

No. 15-2801 (L)

15-2805, 15-3228 (Con)

United States Court of Appeals for the Second Circuit

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,
Plaintiff-Counter-Defendant-Appellant,

AND

NATIONAL FOOTBALL LEAGUE,
Defendant-Appellant,

AND

MICHELLE MCGUIRK,
Appellant,

v.

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,
ON ITS OWN BEHALF AND ON BEHALF OF TOM BRADY,
Defendant-Counter-Claimant-Appellee,

AND

TOM BRADY,
Counter-Claimant-Appellee,

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, NOS. 15-5916, 15-5982*

**BRIEF FOR PROFESSOR ROBERT BLECKER
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**

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INTEREST OF AMICUS CURIAE

Amicus Robert Blecker's study of philosophy of game and sport won Harvard's Oberman prize as the best graduating thesis of his 1974 law school class. As a special prosecutor investigating corruption in New York's criminal justice system, and for the past 40 years a tenured professor of criminal law, jurisprudence, and Constitutional history at New York Law School, he has maintained his scholarly and moral interest in cheating and the integrity of law and sport. He made his study of the case on appeal the subject of a speech at the International Association of the Philosophy of Sport titled "Deflategate: Cheating with the Rules." 60 MINUTES SPORTS recently featured aspects of his Deflategate critique and its implications. He has published two op-ed essays on the subject in Law 360 and WBUR's *Cogniscenti*, reprinted on NPR's web site. Columnists in *Newsday* and the *Providence Journal* have featured different aspects of his critique of the case on appeal.

Neither Appellant National Football League ("NFL") nor Appellee National Football League Players Association ("NFLPA") recognizes that "conduct detrimental to the integrity of, and public confidence in the fairness of the sport," includes bias and unfairness in defining, determining, and sanctioning such "detrimental conduct." Thus this *amicus* raises issues that neither party addresses relating to the integrity of sport and the proper limits of an investigation and

arbitral adjudication necessary to protect it. *Amicus* has no financial interest in this case, but a strong interest to assist this Court to reach the right outcome, and for the right reasons.

SUMMARY OF THE ARGUMENT

This case challenges this Court to reconcile competing values and conflicting principles. Congress clearly encourages dispute settlement through contractual arbitration. U.S. Supreme Court and Second Circuit jurisprudence has long recognized presumptive validity attaching to arbitrator's decisions and demands judicial restraint, except in extraordinary circumstances. Ordinarily a court must not substitute its judgment for the arbitrator's. Presumptions, of course, can be rebutted, although the losing party bears a heavy burden to demonstrate the arbitrator's evident bias, caprice or dishonesty, the lack of fundamental fairness, or in the extreme, fraud in the factual findings.

Naturally, the NFL summarily characterizes its own investigation as full and fair, emphasizing a Commissioner's unfettered discretion to define and punish conduct detrimental to the integrity of the sport. However from the start, the NFL's investigation, adjudication, and punishment of Tom Brady for actively participating in a scheme to illegally tamper with ball pressure has been infected with bias, unfairness, evident partiality and occasional fraud.

Within hours after the AFC Championship game, NFL officials leaked false measurements to the media which they did not correct for seven weeks while public opinion congealed against the Patriots. After a long and unfair delay, they finally notified the Patriots of the truth but only on condition the Patriots continue to suppress the truth until the League issued its final report.

The NFL has persisted to the present in the literally true but contextually misleading assertion that all Patriots balls were illegally deflated while all measured Colts balls were within legal limits – as if this somehow indicated misconduct and tampering rather than the perfectly predictable product of environmental conditions. The NFL engaged in deceptive logic and demonstrable fraud to bolster its indefensible conclusion that science, alone, could not explain the greater drop in Patriots ball pressure. A rising chorus of reputable scientists, engineers and statisticians have thoroughly discredited the simulations and statistical analysis of the NFL’s so called “disinterested expert consultants” and have shown how science fully explains the pressure drop without any hint of human tampering. Even as it escalates its accusations against Tom Brady, the NFL seems to have abandoned, *without acknowledging it*, the entire scientific foundation for the Commissioner’s original findings. The NFLPA, too, has gone strangely silent.

Conduct detrimental to the integrity of, and public confidence in the game includes bias and unfairness in defining, determining, and sanctioning such “detrimental conduct.” The NFL engages in conduct detrimental and demonstrates its unmistakable bias by analogizing unproven and improbable ball deflation to fixing the world series, thus blurring distinctions between more and less serious cheating. On this too, the NFLPA has gone silent.

The NFLPA reply brief fails to assert or explore the NFL’s bias, dishonesty, or fraud in the investigation. It avoids issues concerning the integrity of sport. Instead, it urges this Court to affirm the District Court on narrow grounds – chiefly that the CBA specifically designates fines but not suspension for first time equipment violations. Secondarily it asserts that the Commissioner exceeded his power in certain procedural rulings. In short, neither side challenges much less explores the integrity of the arbitration process and its effect on the integrity of the sport.

By affirming the District Court -- but for the right reasons, or remanding for an unbiased, truthful determination with the benefit of investigative interview notes, this Court can and should vindicate the proper limits on a District Court’s power to vacate an arbitrator’s findings, even as it vindicates the integrity and public confidence in sport.

ARGUMENT

I. ARBITRATOR'S AWARD PRESUMPTIVELY VALID, EXCEPT IN EXTRAORDINARY CASES OF BIAS, EVIDENT PARTIALITY, UNFAIRNESS AND FRAUD.

The NFL rests its case on the Commissioner's broad discretion to investigate and sanction conduct detrimental to the sport in order to protect the integrity of professional football and the public confidence in it. The NFL also repeatedly emphasizes a District Court's very limited discretion to vacate the Commissioner's decision, citing the leading U.S. Supreme Court case, *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) more than 15 times along with consistent Second Circuit jurisprudence, clearly holding, except in extraordinary circumstances, federal district courts must defer to an Arbitrator's fact-finding and penalties with which it disagrees.

Although Tom Brady does bear a heavy burden of persuasion, *Misco* provides him grounds to bear it. *Misco* simply rejects the federal court's right to void arbitration awards on the basis of public policy. It repeatedly emphasizes that no fraud or dishonesty was alleged or involved and never mentions evident bias. The NFL concedes it: "Unless the award was procured through fraud or dishonesty, mere disagreement with the arbitrator's legal or factual conclusions is manifestly insufficient to justify vacatur of an award." (Brief for Appellants at 30–31 (No. 15-2801; hereinafter "NFLbr"). The NFL disclaims "the sort of severe transgressions

– i.e. fraud, dishonesty...required for a federal court to take the drastic measure of disturbing a labor arbitration award”. (NFLbr27); “If anything, an arbitrator’s procedural rulings are entitled to *even more* deference.” Such decisions “are to be left to the arbitrator” and may be disturbed only if they are the product of “bad faith” or “affirmative misconduct.” *Misco*, 484 U.S. at 40. (NFLbr31). The arbitrator’s determinations need only be grounded in the CBA and devoid of true caprice. (NFLbr26).

This amicus demonstrates that unfairness, consistent bias and occasional fraud infected the NFL’s investigation from the start. The Wells report’s central finding, that science alone could not explain the drop in Patriots ball pressure and therefore Tom Brady knew of, incentivized and approved of a scheme that resulted in AFC championship game ball tampering resulted from Exponent’s—its outside experts’—pseudo-science, artful distortion, unfairness, dishonesty rightly characterized as fraud, and evident partiality.

Thus Tom Brady can meet his heavy burden under *Misco* and this Court can and should sustain the District Court’s *vacatur* or at least remand with access to interview notes that allows Brady to clearly and convincingly establish dishonesty, unfairness and bias.

II. FROM THE START AN INVESTIGATION INFECTED WITH UNFAIRNESS, BIAS, EVIDENT PARTIALITY AND OCCASIONAL FRAUD.

We may never be certain whether Tom Brady was “generally aware” that Patriots employees would deflate footballs, as the Wells report found, or ever participated in, incentivized and directed such a scheme as the NFL brief now insists. A growing chorus of disinterested scientific, statistical and engineering experts, however, have demolished the Wells report’s most essential finding: Beyond any reasonable dispute, today we know, contrary to the “crux” of the League’s finding, **scientific principles and environmental conditions *can* fully explain the Patriots pressure drops without any human tampering.**

Although the NFL brief concedes the Commissioner fully adopted the Wells report’s findings and analysis, by artful phrasing and odd silence, the NFL seems to have largely *abandoned, without any acknowledgement* the entire scientific basis for concluding that human beings illegally deflated footballs. Even as the League’s brief has, through its silence, essentially abandoned the factual foundation of its accusation, it has elevated that accusation, resolutely supporting the punishment that rested upon it.

This amicus emphasizes three among many instances of unmistakable bias that both parties’ briefs have almost completely neglected. It isolates extreme instances of unfairness, deception and at least one instance of fraud.

The NFL’s artful phrasing and subtle silence obviously stems from a desire to prevail. The NFLPA’s puzzling and distressing silence on the NFL’s

unacknowledged retreat from the scientific basis for Brady's guilt, its failure to address, much less rebut the NFL's escalated claims that Tom Brady cheated, combined with its failure to explore or argue essential NFL bias, unfairness and fraud – all of which directly undermine both public confidence in and the integrity of the game – compel this amicus.

THE NFL INVESTIGATORS' BIASED BASIC ASSUMPTIONS

The Wells/Exponent's conclusion that only human tampering could account for the Patriots and Colts balls halftime readings boils down to three statements, each infected in its own way:

- 1. At halftime, all eleven Patriots balls measured below the legal minimum (on both gauges) while all four Colts balls remained legal (on at least one gauge.)**
- 2. Science and environmental conditions cannot explain the Patriots balls measured pressure drop from pre-game to halftime – assuming the referee measured pre-game with the Non-Logo gauge.**
- 3. Regardless of which gauge the referee used, scientific principles and environmental conditions alone cannot explain the relatively *greater* measured Patriots pressure drop as compared to the Colts.**

Therefore human tampering becomes probable.

Each statement above rests upon (1) artfully crafted irrelevancy, or (2) visually misrepresented and deceptively described reality, or (3) an unstated, unsupportable and unsupported highly implausible assumption.

1. ALL ELEVEN PATRIOTS BALLS MEASURED BELOW THE LEGAL LIMIT; ALL COLTS BALLS MEASURED ABOVE.

The widely quoted opening paragraph of the Wells report concludes: “**All eleven** of the **Patriots** game **balls** tested **measured below the minimum** pressure level of 12.5 pounds for square inch **allowed by...the Official Playing Rules...**on both of two air pressure gauges used to test the balls. **The four Colt balls tested each measured within the...range permitted** under the Playing rules on at least one of the gauges used for the tests.” (emphasis added).

Since the Wells report first publicly revealed and repeated it on March 6, although the Commissioner reiterated it in his July 28 “final decision”, the above statement has been irrelevant, completely consistent with scientific principles, and thoroughly misleading to an un(der)informed public and media who seized upon it as proof positive that the Patriots had cheated.

Of course if you initially set balls *at* the legal minimum (12.5) in a warm dry locker room, then move them outside onto a cold rainy field for two hours, their pressure will *all* drop and must measure below the legal minimum of 12.5. If any single Patriots football had measured at or above the legal minimum, science could not explain *that*. And no surprise that the Colts balls, initially set at 13.0 -- above

the legal minimum – also dropped, and hovered just above or below 12.5 two hours later, depending on the gauge used to measure them.

As the League now admits, unaware of the Ideal Gas Law, it never considered that ball-pressure would naturally drop when moved to a cold, wet playing field. But almost a year later, to the delight of high-school physics teachers, everybody following this story now understands this basic fact of nature. Everybody, it seems except the NFL whose brief still repeats this misleading attack as if it somehow indicates conduct detrimental to the game. (NFLbr9).

2. SCIENCE AND ENVIRONMENTAL CONDITIONS CANNOT EXPLAIN THE PATRIOTS PRESSURE DROP FROM PRE-GAME TO HALFTIME – ASSUMING THE REFEREE MEASURED PRE-GAME WITH THE NON-LOGO GAUGE.

Perhaps the clearest (although not most consequential) instance of bias and distortion shows up in NFL/Wells/Exponent’s finding that the referee probably mis-remembered which of his own two gauges he used 48 times! to measure both teams’ ball pressure pre-game.

All agree: Referee Anderson measured Patriots balls pre-game using one of two gauges – unfortunately called the “Logo-gauge” (higher-reading, longer-needle gauge) and Non-logo (lower-reading, shorter-needle gauge.) If the Referee used the Logo gauge to check the ball pressure pre-game, then of course officials must use that same Logo gauge at halftime to properly measure the drop. In that

case 8 of 11 Patriots balls, along with the average of all 11, fell well within the predicted pressure drop.

Only the lower-reading Non-logo gauge makes the Patriots half-time pressure drop suspiciously large. Crediting the Referee's memory that he used the Logo gauge essentially explains the entire pressure drop.

Exponent, the "expert consultants" (Wells9), rejected the ref's memory, finding against the Patriots that Anderson used the non-Logo gauge. Exponent's logic: Since the Referee's gauge essentially confirmed the accuracy of each team's pre-set ball pressure, we can assume he in fact used whichever of his two gauges more nearly matched the teams' own gauges. That makes sense.

Since Wells/Exponent eventually concluded the Referee misremembered and actually used the non-logo gauge, the teams' gauges must have more nearly matched that non-logo gauge. Except for some unexplained reason, key evidence went missing. The investigators could not locate *either team's* gauge Wells informs us in passing. Very odd, that *both* teams' gauges would disappear when either would tend to confirm or rebut the Ref's memory. How hard did the NFL's investigators search? We don't know. The Wells report doesn't tell us. Perhaps investigators' interview notes contain the answer.

In any case, the NFL now makes Brady's cell-phone destruction the centerpiece of its attack. If adverse inferences should be drawn from a party's

failure to produce relevant evidence, the League's failure to produce *either* gauge overshadows Brady's failure to produce his cell-phone – especially when all phone records confirm that the NFL has all relevant texts.

Although they had neither Colts nor Patriots gauge to compare to the Ref's two gauges, NFL investigators did determine that a master gauge and many others they tested all measured closer to the non-logo gauge, thus leading Wells to reject the Referee's memory and use the non-logo gauge measurements. But this clearly constitutes League investigative bias: It turns out that *all* the other gauges they purchased then tested were *the same model as the non-logo* gauge, and none were the same model as the Logo gauge. They simply couldn't locate any older Logo models the Wells report mentions in passing! Did they check Ebay? In any case this "investigatory" bootstrapping is non-sequitur nonsense. Furthermore, as bloggers have pointed out the intercepted ball that began the whole affray, measured in the locker room 3 times with the Patriots' gauge almost exactly matched the Logo gauge readings at halftime, thus clearly suggesting that the Ref, as he remembered had used the Logo gauge.¹ Exponent conveniently rejected these readings as irrelevant – another potential instance of bias.

But it gets worse, much worse. The bias gets clearer and morphs into fraud.

¹ *C.f.* Dave Garofalo, *De-myth-tifying the Wells Report*, THE SPORT POLICE (June 10, 2015) <http://emailwagon.blogspot.com/2015/06/top-5-myths-of-wells-report-blown-up.html>.

Having assumed the Non-logo gauge measurements on completely specious logic, when the suspiciously missing team gauges would have supported or exploded their non-logo gauge theory, NFL investigators still came up against an experienced referee's memory. And Anderson recalled he had used his Logo gauge. Accepting all Anderson's other recollections including the pre-game pressure of both team's balls, Wells inexplicably rejected this single recollection in favor of an anti-Patriots non-sequitur.

Did Anderson typically use one or the other gauge? We don't know, although investigators most probably asked him this. The Wells report doesn't tell us and the NFL refused to turn over the interview notes. It bolsters their rejection of the ref's memory if his two gauges could barely be distinguished. Perhaps, the referee himself mistook one for the other. As Exponent's figure 2 shows us, the Logo gauge had a longer, more severely bent needle. How much longer? How much greater the bend? See for yourself.

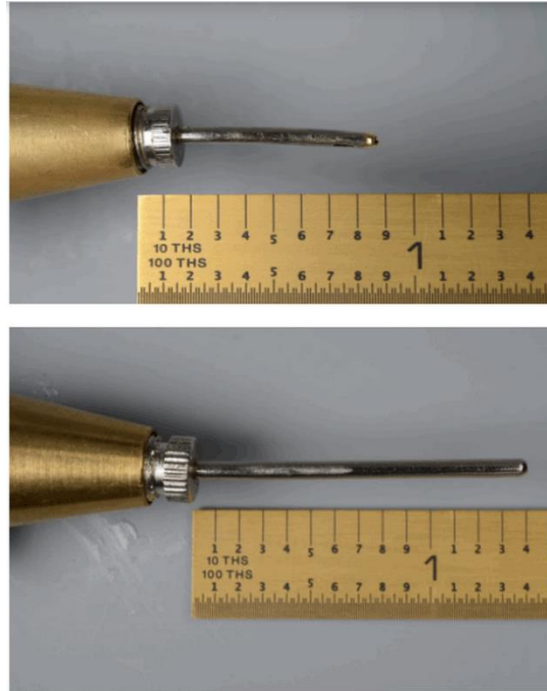


Figure 3. Image of the inflation needles attached to their respective gauges. The Non-Logo Gauge has a noticeably smaller needle when compared to the Logo Gauge. Both needles are slightly bent.

Closely examine the independent unbiased consultant’s own close-up: They carefully placing a simple ruler under each gauge to help us compare. The non-logo “short needle” gauge has the tip of its needle at .9 inch, whereas under it, the logo needle measures 1.4 inches. Could a person miss a one half inch difference? Perhaps.

Now look again: It took my fourth read to catch the trick. Once you see it, you’ll never forget it. The Long needle measures 1.4 inches because it *is* 1.4 inches. The short needle, however measures .9 because they *shifted* the ruler an extra .2 inches! (They conveniently didn’t line up the gauges under each other so your eye wouldn’t catch it.) The Logo gauge needle actually measures ***twice as long*** as the non-logo – .7 vs. 1.4.

Alex Weinman, my research assistant who offered many helpful insights, also noticed here that these “independent” investigator/consultants artfully *photographed* the Logo needle at the single angle that diminishes its much greater bend. Look carefully. Truth lurks in the shadow. And Alex later noticed that their Logo gauge photo subtly shrank the needle and ruler, further diminishing the needles’ apparent difference in length to an observer’s eye.

How could a leading scientific consulting and engineering firm whose physicists, engineers and statisticians generated so many sets of sophisticated graphs based on complex simulations,² innocently fail to line up two simple rulers?

² These simulations have been attacked. See Professor John Leonard’s presentation in Professor Michael McCann’s course “Deflategate” at University of New Hampshire School of Law posted on <http://wellsreportcontext.com/>. C.f. Robert F. Young, *NY Times Letters: Reversal Needed to Claim Science is Against Patriots*, BETTER DIALOGUE (Sept. 18, 2015), <http://betterdialogue.com/timesletter/>; Dave Garofalo, *De-myth-tifying the Wells Report*, THE SPORT POLICE (June 10, 2015) <http://emailwagon.blogspot.com/2015/06/top-5-myths-of-wells-report-blown-up.html>; KEVIN A. HASSETT, ET AL, AMERICAN ENTERPRISE INSTITUTE, *On the Wells Report* (June 2015), <https://www.aei.org/wp-content/uploads/2015/06/On-the-Wells-report.pdf>.

Exponent has a history of conducting controversial simulations on behalf of wealthy clients, and has been accused of biased science that tailors results to suit its clients’ wishes. C.f. Ken Bensinger and Ralph Vartabedian, *Toyota Calls in Exponent Inc. as Hired Gun*, L.A. TIMES (Feb. 18, 2010), <http://articles.latimes.com/2010/feb/18/business/la-fi-toyota-exponent18-2010feb18>. (“Exponent’s research has come under fire from critics, including engineers, attorneys and academics who say the company tends to deliver to clients the reports they need... ‘If I were Toyota, I wouldn’t have picked somebody like Exponent to do analysis,’ said Stanton Glantz, a cardiologist at UC San Francisco who runs a database on the tobacco industry that contains thousands of pages of Exponent research arguing, among other things, that secondhand smoke does not cause cancer. ‘I would have picked a firm with more of a reputation of neutrality.’”). More recently, in *State Farm v. Electrolux*, a federal magistrate judge dismissed Exponent’s simulations on behalf of Electrolux to prove its dryers were safe as “unreliable” and “irrelevant” because, as with Deflategate, its “flawed comparative analysis” compared the incomparable. A district court later agreed. *State Farm v. Electrolux*, 980 F.Supp.2d 1031, 1050 (N.D. Ind. 2012).

How could the Wells team of investigators and lawyers at Paul Weiss in all their drafts and reviews not notice?

Wells added deceptive words to support Exponent's deceptive photos: "Although Anderson's best recollection is that he used the Logo Gauge, he said that it is *certainly possible* that he used the Non-Logo Gauge." (emphasis added) "Certainly possible." It's certainly possible the ceiling above will suddenly collapse and kill us as we read this. If it were 99.9% probable that Anderson rightly remembered using the Logo gauge, it's still "certainly possible" he was mistaken. Not only does bias infect Exponent's photos; it also infected Wells standard of proof. They purported to feel bound to utilize a preponderance, and to resolve ambiguities in their most probable light. This "certainly possible" standard brazenly mocks that claim of unbiased analysis.

Bias, unfairness, or shall we call it what it is? Fraud. *60 Minutes Sports* was so taken with this carefully constructed optical illusion they exposed the NFL's hidden bias on national TV. *Deflategate: "Tissue of Lies"*, YOUTUBE (Sept. 14, 2015) <https://www.youtube.com/watch?v=wls6WT0DrFM>). Naturally, the NFL brief no longer discusses the gauge used or the actual Patriots pressure drop, although it remains a vital part of the missing factual foundation for their simple conclusion that Tom Brady schemed to deflate balls. The NFLPA has never seen fit to mention it.

In short, the pre-game gauge controversy, especially Figure 3 clearly suggests conscious distortion and anti-Patriots bias: This “evident partiality” should disqualify any claim that the investigation from start to finish was full and fair. Scientifically or logically astute critics continue to point out other prejudicial flaws. Why, for example, if Wells assumes the referee initially tested with the non-logo gauge did the officials at halftime NOT *reinflate* the 3 out of 4 Colts balls that also illegally measured below 12.5 on *that* gauge?

Much more could be cited, but let’s rest the case for fraud on Figure 3.

3. THE HALFTIME SEQUENCE: WERE THE COLTS BALLS MEASURED BEFORE OR AFTER THE PATRIOTS BALLS WERE REINFLATED?

The “scientific consultants” ruler-shift provide this court its clearest – although not most consequential – instance of anti-Patriots bias. As the Wells report went on to insist, regardless of which gauge the referee used pre-game, at half-time “no set of credible environmental or physical factors completely accounts for the additional loss in air pressure exhibited by the Patriots game balls, as compared to the loss in air pressure exhibited by the Colts game balls.” In short “this absence of a credible scientific explanation for the Patriots halftime measurements” as compared to the Colts balls “support[ed] a finding” of “human intervention”. (Wells12-13).

Why would the Patriots ball pressure have dropped more than the Colts?

Here's Exponent's description: (Wellsapp2):

[D]uring the halftime period, three events pertaining to the footballs are known to have occurred: 1. The air pressure measurements of 11 Patriots footballs were taken and recorded. 2. The air pressure measurements of four Colts footballs were taken and recorded. 3. The reinflation and regauging of 11 Patriots footballs to a level within the 12.5–13.5 psig range was performed. . . [I]t is clear that . . . measuring of the Patriots balls occurred first. Although there remains some uncertainty about the exact order and timing of the other two events, *it appears likely the reinflation and regauging occurred last.*" (emphasis added).

After measuring the 11 Patriots balls, did the officials inflate the Patriots balls to regulation before measuring the Colts balls, or as Exponent assumed and Wells adopted, did they measure four Colts balls, abruptly stop at four, running out of time and then hurriedly re-inflate all 11 Patriots balls?

The real sequence makes a huge difference.³ If officials did measure the 4 Colts balls immediately after they measured the Patriots balls, then the two sets of balls would have been measured in roughly comparable conditions. The greater Patriots pressure drop would be suspicious. On the other hand, if officials did measure the cold, wet Patriots balls immediately upon bringing them from the playing field, found them all below the legal minimum, then reinflated and

³ Jonathan Yedidia was probably first to note this in response to Mike Florio's post *After further review, a theory on how #Deflategate Initially unfolded* on May 13, 2015, <http://profootballtalk.nbcsports.com/>.

calibrated each of the eleven, during those several minutes, the Colts balls would be warming up in the locker room, and their pressure would be rising.

Comb Exponent's report. You will find no statistical, or logical explanation for this most consequential assumption. Let's try one: The officials already had gauges in their hands; half-time only lasts 15 minutes and time's running short. So why not quickly measure the Colts balls immediately and then reinflate the Patriots? Plausible, except that somehow *after* measuring the Patriots balls *but before* measuring the Colts balls the officials switched gauges. And no one noticed! Neither the two NFL officials assigned to measure, nor the other two officials assigned to observe the process and record the measurements noticed or recalled the switch in gauges. How could they accidentally switch gauges without realizing it unless they put them down?

All logic suggests, and no evidence contradicts the simple and obvious sequence: As everyone agrees, the officials measured the cold and damp Patriots balls first. Then they put aside their gauges to re-inflate and restore the 11 Patriots balls to regulation pressure -- highest priority. Time pressed as the start of the second half approached. So they picked up the gauges not realizing they'd switched them, and now time's really running short. Officials began hurriedly to measure the Colts balls. They evidence their haste and time pressure, mis-

recording or mis-transcribing the third result. Why else stop, one ball later, at four except they ran out of time and raced out for the start of the second half?

Mysteriously, incomprehensibly, incredibly considering that two officials were measuring and two other officials were specifically and exclusively assigned to record and observe, NFL investigators could not determine which happened first – Patriots balls reinflated or Colts balls measured? It strains credulity that NFL investigators could come to no clear consensus as to the basic sequence of events. But Wells glossed over it, and Exponent assumed an order as implausible and biased as it was consequential. If an unbiased arbitrator were to draw adverse inferences from missing evidence, this too would dwarf Tom Brady’s cell phone destruction.

A rising chorus of scientifically trained critics have now pointed to Exponent/Wells biased pseudo-science here and elsewhere.⁴ Simply factor in the extra several minutes during which the officials almost certainly inflated and recalibrated 11 Patriots balls while the Colts balls continued to warm up and dry out – their pressure rising -- and science easily explains (although the Exponent

⁴ Leading attacks include: Daniel L. Goldberg, *The Wells Report in Context*, <http://wellsreportcontext.com/>; Mike Greenway, *Deflategate Deflated* (June 15, 2015), <http://www.deflategatedeflated.com/>; Ben Taylor (blogs as “ElGee”), *The Cognitive and Statistical Biases of Deflate Gate*, BACK PICKS: THE COGNITION OF SPORTS (May 17, 2015), <http://www.backpicks.com/2015/05/17/the-cognitive-and-statistical-biases-of-deflate-gate/>. See for example, several posts by Mike Florio on PRO FOOTBALL TALK, <http://profootballtalk.nbcsports.com/>.

graphs fail to consider) that the pressure in the cold, damp Patriots balls should measure a much more substantial drop than the pressure in the warming relatively dry Colts balls measured several minutes later. (This extra time for the Colts balls to dry out, warm up and more nearly approach pre-game uniform equilibrium also rebuts the Exponent/Wells claim that the Patriots balls had suspiciously unaccounted-for greater variation in measured pressure.) Claiming to have considered every plausible scenario, Exponent seems to have omitted this simple, obvious one, in effect assuming their conclusion by declaring as greater than fifty percent likely, a scenario in fact probably less than *fifteen* percent likely – if that.

Apparently the Commissioner embraced Exponent’s unmistakable bias in his “final” decision on appeal:

I find that the full extent of the decline in pressure cannot be explained by environment, physical or other natural factors. Instead, at least a substantial part of the decline was the result of tampering. (FinalDecision6).

Unfortunately, the NFLPA lawyer who argued on appeal on behalf of Brady barely mentioned to the Commissioner, this convenient but indefensibly biased assumption, and then only as one of a list of unrecorded events. This court, however, should note and fully appreciate the bias in Wells/Exponent’s ungrounded, illogical and biased assumption of sequence.

“Not every evidentiary or procedural ruling went in Brady’s favor,” the NFL brief concedes with ironic understatement. (NFLbr2). In fact, every significant evidentiary assumption on Brady’s underlying guilt or innocence went against him. “The Commissioner reasonably resolved every contested issue” the brief insists.

Really? The investigation from start to finish was saturated in bias and implausible assumptions. Given that gauges were switched and no one noticed, no reasonable fact finder could reasonably find Exponent’s inverted sequence preponderantly probable. This inverted sequence constitutes primary evidence of Anti-Patriots bias that tainted the investigation from start to finish.

“[The Commissioner]...authorized an exhaustive investigation of the underlying conduct, which was limited only by Brady’s failure to cooperate.” (NFLbr2) Nonsense. In its gross failure to consider the effects of timing, temperature, and wetness; in its rejection of the refs memory and measure; and worse in its absurdly implausible, completely unsupported embrace of the inverted half-time sequence, this investigation was limited much more by its own bias rather than Brady’s refusal to cooperate.

In sum, there never was an honest, exhaustive investigation of “the underlying conduct” which, never forget, was the deflation *vel non* of footballs in the bathroom. The evidence clearly indicates ball tampering probably never

occurred. In the face of growing and withering criticism, with its pseudo-science increasingly debunked and exposed as naked bias, understandably the NFL brief has gone completely silent on science. Inexplicably, the NFLPA brief follows suit and continues to cooperate with the NFL's scientific silence. No wonder, then, the NFL has shifted the focus to Tom Brady's non-cooperation and destruction of his cell phone.

But Deflategate was deflategate, not cell gate. When the main support beam has been removed, as the NFL brief removes it, the structure it has supported should collapse.

III. THE NFL'S OWN INVESTIGATION QUALIFIES AS CONDUCT DETRIMENTAL TO THE INTEGRITY OF, AND PUBLIC CONFIDENCE IN THE GAME OF PROFESSIONAL FOOTBALL.

As the NFL brief repeatedly emphasizes, the CBA gives the Commissioner broad authority to impose discipline for conduct "detrimental to the integrity of, or public confidence in, the game of professional football." (NFLbr5-6, *passim*).

But conduct detrimental to the integrity of the game includes bias, unfairness, and distortion *in the definition, investigation and punishment* of "conduct detrimental." Then too, public confidence in the integrity and fairness of the game of professional football includes *public confidence in and the actual*

integrity of the process that determines conduct detrimental and imposes discipline.

If that investigative and adjudicative process is biased, if its substantive factual findings fly in the face of probability and consistently impute misconduct – ball tampering -- where there was none, that more than anything undermines the integrity and public confidence in the game. In nearly a year since the AFC championship game, the NFL’s investigation of Deflategate has more adversely affected public perception of the integrity of the game than any purported misconduct by Brady. Here, then, unlike most other arbitration disputes and appeals, the facts and findings at issue implicate the power of the Arbitrator to find them.

“If the public perceives the games as unfairly tilted in favor of certain players or teams,” the NFL brief righteously intones, “or even susceptible to such tilts, it will cease valuing professional sports as a paradigm of fair-play, honest effort, and healthy competition.” (NFLbr6). The League’s own tilted investigation, coupled with appellate escalations of accusations that Brady is a liar and a cheat, mock these well-articulated core values of fair play, honest effort and healthy competition in getting at and disseminating the truth. Increasingly the public views the Commissioner as tainted and the League’s investigation as the

anti-thesis of fair play. Turning over the investigative notes might be a helpful step in reversing that momentum.

The NFL brief rightly points out that “by signing th[eir] contract, each player acknowledges . . . the Commissioner’s authority “to suspend [the] Player for a period certain or indefinitely” for conduct “*reasonably judged*” by the Commissioner to be detrimental to the integrity of, or public confidence in, the game.” (NFLbr8) (emphasis added). But it begs the question to assume that because the Commissioner determined conduct as detrimental, he thereby “reasonably judged” it so. A series of biased assumptions detailed above casts serious doubt on the Commissioner’s reasonable judgment.

The NFL brief removes all doubts with its analogies. While the NFLPA does attack the Commissioner’s unfair comparison of Brady’s conduct to covering up steroid use with a masking agent, they allow the NFL’s more insulting analogy to the Black Sox scandal – the infamous World Series fix to pass without comment. (NFLbr6). ELIOT ASINOF, EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES (1963) tells the sordid tale of resentful professional athletes hating their penny-pinching owner and conspiring with gamblers to befoul the essence of their sport. Searching for a plausible analogy to Tom Brady, a fierce and talented competitor, perhaps one finds a sad parallel in the fate of Buck Weaver, a great defensive third basemen who neither agreed to, nor aided the fix,

nor received money but instead played his heart out in the series. Yet vindictive Commissioners permanently banished an innocent Weaver from baseball, the sport he loved. But that analogy extends only so far. Buck Weaver was fully aware of the scheme that did strike at the heart a sport's integrity, yet failed to reveal it to authorities.

Let's be clear. The NFL in its appellate brief accuses Brady of cheating. While philosophers of sport differ in their definitions of cheating, essentially it includes *a deceptive attempt to gain an unfair advantage* (by violating the letter and spirit of rules the player has agreed to abide by.) The NFL brief cites Brady's attempt to gain a "competitive advantage...devised to avoid detection." (NFLbr1).

Arguably it might make no difference if balls were actually deflated as long as Brady "schemed" to deflate them. Immanuel Kant, the great retributivist held the only evil to be an evil will. Attempts traditionally constitute serious crimes because they involve the same intent as the completed crime.

And while cheating can be more or less serious, Brady's cheating, the NFL asserts "struck at the heart of the game's integrity." (NFLbr1). Yet, when quarterback Aaron Rogers openly bragged that he overinflated balls above the legal limit to see if he could slip them by the refs unnoticed, the NFL didn't even question, much less investigate, prosecute and sanction him for that attempt to

gain an unfair advantage. But somehow Tom Brady's alleged knowledge of a scheme to deflate was comparable to fixing the world series?

Even "Hatriots" (those who hate the Patriots) tweets often acknowledge that the purported deflation or inflation of game balls constitutes a relatively trivial violation in itself. We can be virtually certain that for many years, hundreds of games have been played in freezing rain or snow with game balls well under 12.5psi. Are they all tainted?

The NFLPA brief does cite Aaron Rodgers' boast, but as proof of the League's inconsistency. (Brief for Appellees at 24–25 (No. 15-2801); hereinafter "NFLPAbr"). Seemingly more determined to attack the Commissioner's "sweeping grab" for power than to defend Brady's smeared reputation, the NFLPA leaves unchallenged the NFL's attack on Brady's integrity as an athlete and competitor with its insulting comparison to fixing the world series. The NFL itself strikes at the heart of Tom Brady's reputation and standing as a sportsman. Totally unsupported, it should not be allowed to stand.

"This case requires a prompt resolution," the NFL brief closes, urging reversal without remand. Much as Tom Brady, too, must desire a prompt resolution, still more he deserves justice through an honest and accurate resolution. Allegations of active involvement in actual ball tampering, most probably false, certainly have not been proven. If every reasonable factfinder

must find that science *can* fully explain the pressure drop, Tom Brady should not be suspended. More pressing still, for the integrity of the sport, the NFL should not be permitted to tarnish Tom Brady's well-earned superstar status by permanently stigmatizing him as a cheat.

In short, by escalating accusations of cheating even as it silently abandons the science on which the sanctions rest, the NFL undermines the integrity of the sport its sanctions are meant to protect.

IV. DENYING TOM BRADY ACCESS TO INVESTIGATIVE NOTES, THE NFL HAS SUPPRESSED RELEVANT EVIDENCE, UNDERMINING FUNDAMENTAL FAIRNESS, AND BRADY'S RIGHT TO PRESERVE PUBLIC CONFIDENCE IN HIS OWN INTEGRITY.

The NFLPA's brief supports the District Court's *vacatur* principally because the Commissioner's punishment under cover of his power to protect the "integrity of the game" illegally supplants the CBA's more specific lesser punishment of a monetary fine for an equipment violation first offenders. Secondly, the NFLPA supports the *vacatur* on grounds of unfairness in the NFL's refusal to turn over its investigative notes. However, as the NFL points out, the NFLPA has never really clarified exactly how those notes support the *vacatur*. (NFLbr52–53).

Except in one vague, passing observation that these investigative files gave the NFL counsel "valuable impressions, insights and other investigative information" unavailable to Brady, and one other narrow point, the NFLPA still

fails to do this. (NFLPAbr7). By now, hopefully this Court should see clearly how the interview notes could, and probably would reveal bias that infected the investigation. Turning over the notes should protect the integrity of the sport and give its leading quarterback even firmer ground to support the District Court's *vacatur*.

Specifically, the notes should help resolve many important questions and demonstrate or undermine "evident bias":

1. **Referee Anderson's** interview should shed light on **WHICH GAUGE** he used to measure the balls pre-game: Did he routinely use the Logo gauge and merely carried the non-Logo only as backup? Was he aware that the Logo gauge needle was twice as long and much more bent? The notes should clarify the referee's actual **CONFIDENCE** level as to which gauge he used 48 times! although it was "certainly possible" he mis-remembered.
2. The testimony of **4 OFFICIALS**, two who measured, two assigned to observe and record, who somehow can't recall or reach a consensus on the **BASIC HALFTIME SEQUENCE**: 11 Patriots balls reinflated before or after 4 Colts balls measured?

3. How could both teams gauges – **Colts and Patriots** (which would have matched the ref’s actual gauge) each gone **missing? Exactly what efforts were made to recover them?**
4. Sincere attempts to **obtain other Logo-type gauges.**
5. Any notes or discussion re. **EXPONENT’S APPENDIX**, principally **figure 3**, the halftime sequence, and its “science cannot explain” conclusion.
6. The **INTERCEPTED BALL**: all discussions re how to use it and the decision to disregard it.
7. Any account of **wetness and other game conditions** when comparing Patriots pressure to Colts.
8. Any concerns expressed about the validity of **EXPONENT’S SIMULATIONS.**
9. Why NFL investigators rejected stadium **SECURITY PERSONNEL** testimony that McNally often took game balls with him to the field?

A NOTE ON “INDEPENDENCE” AND THE INTEGRITY OF THE SPORT

The District Court held the Commissioner should have required Pash, the NFL’s General Counsel to testify as to his actual input, to determine whether the investigation was truly “independent.” (*NFL Mgmt. Council v. NFL Players*

Ass'n, No. 15 CV 5916, *35, (S.D.N.Y. Sept. 3, 2015). The NFL counters that the CBA does not require an “independent” investigation.

Notice, the ambiguity of “independence”. If independent means “outside the control and direction of the Commissioner,” the CBA does not guarantee independence, nor must it. Arguably, the Commissioner, as he insists, *could* base discipline entirely on an in-house investigation, as long as that investigation itself were independent in a second dictionary sense – “unbiased, impartial”. More determined to restrict the power of the Commissioner than protect the integrity of the game, the NFLPA emphasizes independence in the first sense, contrary to the CBA. But independence as “fair and unbiased” the Commissioner cannot and has not disavowed in principle, although he has failed in practice.

CONCLUSION

The record as a whole clearly reveals an NFL investigation purportedly “thorough” and “independent” but actually biased, dishonest and fundamentally unfair. The NFL’s brief opens by noticing this case’s “celebrity”. National and international attention directed at Deflategate provides this court a perfect opportunity to vindicate two essential principles which seem to conflict. On the one hand, the Court may be tempted to use this case as a vehicle to emphasize the established principle that Courts should not substitute their views for the

Arbitrator's, chastising a District Court who three times this year alone has vacated Arbitrators' awards. *See N.Y.C. v. Ass'n of Wall-Ceiling & Carpentry Indus. Of N.Y.*, 2015 U.S. Dist. LEXIS 54489 (S.D.N.Y. Apr. 27, 2015); *Attia v. Audionamix Inc.*, 2015 Dist. LEXIS 127330 (S.D.N.Y. Sept. 21, 2015). Such reversal, with its accompanying notoriety, would surely send a salutary message.

But this particular situation also calls on this Court to vindicate an even more compelling principle – the integrity of sport. Under cover of that concern, no Commissioner can initiate an investigation saturated with unfairness and bias, then find guilt on the basis of that bias and pseudo-science, only to escalate the accusation even as he abandons the very factual basis for it. The Commissioner's "final decision" must not be final.

This court should either affirm the *vacatur* or remand to the District Court for further proceedings to consider the investigation and arbitrator's "bias" "caprice" and "evident partiality", giving Tom Brady access to the investigators' notes. As it announces this, the Court should re-emphasize its commitment to the fundamental rule of judicial deference – making it a rule "honored (*even*) more in the breach than the observance" – the real meaning of an often inverted phrase.

"I really think the NFL should drop its appeal," MIT Professor John Leonard publicly declared, concluding his must watch devastating critique of the "messed up" and "crazy" pseudo-science underlying the purported "crime". (*MIT*

Professor Debunks Deflategate, YOUTUBE (Dec. 1, 2015),
<https://www.youtube.com/watch?v=wwxXsEltyas&feature=youtu.be>).

Fortunately, however, although from questionable motives, the NFL Commissioner has persisted, and thus presents this Court an important occasion to do the right thing, but for the right reasons.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because this brief contains 6,949 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman 14-point font.

Dated: December 14, 2015

Respectfully Submitted,

Robert Blecker

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