medication or consented to risks that had been identified to him before receiving the medication. He further testified that he wished things had been done differently. (SAC, ¶ 249).</p>



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Club	Admissions by Club Medical Personnel
<p>Cincinnati Bengals</p>	<p>In an e-mail dated August 24, 2009, Bengals head trainer Paul Sparling writes: “I trust all is well with your and Gtown. Can you have your office fax a copy of your DEA certificate to me? I need it for my records when the NFL ‘pill counters’ come to see if we are doing things right. Don’t worry, I’m pretty good at keeping them off the trail!” (SAC, ¶ 278).</p> <p>In an e-mail dated November 3, 2010, Paul Sparling, the Bengals head trainer, writes to Dean Kleinschmidt, the Lions head trainer, “Until the VCML is actually in effect, we will continue to do as we have done for the past 42 years [i.e., travel and distribute controlled substances in violation of federal law]. . . . I sure would love to know who blew up the system that worked all these years. It reminds me of when Charlie (from NFL security) told Marv, George Anderson, Ralph Berlin, etc., that having a bottle with more than one type of medications was co-mingling!” (SAC, ¶ 278).</p> <p>[O]n October 13, 2014, 27 teams responded to a survey and noted that an average of 26.7 players (more than half of the active roster) per team took at least one dose of Toradol per game. On September 24, 2010, Paul Sparling (Bengals Head Trainer) e-mailed Dr. Jill Eippert (Bengals doctor): “We, for example rarely dispense more than 12 – 20 Vicodine 5/500 a game, whereas I know others that will routinely dispense 90+ each game.” (SAC, ¶ 119).</p>
<p>Pittsburgh Steelers</p>	<p>And for the Steelers, the numbers only go higher. In a document dated March 1, 2013 from Lawrence Brown (on NFL letterhead) to Dr. Yates (Steelers’ team doctor), attached hereto as Exhibit D, Dr. Brown notes that “there was documentation of dispensing by a non-physician [despite the numerous warnings that had been going around the League since the early 1990s, as documented herein]. Please re-evaluate to insure that this behavior is congruent with federal and state regulations.” It also notes that during the “calendar year 2012, the [Steelers] medical staff . . . prescribed 7,442 doses of NSAIDs [again, 53-man roster] compared to League-wide average of 5,777 doses of NSAIDs per Club. Regarding controlled medications, [the Steelers] prescribed 2,123 doses of controlled medications compared to League-wide average of 2,270 doses of controlled medications per Club. By total doses, your Club ranks 10th in the greatest volume of NSAIDs provided by an NFL Club and 14th in the greatest volume of controlled medications provided by an NFL Club.” (SAC, ¶ 123).</p> <p>Dr. Yates testified that a majority of Clubs as of 2010 had trainers controlling and handling prescription medications and controlled substances when they should not have. (SAC, ¶ 216).</p> <p>Dr. Yates testified that even last season, he witnessed players lining up for the “T Train,” – Toradol injections before a game – something that had been occurring with the Steelers for at least the previous 15 years. (SAC, ¶ 243).</p>



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April 11, 2017

Larry Ferazani, NFL Senior Vice President
345 Park Avenue
New York, NY

Re: CBA Article 39 Health & Safety Committee Membership and Related Information

Dear Larry:

Thank you for your response regarding our inquiry about the NFL Prescription Drug Advisory Committee (PDAC or “the Committee”). As you know, we raised a specific concern about the failure of the NFL to include the NFLPA Medical Director on a committee directly related to the health and safety of our players, in violation of Article 39 Section 1(d) of the 2011 CBA. Information about the Committee was included in an un-redacted federal court complaint that was published in the Northern District of California on March 10, 2017. The un-redacted complaint includes: specific references to deposition testimony by NFL physicians and other personnel discussing prescription drugs dispensed to players; references to criminal investigations of the NFL and its member clubs by the Drug Enforcement Agency; the participation of NFL lawyers, doctors and other personnel on committees that dealt with both the use of prescription drugs and the criminal investigation, and records detailing the rates at which prescription drugs were dispensed by teams.

Simply stated, the un-redacted complaint contains information that calls into question the NFL’s fulfillment of its duties with respect to the health and safety of the NFL Players and raises serious questions relating to the health and safety of the men we represent. Indeed, the content of the complaint raises serious issues about whether the NFL knew about potential and ongoing criminal violations regarding prescription drugs, as well as troubling questions about the legality and medical ethics of the dispensing of painkillers by NFL medical personnel to players.

Thus, while we appreciate your brief response to our inquiry about the Committee, we believe that it raises more questions than it answered.

First, we disagree that the Committee, which by its very title dealt with prescription drugs and issues surrounding dispensing such drugs to NFL players, is not an NFL player health and safety committee covered by Article 39 of the 2011 CBA. As you know, Article 39 Section 1(d) states: “[The NFLPA Medical Director] ***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.***” (Article 39 Section 1(d), emphasis





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added.) Your response included no facts which leads us to believe that NFLPA and its Medical Director are not entitled to all of the information and data provided to the NFL's PDAC Committee. Your statement that "[t]he [Prescription Drug Advisory Committee] has not been in existence for several years" did not dispute the existence of the Committee during the 2011 CBA, and your assertion that the NFL's Medical Advisor was not a member of the Committee is irrelevant to the analysis since exclusion by the NFL of its Medical Advisor from a committee that dealt with prescription drugs dispensed to players does not alter the obvious fact that such a committee is a player health and safety committee requiring compliance with Article 39.

Based upon the un-redacted complaint, it appears that the Committee specifically addressed issues about the NFL and its member teams' compliance (or lack thereof) with federal, state laws and other rules surrounding prescription, dosage, and use of prescription drugs for players, which directly affects their health and safety. Despite the explicit reference in the 2011 CBA, the NFL has provided no information to the NFLPA about the level of its non-compliance with these laws and certainly did not include the NFLPA or its Medical Director on any "committee" that was formed to address these issues.

Second, we note that your response did not indicate when the Committee was created or presumably dissolved. It is our understanding that the Committee was in existence after the adoption of the 2011 CBA on August 4, 2011 and continued through at least 2014, if not later. Please specifically inform us of the date the Committee was formed as well as its date of dissolution. Please also inform us of the members of the Committee from August 4, 2011 through its date of dissolution, and the dates of all meetings or conference calls of the Committee between August 4, 2011 through the date of dissolution.

Third, I am sure that you are also aware that for the first time in 2011, Article 39 was amended through collective bargaining to include a duty of compliance with all federal, state and ethical rules relating to team physicians and medical personnel. Specifically, it requires that "***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.***" Article 39 Section 1(c), emphasis added.

The inclusion of that collectively bargained language imposes an individual duty on all medical personnel to comply with federal, state and ethical obligations. Accordingly, in addition to compliance with all CBA obligations, we are also concerned about any committee that had information relating to certain individuals' compliance or lack of compliance with individual federal, state licensing and/or other medical and ethical



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obligations. We are also interested as to whether the PDAC or any other committee had any information that was forwarded to the Commissioner for disciplinary purposes since any knowledge or participation in ongoing violations of federal or state law would clearly constitute “conduct detrimental to the integrity and public confidence in the NFL,” and thus violate the NFL’s Personal Conduct Policy, which applies to “**everyone** who is part of the league.” (NFL Personal Conduct Policy 2016, p. 1)

Accordingly, notwithstanding the existence of the PDAC, we request that the NFL and its member teams provide us with any data in its possession relating to the non-compliance by any Club physician and/or medical personnel of their duties incorporated into Article 39.

To summarize, as required by Article 39 of the CBA, and in accordance with the NFL’s independent obligation as the employer under federal labor law to provide information in its possession that is reasonably necessary for the NFLPA to police and administer the collective bargaining agreement¹, please provide the following information by April 19, 2017:

- 1) The identity of all members of the Prescription Drug Advisory Committee as of August 4, 2011 through the date of its dissolution, as well as the date of the Committee’s dissolution;
- 2) “All data, records and information” provided to the members of the Prescription Drug Advisory Committee from August 4, 2011 through the date of its dissolution. “Information” includes all communications among members regarding the work of the Committee;
- 3) The identity of any other NFL committee, including any successor committee to the Committee identified above, that has existed for any duration of time since August 4, 2011 which addresses issues relating to the administration of prescription drugs to players; and

¹ The allegations contained in the un-redacted complaint require that the NFLPA conduct a thorough investigation regarding these matters to determine whether or not the NFL and its member clubs are complying with their CBA duties, and if not, to enforce those obligations through the grievance process.



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- 4) Any data or information in the NFL or member clubs' possession relating to compliance or non-compliance by any Club physician and/or medical personnel of their duties as explicitly incorporated into Article 39, including, with limitation, their duties as they relate to the prescription for and dispensing of drugs to NFL players. This should include all years under the current CBA, beginning in 2011 through to present.

Finally, if any other NFL Committees exist as referenced in number 3 above (or have existed since August 4, 2011), we also ask you to comply with your CBA obligations to provide the NFLPA Medical Director Dr. Mayer with access to "all data, records and information" provided to the members of such Committees and immediately acknowledge him as a voting member of such committees.

Very truly yours,

A handwritten signature in black ink that reads "Thomas J. DePaso". The signature is written in a cursive, flowing style.

Tom DePaso
NFLPA General Counsel

cc: DeMaurice Smith
Heather McPhee