

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

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JONATHAN VILMA,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	No. 12-1283 c/w 12-1718 & 12-1744
VERSUS	:	PERTAINS TO 12-1744
	:	
	:	SECTION "C" (3)
ROGER GOODELL, ET AL,	:	
	:	JUDGE HELEN G. BERRIGAN
Defendants.	:	
	:	MAGISTRATE JUDGE
-----	x	DANIEL E. KNOWLES, III

**MEMORANDUM OF LAW IN SUPPORT OF THE NFLPA'S MOTION
TO VACATE COMMISSIONER GOODELL'S ARBITRATION AWARD**

PRELIMINARY STATEMENT

Plaintiff/Petitioner National Football League Players Association (“NFLPA”), on its own behalf and on behalf of Scott Fujita, Anthony Hargrove, and Will Smith (collectively, the “Players”), brings this motion for vacatur. Through this Motion, the Players seek only what the law requires: an objectively unbiased arbitrator who can provide them with a fundamentally fair process and a bona fide opportunity to defend themselves against the Commissioner’s false charges concerning an alleged “bounty” scheme to encourage injuring NFL players.

After the CBA Appeals Panel ruled that Commissioner Goodell had overstepped his authority by punishing the Players for “pay-for-performance” conduct within the exclusive jurisdiction of the neutral System Arbitrator, the Commissioner went through the motions of receiving additional evidence and meeting with the Players, purportedly to determine if any discipline remained appropriate under his conduct detrimental authority, as cabined by the Appeals Panel. Despite representations that the Commissioner would objectively reconsider the discipline, the NFL orchestrated a charade which took its prior disregard for fair process to new heights. And, at the conclusion of that process, the Commissioner re-issued essentially the same punishments: collectively, suspensions for 28 of the 31 games he previously imposed.

Specifically, the Commissioner re-imposed the entirety of Mr. Smith’s four-game suspension for allegedly “endorsing” Coach Williams’s “pay-for-performance/bounty” program, and re-imposed seven of eight games for Mr. Hargrove allegedly “lying” about the program (Mr. Vilma’s season-long suspension was also re-imposed). The Commissioner re-labeled his prior “pay-for-performance” allegations as “the agreement to injure” in a cynical attempt to avoid having the discipline set aside once again by the Appeals Panel.¹ There is, however, simply no

¹ (Compare, e.g., Letter from Roger Goodell to Will Smith at 3, Oct. 9, 2012 (referring to “the agreement to attempt to injure or disable opposing players”) (attached to the Declaration of David L. Greenspan,

credible evidence to substantiate any punishment of the Players under the rubric of an intent-to-injure scheme. As for Mr. Fujita, the Commissioner was forced to conclude that Mr. Fujita did not participate in Gregg Williams's pay-for-performance pool at all – but he suspended Mr. Fujita anyway, based upon a purported violation of previously un-cited and totally inapplicable provisions of the NFL Constitution & Bylaws. Unfortunately, this game of “gotcha” has become a hallmark of these proceedings.²

The Players have exercised their CBA right to initiate an arbitration appealing the Commissioner's latest round of penalties and simultaneously asked the Commissioner to recuse himself in favor of a neutral arbitrator and to comport with the due process that the CBA and labor arbitration law require. The Commissioner has not agreed to step down or to the requisite due process. The arbitration hearing will likely occur on October 23, 2012 and will invariably culminate in confirmation of the re-imposed suspensions – suspensions that will become effective instantaneously, severely and irreparably harming the Players until set aside.

It is established now that the Commissioner's arbitration award will be defective and require vacatur. First, and principally, the Commissioner has demonstrated his evident partiality beyond any doubt through his (and the NFL's) statements and course of conduct concerning the specific subjects the Commissioner intends to arbitrate. The question this Court must decide is whether, based on the already well-established record, “a reasonable person would have to conclude that [the Commissioner] was partial to one party.” Householder Group v. Caughran,

filed concurrently herewith, as Ex. A) with Letter from Roger Goodell to Will Smith at 1-2, May 2, 2012, Ex. I to Appl. (referring to Mr. Smith's alleged role in the “pay-for-performance/bounty” program, including “funding” and “offer[ing] significant sums toward it).

² The NFL is a repeat offender in playing “gotcha” with the careers of NFL players. See Findings of Fact, Conclusions of Law, and Order for Judgment, FOF ¶ 154, Williams v. NFL, 2010 WL 1793130 (Minn. 4th Dist. May 6, 2010), Greenspan Decl. Ex. B (finding that an NFL executive responsible for the “bounty” investigation had previously deliberately failed to warn NFL players that a banned and dangerous substance was secretly contained in an over-the-counter product innocently used by players, and that “Birch was playing a game of ‘gotcha.’”).

354 F. App'x 848, 852 (5th Cir. Nov. 20, 2009). The answer is clearly “yes” – and will remain so no matter what the Commissioner rules in his arbitration award. Long ago, the Commissioner chose to abandon any semblance of impartiality, making it impossible to retreat from his promise to punish the Players with “unprecedented discipline” – a reality underscored by his re-imposition of virtually the same punishments that were set aside by the CBA Appeals Panel.

Second, the Commissioner’s arbitration award will also be defective if – and, by all accounts, when – the NFL again denies the Players the basic procedural safeguards and fairness that industrial due process implicitly requires in all labor arbitrations, and that the CBA expressly requires in Article 46. Specifically, the Players have the right to access, among other things, all documents the NFL has relied upon (including exculpatory evidence), and also to cross-examine their accusers at the arbitration hearing. The NFL ignored anything resembling these requirements of fundamental fairness at the prior arbitration and has indicated it will do so again. Although the Commissioner’s evident partiality independently requires vacatur, the NFL’s sham process will provide an additional legal ground for doing so.

Third, to the extent the Commissioner upholds any discipline for Mr. Fujita, it will defy the “essence of the agreement.” As shown below, there is no rational interpretation of the NFL Constitution & Bylaws that could support the Commissioner’s brand new, manufactured charge against Mr. Fujita. Notwithstanding the Commissioner’s determination to suspend each Player for something, the Fifth Circuit requires vacatur of arbitration awards that reflect the arbitrator’s “own brand of industrial justice.” Delta Queen Steamboat Co. v. Dist. 2 Marine Eng’rs Beneficial Ass’n, 889 F.2d 599, 602 (5th Cir. 1989).

It is time for the Court to take this matter out of the hands of an evidently partial arbitrator and place it in those of a neutral arbitrator who can finally facilitate a fair resolution of

this matter.³

STATEMENT OF FACTS⁴

A. The Commissioner Publicly Condemned The Players Before He Even Issued Any Discipline Or First Arbitrated The Alleged Conduct

Even before issuing the Players' initial discipline on May 2, 2012, the Commissioner commenced a public relations campaign against the Players for their alleged role in the purported "bounty" scheme without any regard for his responsibilities as an arbitrator. See, e.g., Interview by Adam Schefter with Roger Goodell, NFL Commissioner (Mar. 21, 2012) (The "punishment is designed to let people know that we are going to hold them accountable and responsible for what goes on in their organizations. . . . [N]ot only on the team level but also with the players.");⁵ Interview by Rich Eisen with Roger Goodell, NFL Commissioner (Mar. 21, 2012) ("I don't think you can be too hard on people that put at risk our players' health and safety. That is a critical issue for us We always protect that.");⁶ Consent Mot. to Take Judicial Notice (Rec. Doc. 98); see also Appl. ¶¶ 47-50.

The day after he first issued discipline, the Commissioner employed the NFL's outside counsel to hold a press call, during which she characterized the purported "pay-for-performance/bounty program" as "undisputed" and "as egregious as you can get," the charges as "overwhelmingly supported" by evidence, and the Players' right to confront their accusers as "a

³ Given his substantial familiarity with the issues, and impeccable reputation for fairness, the Players would be willing to stipulate to Magistrate Knowles serving as the arbitrator if he is available and willing.

⁴ Plaintiffs/Petitioners respectfully refer this Court to their prior submissions for a complete picture of the facts in this case up to the August 10, 2012 hearing on the NFLPA's Application to Vacate the Commissioner's Arbitration Award. See Appl. to Vacate (No. 12-cv-01744, Rec. Doc. 1); Mem. of Law in Opp'n to Defs.' Mot. to Dismiss, Or, In the Alternative for Summary Judgment (Rec. Doc. 104), and Plaintiffs/Petitioners' LR 56.2 Statement of Disputed Material Facts (Rec. Doc. 104-1).

⁵ <http://www.blogandtackle.net/2012/03/21/nfl-commissioner-roger-goodell-interviews-on-nfl-network-and-espn-march-21/>.

⁶ <http://www.nfl.com/news/story/09000d5d827c28ff/article/commissioner-goodell-says-nfl-was-misled-in-bounty-probe>.

red herring.”⁷ The NFL’s outside counsel also trumpeted her review of more than 18,000 documents and 50,000 pages – virtually none of which have been disclosed to the Players. And, the NFL issued a press release that said: “The evidence clearly showed that the players being held accountable today willingly and enthusiastically embraced the bounty program.” E.g., Press Release, NFL, Four Players Suspended for Participation in Saints’ Pay-for-Performance/Bounty Program (May 2, 2012).⁸

The Commissioner’s and the NFL’s public statements put the world on notice that, in the view of the Commissioner and the NFL, the only acceptable discipline for the Players’ alleged conduct would be of the utmost severity – making it essentially impossible to retreat from this position if the evidence presented at the arbitration proceedings so warranted.

B. The Commissioner Conducts A Sham Arbitration And Continues To Demonstrate His Evident Partiality

This Court is very familiar with the prior arbitration proceedings before Commissioner Goodell, which violated the essence of the CBA and basic principles of industrial due process. (See Appl. ¶¶ 85-125.) As the Court stated:

I think the proceedings were neither transparent nor fair. . . . I think the refusal to identify the accusers, much less have them at the hearing to be cross-examined, to look at biases, flaws in their testimony, and 18,000 documents that apparently were relied upon by Mr. Goodell, less than 200 were actually provided to you, many of them redacted. . . . [The Players] were thwarted at every time by Mr. Goodell’s refusal to provide you meaningful access to witnesses and to documents.

(Appl. to Vacate Hr’g Tr. 8:15-25, Aug. 10, 2012.) Even in the weeks after the NFLPA filed its Application to Vacate the prior award, the Commissioner continued his campaign to convict the Players in the court of public opinion, e.g.:

⁷ Tr. of Player Discipline Conference Call with Mary Jo White, May 3, 2012, Ex. L to Appl.

⁸ <http://nflabor.files.wordpress.com/2012/05/5-2-12-saints-players1.pdf>.

- “We believe that the facts are clear that this issue was ongoing in the bounty case with the Saints and that we responded appropriately.”⁹
- “Listen, the facts are clear. There was a bounty system in place. . . . We don’t reward players for hurting people or taking them off the field, and that’s a bounty. And there are accusations even beyond that. So, it’s clear this was in place, and we’re not going to tolerate it.”¹⁰
- “As a league, we will ensure that the prohibition against bounties is clearly understood and consistently enforced. Period.”¹¹

C. The Appeals Panel Vacates The Commissioner’s Arbitration Award

While the NFLPA’s Application to Vacate was sub judice, the CBA Appeals Panel reviewed System Arbitrator Burbank’s decision deferring jurisdiction over the alleged pay-for-performance scheme to the Commissioner. On September 7, 2012, the Appeals Panel issued a unanimous decision vacating the Commissioner’s discipline because it usurped the System Arbitrator’s exclusive jurisdiction to arbitrate (and, if appropriate, impose fines for) pay-for-performance conduct. (See Summary Decision of the CBA Appeals Panel at 4, Sept. 7, 2012, Greenspan Decl. Ex. C.) Specifically, the Appeals Panel held that “the Commissioner would have exclusive jurisdiction to impose penalties for the players’ agreement to seek to injure opposing players,” if any, but not for “an agreement to receive (and possibly fund) payments from the pool . . . (whether for licit or illicit behavior).” (Id. at 3.) The Panel concluded: “[t]o the extent that any portion of the discipline previously imposed was ascribed to the undisclosed compensation aspects of the program, any re-imposed discipline should be adjusted accordingly.” (Id. at 4.)

⁹ Brian McIntyre, Roger Goodell talks role in ‘bounty’ scandal discipline, *Around the League*, Aug. 3, 2012, <http://www.nfl.com/news/story/09000d5d82b04878/article/roger-goodell-talks-role-in-bounty-scandal-discipline>.

¹⁰ Marc Sessler, Roger Goodell: I think Saints want to move on now, *Around the League*, Aug. 5, 2012, <http://www.nfl.com/news/story/0ap100000046143/article/roger-goodell-i-think-saints-want-to-move-on-now>.

¹¹ Letter from Roger Goodell to NFL Fans (Aug. 31, 2012), <http://nflabor.files.wordpress.com/2012/08/8-31-12-commissioner-to-fans.pdf>.

Upon receiving the Appeals Panel's summary decision, the NFLPA reiterated to the NFL its position that if the Commissioner were to re-impose any discipline, and in the event the Players wished thereafter to appeal, the Commissioner would be unable to serve as arbitrator because of his demonstrated evident partiality. The NFLPA also reiterated its requests for the CBA procedures and industrial due process the Players previously had been denied. (See Letter from Tom DePaso to Jeffrey Pash, Sept. 7, 2012; Letter from DeMaurice F. Smith to Roger Goodell, Sept. 10, 2012, Greenspan Decl. Exs. D and E, respectively.) The NFL responded simply by stating that "each player will have the right to appeal any [re-imposition of] discipline to the Commissioner pursuant to Article 46 of the CBA." (Letter from Adolpho A. Birch III to Tom DePaso at 1, Sept. 10, 2012, Greenspan Decl. Ex. F.)

On October 4, the Appeals Panel issued its full-length Opinion. (Appeals Panel Opinion, Oct. 4, 2012, Greenspan Decl. Ex. G.) The Panel restated its conclusion that the Commissioner's exclusive jurisdiction is limited to considering and punishing any actual "agreement to injure" that may have existed, and that the "part of the program that provided for undisclosed payments to players, whether for legitimate or illegitimate plays, falls within the explicit terms of Article 14 and lies within the [System Arbitrator's] exclusive jurisdiction." (Opinion at 8-9 (emphasis added).) This Opinion not only underscores the limited reach of Commissioner Goodell's conduct detrimental powers, but also demonstrates how far afield the Commissioner has gone from his circumscribed authority in re-imposing substantially the same suspensions on the Players for the same alleged conduct.

D. The Commissioner And NFL Continue To Flaunt Fundamental Fairness

In connection with the Commissioner purportedly re-determining whether there was any basis to impose discipline on the Players, the Players agreed to meet with the Commissioner to

discuss the allegations. Unfortunately, those meetings quickly demonstrated that the NFL, despite its promises and representations, had no intention of changing its ways.

For starters, rather than engaging the Players in an open dialogue with an open mind, the Commissioner had former U.S. Attorney Mary Jo White conduct a cross-examination-style interrogation of the Players documented by a court reporter. The obvious intent of this style of questioning was to try to control the Players' statements rather than allow them an opportunity to fully recount their understandings and recollections of Gregg Williams's "pay-for-performance/bounty" program. Each Player unequivocally denied that there was any "intent-to-injure" component of Coach Williams's program in general, much less specific "bounties" to injure individual players. Each Player also unequivocally denied that he had taken any actions to agree to injure or encourage others to injure any NFL players.

During these September meetings, the NFL attempted to surprise the Players with previously undisclosed evidence – despite numerous requests from the NFLPA to provide such evidence dating back to at least April.¹² Among other things, the NFL unveiled declarations from Gregg Williams and his former assistant, Mike Cerullo. (See Decl. of Mike Cerullo, May 22, 2012, Greenspan Decl. Ex. H; Decl. of Gregg Williams, Sept. 14, 2012, Greenspan Decl. Ex. I.) The Williams Declaration, which the NFL obtained just days before the Player meetings (despite having repeatedly declined to make Coach Williams available to the Players), contains exculpatory information corroborating the Players' statements about the program:

[I]t was never my intent to cause our opponents to be injured.

* * *

In addition, if a penalty were called on a play, no payment would be made for anything that happened on that play Therefore, it was my view

¹² See Letters from Heather M. McPhee to Jeff Pash, Apr. 9, 2012, Ex. E to Appl.; Letter from Heather M. McPhee to Commissioner Roger Goodell, June 11, 2012, Ex. N to Appl.; Letter from Heather M. McPhee to Roger Goodell, June 14, 2012, Ex. O to Appl.

and my intention that we were only encouraging clean, aggressive hits within the rules of the NFL . . . we did not intend to incentivize and did not make payments from the pool for illegal hits or on-field misconduct. While I understood that the pool payments were payments prohibited by NFL rules, they were not payments intended to reward on-field misconduct.

(Williams Decl. ¶¶ 7, 15.) Coach Williams’s declaration expressly states that not only had he “previously provided the information contained in this Declaration . . . to NFL investigators,” he had also provided them with “other factual details not set forth herein,” i.e., information concealed from the NFLPA and the Players to this day. (Williams Decl. ¶ 16 (emphasis added).)

With respect to Mr. Cerullo’s declaration, the NFL obtained it five months ago (on May 22, 2012), relied on it in the Commissioner’s initial arbitration award, but never disclosed it to the NFLPA and the Players as the CBA and industrial due process required.

It is now evident that Coach Williams and Mr. Cerullo are the primary sources of the NFL’s purported “bounty evidence.” It is clear from the face of this so-called evidence, however, that it cannot be a credible basis for the Commissioner’s claim that any of the Players participated in, or covered up, an “intent to injure” scheme. Not only does Coach Williams affirmatively deny any such “agreement to injure” aspect of his program (supra), but Williams’s and Cerullo’s statements about one or two alleged player specific “bounties” are overwhelmingly refuted by the statements and testimony of scores of players and Coach Joe Vitt, who denied that any player-specific bounty was offered.¹³ Moreover, the Williams and Cerullo Declarations contradict one another other in material ways. (Compare Cerullo Decl. ¶ 13 (“I personally collected the money that Mr. Vilma left on a table at the front of the room and subsequently gave

¹³ See, e.g., TRO Hr’g Tr. 30:7-31:11; 58:20-24; 84:10-12; 84:22-85:9; 92:22-93:10; 124:11-125:9; 149:14-19; 159:5-12 (July 26, 2012); see also Decl. of Joe Vitt ¶ 4, July 17, 2012 (Rec. Doc. 52) (refuting that “the Saints ever had a Bounty Program or that any member of our Defense, including Mr. Vilma, ever placed a bounty on an opposing player and set out to injure anyone or to encourage any other Saints player to injure anyone”).)

it to Mr. Williams for safekeeping.”) with Williams Decl. ¶ 12 (“I was never given any money by anyone because of a pledge related to the injury of a particular player”); compare Cerullo Decl. ¶ 13 (alleging that Mr. Vilma pledged \$10,000 for anyone who knocked Cardinals quarterback Kurt Warner out of the 2009 NFC divisional playoff game) with Williams Decl. (alleging no such thing). It is startling that the Commissioner has damaged the careers and reputations of the Players on such scant, contradictory and incredible sources.

The more information the NFL discloses, the more untenable the Commissioner’s conclusions become. And, yet, there are mountains of evidence the NFL still has not revealed – from the mysterious “18,000 documents,” to transcripts of the Saints coaches’ and management’s appeal hearings, to transcripts or other records of the NFL’s witness interviews.

E. The Commissioner Re-Imposes Discipline And Declines To Recuse Himself Or Agree To Conduct A Fundamentally Fair Hearing

On October 9, 2012, Commissioner Goodell issued new discipline letters to Messrs. Fujita, Hargrove, Smith and Vilma imposing effectively the same suspensions as his prior discipline (collectively, suspensions for 28 instead of 31 total games). (See Letters from Roger Goodell to Scott Fujita, Anthony Hargrove, Will Smith, and Jonathan Vilma, Oct. 9, 2012, Greenspan Decl. Exs. J, K, A, and L, respectively.)

As to Mr. Smith, the Commissioner made absolutely no change to his previously imposed four-game suspension despite the fact that the previous discipline was based at least in part on conduct that the Appeals Panel found was not within the Commissioner’s jurisdiction. The Commissioner claimed that Mr. Smith “endorsed and agreed to, and contributed substantial sums toward, a program that incentivized, encouraged and paid players to cause cart-offs and knockouts,” referring to this as “the agreement to attempt to injure or disable opposing players.” (Smith Letter at 3.) The Commissioner’s discipline letter prominently relied upon yet another

document never before disclosed by the NFL – not even when the Commissioner met with Mr. Smith a few weeks beforehand. (See id. at 2-3 (citing “Saints internal documents”).) Even more brazenly, the NFL immediately posted this new document on its website – in another demonstration of subordinating due process to public relations – so that this new purported evidence was publicly disclosed at the same time it was first disclosed to the NFLPA and Mr. Smith.¹⁴

With respect to Mr. Fujita, the Commissioner begrudgingly concluded that he did not contribute any funds to Coach Williams’s pay-for-performance/bounty pool (Fujita Letter at 3 (“I have not found that you directly contributed to the bounty pool.”). Although one would expect that Mr. Fujita would not face a suspension if even the Commissioner could no longer claim that he participated in the alleged “agreement to injure,” the Commissioner nonetheless suspended him for one game based upon Mr. Fujita’s acknowledgement that he occasionally rewarded teammates for legal “big plays” – such as forced fumbles, sacks and other indisputably legitimate performance. To justify this suspension, the Commissioner, for the first time, cited two provisions of the NFL Constitution & Bylaws which address the behavior of League or team officers and employees offering cash incentives to players if they win specific games; the provisions say nothing about players offering incentives to other players for legitimate plays. (See Point III, infra.) This trumped up, results-oriented determination is further indication of the Commissioner’s inability to review these matters in any objectively impartial fashion.

As for Mr. Hargrove, the Commissioner reduced his eight-game suspension by a single game. (See Hargrove Letter at 2.) In doing so, the Commissioner flatly ignored Mr. Hargrove’s explanation that he had not lied to NFL investigators about the existence of a bounty on Brett

¹⁴ NFL Memo to Clubs and Documents Related to Saints’ Bounty Matter, “Document 2” (posted Oct. 9, 2012), <http://nflabor.files.wordpress.com/2012/10/10092012-document-2.pdf> .

Favre because, quite simply, there had been no such bounty. (See id.) In a nutshell, the Commissioner determined that Mr. Hargrove and the scores of players who have denied any bounty on Brett Favre are “not credible,” instead choosing to rely upon the statements of Williams and Cerullo, the former of whom needs Commissioner approval to ever coach again in the NFL, the latter of whom was unceremoniously fired by the Saints, and who contradict one another on this very issue.¹⁵

Finally, Mr. Vilma’s season-long suspension was unchanged, again making clear that the Commissioner ignored the CBA Appeals Panel ruling and is unable to act objectively fair with respect to this matter. (See Vilma Letter at 4.)

F. Commissioner Arbitration Redux

The Players timely noticed an arbitration appeal, requesting that: (i) the Commissioner recuse himself in favor of a neutral arbitrator; (ii) in the event he would not recuse himself, that the NFL agree not to impose any suspensions upon the Players until the Court has an opportunity to rule; and (iii) the NFL agree to provide the Players access to the documents and witnesses they previously had been denied. (See Letter from Tom DePaso to Commissioner Goodell, Oct. 11, 2012 and E-mail from David Greenspan to Gregg Levy and Benjamin Block (Oct. 14, 2012, 14:47 EST), Greenspan Decl. Exs. M and N, respectively.) The Commissioner has not agreed to any of these requests. (E-mail from Adolpho A. Birch III to David Greenspan and Tom DePaso (Oct. 14, 2012 20:15 EST), Greenspan Decl. Ex. O.)

¹⁵ See Mem. of Decision at 7, Ex. D to Appl.; Amended Complaint ¶¶ 118-125 (Rec. Doc. 26).

ARGUMENT

I. THE COMMISSIONER'S ARBITRATION AWARD MUST BE VACATED ON THE INDEPENDENT GROUND OF HIS EVIDENT PARTIALITY

A. The Evident Partiality Test

As the NFL has conceded, the Commissioner's role as a CBA arbitrator carries with it the requirement that he conduct himself and oversee the proceedings free from evident partiality. (Opp'n Br. at 9; Appl. to Vacate Hr'g Tr. at 27-28.) Mr. Goodell's position as League Commissioner does not excuse his obligation to refrain from evidently partial conduct, nor does it "immunize" him from judicial scrutiny. NHLPA v. Bettman, 1994 WL 738835, at *13 (S.D.N.Y. Nov. 9, 1994) (decision relied upon by NFL, see, e.g., Mem. in Support of Defs.' Mot. to Dismiss, Or, In the Alternative, For Summary Judgment (Rec. Doc. 64-1)).

The objective standard for finding evident partiality in this circuit is whether "a reasonable person would have to conclude that [the arbitrator] was partial to one party." Householder Group, 354 F. App'x at 852. Arbitrator conduct that creates "a reasonable impression of bias" rises to the level of evident partiality where it "creates a strong impression that [the arbitrator] ha[s] already decided the disputed issues in the [] [a]rbitration before it beg[ins]." Dealer Computer Servs., Inc. v. Michael Motor Co., Inc., 761 F. Supp. 2d 459, 465 (S.D. Tex. 2010), reversed on other grounds, 2012 WL 3317809 (5th Cir. Aug. 14, 2012).

Although any judicial determination of evident partiality is necessarily fact intensive and case specific, the circumstances here are analogous to those in Morris v. New York Football Giants, in which the NFL Commissioner was disqualified from serving as an arbitrator, and the court appointed a neutral arbitrator in his place. See 575 N.Y.S.2d 1013 (Sup. Ct. 1991). In Morris, the court found that the Commissioner's prior advocacy to the Solicitor General's Office of the same legal position he was supposed to arbitrate demonstrated "evident partiality" on that

subject. Id. at 1016-17. Lobbying the government on a legal position important to the NFL may have been part of Mr. Tagliabue's job, but it still disqualified him from arbitrating that issue because "[t]o find for plaintiffs herein, the Commissioner would have to reverse certain positions he previously strongly advocated." Id. Here, too, the Commissioner cannot impartially arbitrate a dispute on which he has staked out positions from which he is not ever going to retreat.

B. The Commissioner's Evident Partiality Is Well-Established

As demonstrated above, and previously in the NFLPA's Application to Vacate and Memorandum of Law in Opposition to Defendants' Motion to Dismiss, the record is unambiguous that the Commissioner has rendered himself evidently partial by choosing to engage in a comprehensive publicity campaign against the Players – making it clear that their fair treatment will be secondary to the NFL's own agenda about making a public statement against (non-existent) bounties. (See also Consent Mot. to Take Judicial Notice (Rec. Doc. 98); Order Granting Mot. To Take Judicial Notice (Rec. Doc. 102.)

Indeed, having already declared – even before the first arbitration – that “the evidence is quite clear that the players embraced this,” how could any reasonable observer not conclude that the Commissioner is locked into this conclusion?¹⁶ Similarly, from the outset, Commissioner Goodell has repeatedly proclaimed that the penalties levied on the Players must send a “strong and lasting message” and make an example of them: “It was clear to me when we discovered there was a bounty program that we had to take a strong stand We made it clear we weren't going to accept it. We wanted to make sure if anybody decided this was the way to go they understood the consequences were very real.”¹⁷ Even after the NFLPA commenced these

¹⁶ Interview by Rich Eisen with Roger Goodell, NFL Commissioner (Apr. 24, 2012).

¹⁷ Intersport Activation Summit: Goodell Sits For A Wide-Ranging Q&A, Sports Business Daily (June 1, 2012).

proceedings, the Commissioner's public relations campaign continued: "We believe that the facts are clear that this issue was ongoing in the bounty case with the Saints and that we responded appropriately."¹⁸ No objective person could conclude that the Commissioner (or anyone selected by the Commissioner) remains capable of conducting an impartial arbitration that could yield an outcome inconsistent with the Commissioner's public statements.

The Commissioner's evident partiality has not been not limited to his words, but also includes his course of conduct. A prime example is the Commissioner's decision to invite reporters into the NFL's offices immediately following the Players' initial arbitration hearing to view the same presentation by the NFL's outside counsel that she made before the Commissioner; his brazen attempt to convince the media of the propriety of a decision he had yet to issue, in an arbitration that had yet to conclude, rendered him unable to issue an unbiased decision then and now.¹⁹ This behavior continued just last week, when the Commissioner again prioritized public relations over process by posting the very documents underlying his latest disciplinary decisions – which had never before been disclosed to the NFLPA or the Players – to the NFL's website minutes after re-imposing the discipline. (Supra.)

¹⁸ Brian McIntyre, Roger Goodell talks role in 'bounty' scandal discipline, Aug. 3, 2012.

¹⁹ See, e.g., In re Boston's Children First, 244 F.3d 164, 170 (1st Cir. 2001) (disqualifying judge for comments to a reporter that the case before her was "a more complex case" than another case the reporter had described and holding that "the very rarity of such public statements, and the ease with which they may be avoided, make it more likely that a reasonable person will interpret such statements as evidence of bias") (emphasis added). In United States v. Cooley, for example, the Tenth Circuit ordered disqualification of a judge presiding over criminal trials for abortion protesters because the judge had appeared on "Nightline" prior to the protests to discuss his preliminary injunction ordering that the abortion clinics remain open. 1 F.3d 985, 990, 995 (10th Cir. 1993). The appellate court held that "in deliberately making the choice to appear in such a forum at a sensitive time to deliver strong views on matters which were likely to be ongoing before him," the judge "unavoidably created the appearance that [he] had become an active participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator." Id. at 995; see also Broadman v. Comm'n on Judicial Performance, 18 Cal. 4th 1079, 1104 (1998) ("By making public comments in an attempt to justify and defend his decisions while those decisions were pending on appeal, petitioner adopted the role of an advocate. Such actions would appear to an objective observer to be 'prejudicial to public esteem for the judicial office.'").

That Commissioner Goodell will stop at nothing to substantiate his discipline is also demonstrated by the conflicted statement he made to this Court about his purported deliberation process. Mr. Goodell attested in a declaration: “I had intended to discipline the Saints players at the same time that I disciplined the Saints franchise and non-player employees for their respective roles in the pay-for-performance/bounty program.” (Decl. of Roger Goodell ¶ 2, Aug. 16, 2012 (Rec. Doc. 113-1).) However, he recently told the 32 NFL Clubs something quite different: “After imposing discipline on the club and non-player employees, I considered what, if any, discipline to impose on players.” (Mem. from Commissioner Goodell to Chief Executives and Club Presidents (Oct. 9, 2012), Greenspan Decl. Ex. P.)

The Commissioner’s refusal to provide the Players with even a modicum of fair process, and his re-imposition of virtually the same penalties that the CBA Appeals Panel vacated, further establish his evident partiality in this matter. That bias is indelibly entrenched, and any arbitration award issued by the Commissioner will be fatally infected as a result. There is nothing that the Commissioner can do now to change this record.

C. The Court’s Authority To Appoint A Neutral Arbitrator

Upon a finding of evident partiality, the Court has the authority – both under the Federal Arbitration Act (“FAA”) and Labor Management Relations Act (“LMRA”) (which looks to the FAA for guidance) – to vacate the Commissioner’s arbitration award and to appoint a neutral arbitrator in his place. See, e.g., Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067, 1068 n.2 (2d Cir. 1972) (rejecting claim that court “had no power to direct the substitution of a neutral arbitrator for the disqualified Commissioner of the American Basketball Association” as “typical of other attempts to emasculate arbitration procedures under the federal act” and noting that “[t]his ruling in favor of a neutral arbitrator was, of course, designed to

insure a fair and impartial hearing); Stroehmann Bakeries, Inc. v. Local 776, Int’l Bhd. of Teamsters, 969 F.2d 1436, 1446 (3d Cir. 1992) (vacating award for evident partiality and remanding to neutral arbitrator for a de novo hearing); Grand Rapids Die Casting Corp. v. Local Union No. 159, 684 F.2d 413 (6th Cir. 1982) (remanding for additional arbitral proceedings and recommending new arbitrator because prior arbitrator deprived the parties of the impartiality to which they were entitled); Morris, 575 N.Y.S.2d 1013 (disqualifying NFL Commissioner as arbitrator and appointing a neutral); see also 9 U.S.C. § 5 (under the FAA, where a procedure for appointing a neutral replacement is not expressly provided by the arbitration agreement, “the court shall designate and appoint an arbitrator . . . who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein”).²⁰

Section 301 of the LMRA, 29 U.S.C. § 185, similarly affords federal courts wide latitude in resolving contractual disputes in a manner that advances the goals of federal labor policy. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957) (noting that courts may be called upon to exercise “judicial inventiveness” in Section 301 cases); Int’l Woodworkers of Am. v. DAW Forest Prods. Co., 833 F.2d 789, 794 (9th Cir. 1987) (reversing the district court in a Section 301 case, finding that it erred by failing to consider a broader range of possible remedies). The Fifth Circuit applies these principles in labor arbitrations such as this one:

It is important for labor peace that the processes of arbitration not be permitted to fail. To that end the courts are authorized, indeed are under a duty, to exercise a ‘range of judicial inventiveness. . . . Defendant’s final point is that this case cannot be sent to arbitration because no arbitrator has been named under the 1951

²⁰ See also, e.g., Trade & Transp., Inc. v. Natural Petroleum Charterers Inc., 931 F.2d 191, 196 (2d Cir. 1991) (where parties’ agreement was “silent as to the method by which a replacement arbitrator should be designated, it was within the authority conferred by the Act for the court to appoint to the panel [a] new nominee”); Hart v. Overseas Nat’l Airways Inc., 541 F.2d 386, 394 (3d Cir. 1976) (where “a defect in the proceedings or bias on the part of the referee is found . . . , the district court should formulate an appropriate remedy . . . including, if necessary, a procedure whereby a new arbitrator is selected”); Third Nat’l Bank v. Wedge Group Inc., 749 F. Supp. 851, 855 (M.D. Tenn. 1990) (finding arbitrator exhibited “evident partiality” and appointing a neutral arbitrator under 9 U.S.C. § 5).

memoranda. But this defect can be and should be cured by this Court adopting as a guiding analogy the practice under § 5 of the Federal Arbitration Act, 9 U.S.C. § 5. If the parties are unable within ten days to agree upon an arbitrator, this Court will appoint one. Such a solution has now been approved by the Supreme Court.

Deaton Truck Line Inc. v. Local Union 612, 314 F.2d 418, 423 (5th Cir. 1962) (affirming order of specific performance to arbitrate two labor disputes); see also United Ass'n. of Journeymen v. Bechtel Constr. Co., 128 F.3d 1318, 1323 (9th Cir. 1997) (“We agree with the Third Circuit and the Fifth Circuit. Preservation of labor peace requires that district courts have some flexibility in fashioning decrees to enforce agreements to arbitrate labor disputes.”) (affirming district court’s appointment of an arbitrator from list of names submitted by the parties where parties were otherwise unable to agree).

Here, the Court should vacate the Commissioner’s arbitration award on evident partiality grounds and order the parties to agree to a neutral arbitrator within seven days or appoint one itself. As previously noted, the NFLPA and Players would be willing to stipulate to the appointment of Magistrate Judge Knowles to serve in this capacity given his familiarity with the facts and issues to be arbitrated.

II. THE COMMISSIONER’S FUNDAMENTALLY UNFAIR ARBITRATION PROCEEDINGS CONSTITUTE AN ADDITIONAL GROUND FOR VACATUR

The NFL has indicated that the procedures to be employed in the Commissioner’s arbitration will be more of the same – e.g., no production of the 18,000 documents the Commissioner relied upon, no disclosure of the NFL’s records of witness interviews that it conducted, no disclosure of the transcripts from the coaches’ and management’s appeal hearings presided over by the Commissioner, no disclosure of any other exculpatory materials, and no ability for the Players to confront their accusers at the arbitration hearing. The Players will thus, once again, be subject to a “fundamentally unfair” arbitration requiring vacatur. Specifically, the Commissioner’s arbitration award will violate principles of industrial due process – i.e., the

implicit requirements of fairness that apply to all labor arbitration proceedings. In addition, his arbitration award will be borne of a process in total disregard of express provisions of the CBA, further compelling vacatur under the governing “essence of the agreement” standard.

A. The Commissioner’s Denial Of Industrial Due Process

1. The Players’ Inability To Confront Their Accusers

The deprivation of access to a crucial witness is well-recognized as a basis on which to overturn employee discipline. See, e.g., Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20-21 (2d Cir. 1997) (vacating arbitration award and finding that “panel’s refusal to continue the hearings to allow [witness] to testify amount[ed] to fundamental unfairness and misconduct,” particularly where “[witness] was identified several times throughout the testimony”). Indeed, the ability of the Players to have a meaningful and balanced opportunity to confront their accusers is critical to a fair arbitral process. See Elkouri & Elkouri, How Arbitration Works 356 (Kenneth May ed., 6th ed. Supp. 2010) (the right to confront and cross-examine an adverse witness in discipline or discharge cases is a part of arbitral “due process” jurisprudence); see also, e.g., Akron City Hospital, 113 Lab. Arb. Rep. (BNA) 146, 151 (1999) (Chattman, Arb.) (“While a disciplinary process is not subject to the same Due Process protections as in a criminal trial, there exists an ‘industrial version’ of Due Process that sets the standards of fair dealing with employees . . . [including] [t]he right of an accused to confront his accusers.”) (citation omitted).

The right to confront accusers is critical here, where, as set forth above, the Players’ accusers amount to two first-hand witnesses to the events in question – Williams and Cerullo – whose statements contradict each other and are overwhelmingly refuted in material respects by every single player who has testified or given statements in this matter. In addition to cross-examining Williams and Cerullo, the NFLPA and the Players have the industrial due process

right to confront the NFL investigators who conducted the Commissioner’s investigation, as well as any other person who was part of the Commissioner’s fact-finding process.

2. The Commissioner’s Refusal To Disclose All Potentially Exculpatory Evidence

Employees are denied industrial due process when they are not permitted access to potentially exculpatory evidence. See, e.g., Hamilton City Sch. Dist., 122 Lab. Arb. Rep. (BNA) 463, 470-71 (2006) (Dean, Arb.) (“Where an employer denies the union access to potentially exculpatory evidence or destroys such evidence, it will be precluded from exercising its disciplinary authority . . .”). Witnessing the NFL self-servingly, delinquently, and selectively disclose additional evidence in recent weeks – such as the Gregg Williams declaration attesting that “it was never my intent to cause our opponents to be injured” – it has become more apparent than ever that the NFL has been withholding exculpatory evidence from the NFLPA and the Players. (Williams Decl. ¶ 15.) The NFL cannot claim it only recently obtained Coach Williams’s testimony that his program was not an “agreement to injure” because his declaration expressly states that he had “previously provided the information contained in this Declaration . . . to NFL investigators.” (Id. ¶ 16.) Equally disturbing – and violative of the Players’ industrial due process rights – Coach Williams attests that he has provided the NFL with “other factual details not set forth herein [in his declaration].” (Id. (emphasis added).) One can only assume that these “other factual details” consist at least in part of exculpatory information; if not, the NFL surely would have disclosed it. The bottom line is that the NFL’s repeated and demonstrated failure to disclose materials plainly relevant to the Players’ efforts to exonerate themselves is a denial of industrial due process.²¹

²¹ Principles of fundamental fairness and industrial due process also require that arbitrators account for mitigating factors in their decisions. (See Appl. ¶ 118.) Such mitigating factors, in turn, include the aptly named and well-established “management-also-at-fault” doctrine. (Id. ¶¶ 115-125.) Here, the

B. The Commissioner's Total Disregard For Express CBA Process Rights

In addition to the Players' implicit, industrial due process rights, the CBA explicitly provides for essential player protections in Article 46 arbitrations, which the NFL has denied:

Discovery. In appeals [before the Commissioner], the parties shall exchange copies of any exhibits upon which they intend to rely no later than three (3) calendar days prior to the hearing. Failure to timely provide any intended exhibit shall preclude its introduction at the hearing.

(CBA, Art. 46, § 2(f)(ii).) The CBA also expressly affords players the right to be accompanied by counsel of their choosing at any Commissioner arbitration (id., Art. 46, § 2(b)), and the standard form NFL Player Contract appended to the CBA provides that the Commissioner may impose discipline “only after giving [the] Player the opportunity for a hearing.” (Id., App. A, NFL Player Contract ¶ 15.) The CBA provisions establishing the right of players to both a hearing and counsel carry with them the guarantee of a fair hearing.

As described above, the Commissioner's arbitration will once again defy these bargained-for CBA requirements. Accordingly, the Commissioner's arbitration award will fail to derive its essence from the CBA and must be vacated. See, e.g., Cont'l Airlines, Inc. v. Int'l Bhd. Of Teamsters, 391 F.3d 613, 619-20 (5th Cir. 2004) (arbitral board's interpretation of the parties' agreement failed to construe the agreement's plain terms by “read[ing] out” specific requirements and thus did not draw its essence from the parties' agreement). The “rule in [the Fifth Circuit], and the emerging trend among other courts of appeals, is that arbitral action contrary to express contractual provisions will not be respected” and that “federal courts are free to scrutinize [an arbitration] award to ensure that the arbitrator acted in conformity with the . . .

Commissioner's own investigation concluded that the alleged “pay-for-performance/bounty” program was “developed,” “administered,” “designed,” “implemented,” and “operated” by Saints coaches. (See id., NFL Security Report at 2, Ex. C to Appl.; Memorandum at 1-2, Ex. D. to Appl.; Player Discipline Letters at 1, Exs. G-I to Appl.) The NFLPA and the Players reserve their rights to seek to vacate the award on this ground as well.

collective bargaining agreement.” Delta Queen, 889 F.2d at 602, 604; see also Int’l Union of Operating Eng’rs v. Cooper Natural Res., Inc., 163 F.3d 916, 920 (5th Cir. 1999) (affirming vacatur because arbitrator disregarded his clear obligations under the contract). And, when an arbitrator goes beyond the four corners of the collective bargaining agreement, “vacation or modification of the award is an appropriate remedy,” and judicial deference afforded to the arbitrator’s ruling “is at an end.” Delta Queen, 889 F.2d at 602.

III. THE COMMISSIONER’S MANUFACTURED SUSPENSION OF MR. FUJITA ALSO VIOLATES THE ESSENCE OF THE AGREEMENT

In his discipline letter to Mr. Fujita, the Commissioner was finally forced to acknowledge that Mr. Fujita did not participate in Gregg Williams’s pay-for-performance pool. (See, e.g., Fujita Letter at 3 (“I have not found that you directly contributed to the bounty pool.”)²² What Mr. Fujita did acknowledge was that, on an individual basis, he would occasionally pay teammates for legitimate “big plays” such as sacks and forced fumbles – pledges that even the Commissioner does not (mis)characterize as encouraging injuries. (See id. at 1.) The Commissioner’s begrudging conclusion should have ended this matter for Mr. Fujita – but the Commissioner’s public comments and course of conduct have rendered him unable to retreat from his promise to make an example of each Player.

As a result, the Commissioner re-determined a one-game suspension for Mr. Fujita based on the entirely new theory that Mr. Fujita violated two provisions of the NFL Constitution & Bylaws never raised since the beginning of this matter. (See Fujita Letter at 3 (“[t]his conduct is itself a violation of Article IX, Sections 9.1(C)(8) and 9.3(F”).) But the cited Constitution &

²² For clarity, Mr. Fujita categorically denies that the “pay-for-performance/bounty” program was any sort of “agreement to injure” (e.g., Fujita Letter at 2), but he has further demonstrated that, no matter how the NFL characterizes Coach Williams’s program, he (Mr. Fujita) did not participate in it. (See id. at 1-2.)

Bylaws provisions cannot possibly apply to Mr. Fujita or any other NFL player. Rather, these provisions unambiguously apply only to League and Club employees:

No . . . officer or employee of the League shall: Offer or pay a player or coach, and no player or coach may receive any bonus, money, or thing of value, for winning any game played in the League. No club or any representative thereof, shall offer to pay, directly or indirectly, to a player, and no player shall receive, any bonus of any kind unless such a bonus provision is attached to and/or incorporated in the contract of such player.

* * *

No bonus may be paid to a player or players for winning a particular game; neither may remuneration or gifts of any kind other than those listed in the contract of a player be announced, promised, or paid directly or indirectly by a member club or by any person connected with or employed by a club.”).

(NFL Constitution & Bylaws, Art. IX, § 9.1(C)(8), § 9.3(F), Ex. KK-1 to NFL Opp’n Brief (Rec. Doc. 64-15).) Although the provisions prohibit payments to players, they do not, by their express terms, prohibit payments from players.²³ Accordingly, if the Commissioner’s arbitration award upholds any punishment of Mr. Fujita on the basis of a purported breach of these sections of the NFL Constitution & Bylaws, it will violate the “essence of the agreement.” Delta Queen, 889 F.2d at 604 (“arbitral action contrary to express contractual provisions will not be respected”); Cooper Natural Resources, 163 F.3d at 919 (vacating award where arbitrator “ignored the plain language of the contract”).

In his letter to Mr. Fujita, the Commissioner tries to circumvent the obvious inapplicability of these Constitution & Bylaws provisions by sleight of hand. While citing to these clauses as the basis for Mr. Fujita’s punishment, the Commissioner quotes language from an entirely different document (the 2009 League Policies for Players). (Fujita Letter at 3 (citing NFL Constitution & Bylaws as the basis of Mr. Fujita’s punishment while quoting the 2009

²³ Where the NFL sought to include player conduct in that prohibited by Article IX, it expressly did so. See, e.g., NFL Constitution & By-laws, Article IX, § 9.1(D) (“No player, coach, or manager shall, directly or indirectly, own stock or have any financial interest in the ownership or earnings of any member club”) (emphasis added).

League Policies for Players, which state that “[t]his restriction on clubs, which is called ‘the bounty rule,’ also prohibits players . . . from offering or accepting such a bonus”).) While this 2009 document may purport to prohibit player-to-player payments, the NFLPA never agreed to the League Policies for Players – they are just policies that the NFL unilaterally issued and are thus expressly superseded by the CBA. (CBA, Art. 2, § 1 (CBA trumps all conflicting provisions of NFL Constitution & Bylaws and NFL Rules).)

Further, as the CBA Appeals Panel and this Court have already recognized, the Commissioner has limited jurisdiction under the CBA and may not punish whatever behavior he pleases simply by labeling it “conduct detrimental.” (Appeals Panel Opinion at 7 (Commissioner’s “conduct detrimental” powers “are not unlimited”); Appl. to Vacate Hr’g Tr. 57:2-4 (“THE COURT: Does conduct detrimental just sort of vacate everything else that’s in the Collective Bargaining Agreement? That just seems not what was bargained for.”).) In particular, the Commissioner’s conduct detrimental authority is circumscribed by the NFL Player Contract, which is incorporated into the CBA and lists the specific types of conduct that would be detrimental to the sport, including throwing games, betting on games, associating with gamblers, or using or providing performance-enhancing drugs. (See CBA, App. A ¶ 15.) Although this list is not exhaustive, the CBA Appeals Panel held that the “conduct detrimental” “catch-all must be read in the context of specific types of conduct identified, and were the Commissioner to act unreasonably in applying Article 46, his decision would presumably be subject to review in the appropriate forum.” (Appeals Panel Opinion at 7.); see also In re Katrina Canal Breaches Litig., 495 F.3d 191, 218 (5th Cir. 2007) (“Under the canon of eiusdem generis, ‘where general words follow the enumeration of particular classes of persons or things, the

general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.”).

The occasional incentives offered by Mr. Fujita to teammates for indisputably legitimate “big plays” is plainly not the type of “conduct detrimental” exemplified in the Player Contract or the CBA, nor can the Commissioner ignore the actual language of the NFL Constitution & Bylaws provisions to make up conduct detrimental offenses that do not exist. Simply put, as an arbitrator, the Commissioner cannot “dispense his own brand of industrial justice.” Delta Queen, 889 F.2d at 602. To the extent the arbitration award upholds any punishment of Mr. Fujita, vacatur is required on this additional ground of violating the essence of the agreement.

CONCLUSION

As they have from the beginning, the Players merely seek to enforce their right to defend themselves before an arbitrator who is free from evident partiality, and as part of a process that is fair. The NFLPA and the Players respectfully request that this Court issue an order vacating Commissioner Goodell’s arbitration award and directing the parties to either agree upon a neutral arbitrator within seven days or to have such neutral immediately appointed by the Court.

Respectfully submitted this 15th day of October, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2012, a copy of the above and foregoing was served via the Court's CM/ECF system upon all counsel of record in these consolidated cases.

/s/ Joseph N. Mole