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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DREW ROSENHAUS, an individual,

Petitioner,

vs.

DESEAN JACKSON, an individual,

Respondent.

DESEAN JACKSON, an individual,

Cross-Petitioner,

vs.

DREW ROSENHAUS, an individual; JASON ROSENHAUS, an individual; ROSENHAUS SPORTS REPRESENTATIONS, INC., a Florida Corporation,

Cross-Respondents.

CASE NO. 2:14-cv-03154 MWF (JCGx)

REVISED POST-HEARING BRIEF OF PETITIONER AND CROSS-RESPONDENT DREW ROSENHAUS AND CROSS-RESPONDENTS JASON ROSENHAUS, AND ROSENHAUS SPORTS REPRESENTATIONS, INC.

Petitioner and Cross-Respondent Drew Rosenhaus and Cross-Respondents Jason Rosenhaus and Rosenhaus Sports Representation, Inc. (hereinafter "RSR") (hereinafter collectively "Rosenhaus Parties") by and through undersigned counsel, hereby file their post-hearing brief, as directed by the Court at the August 14, 2014 Hearing on the Petition to Confirm Arbitration Award and the Cross-Petition to Vacate Arbitration Award (the "Hearing"). The Post-Hearing Brief is Supported by the Dickieson Declaration and its fourteen exhibits - "A" through "N," including the Cornwell Declaration as Exhibit "A."

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A. PROCEDURAL BACKGROUND

On April 24, 2014, Drew Rosenhaus filed a routine petition seeking to confirm the Arbitration Award issued in an underlying National Football League Players Association ("NFLPA") arbitration proceeding captioned, *In The Matter of Arbitration Between Drew Rosenhaus and DeSean Jackson*, NFLPA Case No. 13-31 (the "Petition"). [D.E. 1]. On June 5, 2014, Cross-Petitioner DeSean Jackson ("Jackson") filed a cross-petition to vacate the arbitration award in the underlying NFLPA arbitration proceeding (the "Cross-Petition"). [D.E. 20]. At the Hearing on August 4, 2014, the Court determined that Arbitrator Roger Kaplan (the NFLPA assigned arbitrator in the underlying arbitration proceeding) did not exceed his power in issuing the Arbitration Award, and Jackson's weak allegations of partiality and/or bias were rejected. However, the Court asked the parties to submit post-Hearing "summary judgment type" briefs relating to the issue of "disclosure" concerning the scope of any relationship between Arbitrator Kaplan and the Rosenhaus Parties.

Pursuant to the Court's instruction, the Rosenhaus Parties file this post-Hearing brief to make a determination as to whether an evidentiary hearing and/or discovery is required on the limited issue of "disclosure." It is uncontested that the Rosenhaus Parties arbitrated a prior unrelated dispute before Arbitrator Kaplan and that the Rosenhaus Parties were obligated to pay one-half of the arbitration costs. That separate and unrelated arbitration matter was neither initiated nor filed by the Rosenhaus Parties, but by a former RSR employee, Danny Martoe ("D. Martoe"). This Brief concludes that the Rosenhaus Parties' payment of their half-share of the arbitration fee in the unrelated D. Martoe case does not create an impediment to the enforcement of the Arbitration Award in the Jackson case, even though Arbitrator Kaplan was the Arbitrator in both matters.

B. PRELIMINARY STATEMENT

The "disclosure" issue is comprised of three sub-issues and Jackson must prevail on all sub-issues to warrant a delay in confirming the Arbitration Award: (1) did Arbitrator Kaplan have a duty to disclose that he served as a neutral arbitrator and received ordinary compensation from a party in a separate, unrelated case; (2) do the totality of circumstances indicate that Jackson or his counsel had, or should have had, knowledge about the unrelated D. Martoe arbitration proceeding and the compensation received by Arbitrator Kaplan that was evenly shared by the parties; and (3) even if Jackson's legal counsel was unaware of Arbitrator Kaplan's involvement and compensation in the unrelated D. Martoe arbitration proceeding until after Jackson's evidentiary hearing, does the lack of notification by Arbitrator Kaplan rise to such a high level that would require some corrective action by this Court? The Rosenhaus Parties maintain that, not just one, but each of these sub-issues should lead the Court to the conclusion that the Arbitration Award must be confirmed without any further evidentiary hearing or discovery process.

As evidenced by the Declaration of David Cornwell (attached as **Ex. "A"** to the Dickieson Declaration, filed concurrently) and the totality of circumstances, it is implausible that Jackson, through his legal counsel and long-time NFLPA-certified Contract Advisor Steve Feldman ("Mr. Feldman"), was not aware of Arbitrator Kaplan's role in the D. Martoe arbitration proceeding, as the D. Martoe dispute was widely reported and Arbitrator Kaplan's alleged bias was previously challenged and resolved prior to the Jackson arbitration hearing in the widely publicized Terrell Owens legal dispute. Additionally, Jackson's position that Drew Rosenhaus arranged to have Arbitrator Kaplan serve as "his arbitrator" is simply untrue, which was originally explained to the Court in the Rosenhaus Parties' response to the Cross-Petition [D.E. 23]. D. Martoe filed a grievance against the Rosenhaus Parties and it was D. Martoe who filed the claim with the NFLPA requesting arbitration governed by NFLPA procedures. It was the NFLPA General Counsel who thereafter selected

Arbitrator Kaplan as the arbitrator for the D. Martoe arbitration proceeding. *See* Declaration of Cornwell, **Ex. A** at ¶ 3. The argument that the NFLPA General Counsel and the NFLPA Arbitrator would take action against a player member as a result of bias in favor of a non-member agent strains credulity and was rejected by the Court at the Hearing.

C. LEGAL STANDARD

The burden of establishing grounds for vacating an arbitration award is on the party seeking it. *Employers Ins. v. National Union Fire Ins. Co.*, 933 F.2d 1481, 1489 (9th Cir. 1991). A party seeking relief under 9 U.S.C. § 10(a)(2) must show an arbitrator's partiality by presenting evidence of nondisclosure or bias. *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 427 (9th Cir.1996). Jackson has the burden of proving partiality of Arbitrator Kaplan, and it is not the Rosenhaus Parties' obligation to disprove same. See *Sheet Metal Workers Int'l Ass'n Local 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 745 (9th Cir.1985). **"The appearance of impropriety, standing alone, is insufficient."** *Id.* at 746. (emphasis added) (citations omitted).

Jackson is not automatically entitled to conduct discovery or hold an evidentiary hearing to meet his heavy burden of proof. A court does not abuse its discretion by not permitting discovery, since "[a]rbitration proceedings are summary in nature to effectuate the national policy of favoring arbitration, and they require 'expeditious and summary hearing, with only restricted inquiry into factual issues.'" *O.R. Secs., Inc., v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 747-48 (11th Cir.1988) (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 940, 74 L.Ed.2d 765 (1983)). The decision in *Hunt v. Mobil Oil Corp.* is persuasive as to why discovery should not be permitted in this matter and the Court should rule based on the pleadings already filed, along with this post-Hearing brief.

> "To invoke the discovery and deposition process in a search for evidence to support the charges would be tantamount to requiring a judge to submit to an oral deposition by a nonprevailing party where the judge had refused to recuse himself on allegations of personal bias under 28 U.S.C. § 455.13. Such a discovery process would negate the concept of arbitration as a relatively quick means of dispute resolution, and would only protract and delay the termination of the arbitration proceeding. Thus, the arbitration, instead of serving as an efficient and expeditious means of dispute resolution, an essential ingredient of the parties' agreement to forego the judicial process, would, if discovery and an evidentiary hearing were ordered, mean inordinate delay." 654 F. Supp. 1487, 1495-96 (S.D.N.Y. 1987) (emphasis added).

In fact, counsel for the Rosenhaus Parties requested an affidavit from Arbitrator Kaplan, but the request was denied as Arbitrator Kaplan indicated that he speaks through his Orders and he has ruled on the issues of bias and disclosure in his decision to deny the post-arbitration hearing motion to recuse. *See* Arbitrator Kaplan's denial of Jackson's request for recusal, attached hereto as **Ex. "B"**.

D. ANALYSIS

1. Arbitrator Kaplan Had No Duty To Disclose That He Was Compensated By A Party In An Unrelated Arbitration Proceeding.

First, it is a matter of common sense and common practice that Arbitrator Kaplan had no duty to disclose the fact that the Rosenhaus Parties and D. Martoe evenly shared Arbitrator Kaplan's fee to serve as arbitrator (selected by the NFLPA) in an entirely distinct and unrelated arbitration proceeding. It is understood by all knowledgeable litigators that arbitrators must be paid for their service. Further, even if it was not explicitly understood by Jackson's legal counsel that Arbitrator Kaplan was to be paid by the parties for the services he rendered, Arbitrator Kaplan would have no duty to disclose the fee paid by the parties.

The only pertinent case cited by Jackson to support vacatur for a disclosure matter is *Schmitz v. Zilveti*, 20 F.3d 1043, 1049 (9th Cir. 1994). However, the *Schmitz* case is distinguishable, because the logic given for the result is that a failure to disclose can interfere with the parties' ability to choose their arbitrators, a task that is not involved in the instant case where the NFLPA (an organization formed to protect the NFL player's rights) selected the arbitrator. [1]

Arbitrator Kaplan was not nominated by the parties in the underlying arbitration proceeding. Arbitrator Kaplan was independently selected by the NFLPA. Contract

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[1] Moreover, the *Schmitz* case involved a set of specific disclosure requirements required by the National Association of Securities Dealers ("NASD") for arbitrators. No such requirements are imposed by the NFLPA. Even if the NFLPA was to impose the disclosure requirements of the NASD in the instant case, no disclosure would be required under any of the specified criteria, as the relationship between Arbitrator Kaplan and the Rosenhaus Parties is a professional relationship (as arbitrator and party) that does not create an appearance of partiality or bias, as already determined by the Court:

> "The NASD Code requires each arbitrator to "disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination." NASD Code Sec. 23(a). Specifically, an arbitrator must disclose (1) "[a]ny direct or indirect financial or personal interest in the outcome"; (2) "any ... financial, business, professional, family, or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality or bias"; and (3) any personal relationships with any party, its counsel, or witnesses. *Id.* These relationships must be disclosed whether maintained, presently or previously, by the arbitrators or "members of their families or their current employers, partners, or business associates." *Id.* The NASD Code also requires arbitrators to make an investigation regarding potential conflicts of interest. NASD Code section 23(b) provides: "Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in Paragraph (a) above."

Schmitz, 20 F.3d at 1044.

Advisor Drew Rosenhaus has no influence over the NFLPA selecting Arbitrator Kaplan as the arbitrator.

Arbitrator Kaplan had no financial or personal interest in the outcome of the unrelated D. Martoe arbitration. Instead, Arbitrator Kaplan was compensated in the unrelated arbitration proceeding evenly by D. Martoe and the Rosenhaus Parties based on the filing of the grievance by D. Martoe, which was not dependent on the way in which Arbitrator Kaplan ruled. Drew Rosenhaus did not decide that Arbitrator Kaplan would be the arbitrator appointed to preside over the D. Martoe hearing; that decision was made unilaterally by the NFLPA General Counsel Tom DePaso without any input provided by Drew Rosenhaus. *See* **Ex. "C"** ("the NFLPA will 'take jurisdiction' of the dispute . . . and will promptly forward the dispute to Arbitrator Roger Kaplan").

"When the parties agree to arbitration before disinterested persons who have experience in a specialized business or type of problem, the relatively small number of qualified arbitrators may make it common, if not inevitable, that parties will nominate the same arbitrators repeatedly." *Sathianathan v. Smith Barney, Inc.*, 2009 WL 537158, *7 (N.D.Cal. March 3, 2009) (quoting *Dow Corning Corp. v. Safety Nat. Cas. Corp.*, 335 F.3d 742, 749–50 (8th Cir.2003).

Jackson's legal counsel at the underlying arbitration hearing was Mr. Feldman, an NFLPA Contract Advisor who had a distinct understanding of the Regulations (which limit coverage of disputes under Section 5 therein). Mr. Feldman had personal knowledge of Arbitrator Kaplan's expertise and fair treatment, since he was himself personally before Arbitrator Kaplan in a dispute wherein he was accused by the NFLPA of engaging in prohibited conduct for a Contract Advisor. *See* **Ex. "D"**. Mr. Feldman retained Mr. Cornwell to represent him in that matter. At the conclusion of that proceeding, Arbitrator Kaplan vacated the NFLPA's two year suspension of Mr. Feldman's certified Contract Advisor status. It is hypocritical for Mr. Feldman to argue that Arbitrator Kaplan must disclose a routine fee-sharing arrangement in a case involving the Rosenhaus Parties, without indicating that there was any need to disclose

Arbitrator Kaplan's highly favorable decision for Mr. Feldman in an arbitration proceeding that likely saved Mr. Feldman's career as an NFLPA Contract Advisor. In both situations Arbitrator Kaplan was simply doing his job and neither case creates any obligation to disclose such routine work of an arbitrator to future parties in an unrelated dispute.

Thus, legal authorities and logic lead to the conclusion that Arbitrator Kaplan had no duty to disclose that he served as Arbitrator in a dispute involving the Rosenhaus Parties and received ordinary payments for such arbitration service.

2. Even if A Duty to Disclose Existed, Arbitrator Kaplan's Payments In The Unrelated Case Were Fully Disclosed.

In his Declaration, Mr. Cornwell deftly tries to shade the facts by writing that he advised Arbitrator Kaplan and the Rosenhaus Parties' legal counsel that he "expected to be co-counsel" in the Jackson arbitration proceeding. *See* Declaration of Cornwell, **Ex. "A"** at ¶ 7. This "expectation" understates the actual discussion and the role that was unambiguously conveyed to Arbitrator Kaplan and the Rosenhaus Parties' counsel. The proof of what Mr. Cornwell actually said is contained in two documentations of Mr. Cornwell's statements provided before it was known that this Court would view the issue of Mr. Cornwell's representation as significant: (i) The Rosenhaus Parties' legal counsel's summary Mr. Cornwell's communication in an opposition to Jackson's request that Arbitrator Kaplan recuse himself (*See* **Ex. "E"**); and (ii) Arbitrator Kaplan's ruling on the request to recuse by memorializing his view of Mr. Cornwell's statements about representing Jackson (*See* **Ex. "B"**).

Legal counsel for Drew Rosenhaus opposed the request for recusal of Arbitrator Kaplan and submitted a brief in opposition setting forth that the allegations raised by Jackson's legal counsel had been aired, previously addressed and rejected by the NFLPA and by a state court judge in Florida. *See* **Ex. "E"**. The opposition brief memorialized Mr. Cornwell's statements about representing Jackson by noting:

> "In July 2013, Attorney Cornwell identified himself to Rosenhaus as co-counsel to DeSean Jackson in the *Rosenhaus v. DeSean Jackson* Arbitration. Cornwell also informed Arbitrator Kaplan that he was co-counsel to Jackson during the Martoe arbitration." *See* **Ex. "E"** at ¶ 6.

Likewise, on December 9, 2013, Arbitrator Kaplan responded to Mr. Feldman's letter requesting that Arbitrator Kaplan recuse himself in the Jackson matter. *See* **Ex. "B"**. The paragraph within Arbitrator Kaplan's decision that memorialized Mr. Cornwell's statements about his representation of Jackson is as follows:

> "Finally, Player argues that he was unaware of the financial transaction in the Martoe v. Rosenhaus matter until after the commencement of his hearing on September 24, 2013. While I do not believe this is relevant, his allegation is factually incorrect. In July 2013, **David Cornwell, lead attorney in the Martoe v. Rosenhaus case, informed me that he was part of the legal team representing Jackson in Rosenhaus v. Jackson**, NFLPA 13-31. Based upon that information, I sent a copy of the hearing notice in Rosenhaus v. Jackson, on September 11, 2013, to Cornwell as indicated in that notice of hearing." *See* **Ex. "B"** at p.5 (emphasis added).[2]

It may be presumed that the thorough and experienced Arbitrator Kaplan would not send official hearing notices to an attorney who merely "expected" to be retained, but only to an attorney who had affirmatively represented that he was in fact co-counsel to Mr. Feldman in representing Jackson and who had discussed hearing dates with Arbitrator Kaplan for the Jackson arbitration proceeding.

If this Court accepts Arbitrator Kaplan's decision that Mr. Cornwell had informed him that he was co-counsel, then the disclosure obligation is satisfied by Mr. Cornwell's full knowledge of the D. Martoe arbitration and the method by which

[2] Because Arbitrator Kaplan cannot provide an Affidavit in this proceeding, his voice is limited to his rulings in the underlying arbitration proceeding. Such rulings are entitled to great weight in this proceeding.

arbitration fees were split. Jackson must be credited with full knowledge of Arbitrator Kaplan's role in the D. Martoe arbitration proceeding (including the fee arrangement to pay Arbitrator Kaplan) due to the fact that Mr. Cornwell was always D. Martoe's legal counsel. *See* Declaration of Cornwell, **Ex. A** at ¶ 1.

The hearing for the underlying Jackson arbitration proceeding occurred on September 24, 2013. *See* **Ex. "F"**. Between July 17, 2013 and September 24, 2013, Mr. Cornwell received two notices concerning the scheduling of the Jackson arbitration hearing. *See* Declaration of Cornwell, **Ex. A** at ¶ 8; Hearing Notices attached hereto as **Ex. "F"**. Mr. Cornwell failed to inform Arbitrator Kaplan prior to the hearing in the underlying dispute that Mr. Cornwell would not be present or serving as Jackson's counsel. *See* Declaration of Cornwell, **Ex. A** at ¶ 8 ("I did not respond to either notice"). Thus, Arbitrator Kaplan, at all times relevant, had every reason to believe that Jackson's legal team included Mr. Cornwell and that the Jackson legal team had knowledge of the compensation Arbitrator Kaplan received in the unrelated D. Martoe arbitration proceeding. More importantly, Mr. Feldman was fully aware that Arbitrator Kaplan was copying Mr. Cornwell on official notices (*See* **Ex. "F"**) for the Jackson arbitration proceeding and Mr. Feldman took no action to correct Arbitrator Kaplan. Mr. Feldman cannot now complain that notice given to Mr. Cornwell was insufficient when Mr. Feldman took no steps to inform Arbitrator Kaplan that Mr. Cornwell was not legal counsel to Jackson, despite clear indications that Arbitrator Kaplan was addressing Mr. Cornwell as co-counsel. *See* **Ex. "F"**.

Relevant case law on the issue of "disclosure" also emphasizes that a complaining party cannot bury his head in the sand and then complain that he was without notice of publicly-known or easily-obtainable facts. In *Lagstein v. Certain Underwriters at Lloyd's, London*, the Ninth Circuit noted that details of a separate controversy were made publicly available and could have easily been discovered if the complaining party had conducted even minimal due diligence on the arbitrators. 607 F.3d 634, fn. 11 (9th Cir.2010). The court further "decline[d] to create a rule that

encourages losing parties to challenge arbitration awards on the basis of pre-existing, publicly available background information on the arbitrators that has nothing to do with the parties to the arbitration." *Id.* at 646.

Pre-existing and publicly available information about the D. Martoe arbitration proceeding was easily obtainable with an Internet search. On August 6, 2012, well before the Jackson grievance was filed by Drew Rosenhaus, Messrs. Rand Getlin and Jason Cole of *Yahoo! Sports* wrote an article[3] that began with the paragraph,

> "Prominent NFL agents Drew and Jason Rosenhaus have been accused of breach of contract and fraud **in an arbitration filing with the National Football Players Association** by Rosenhaus Sports Representation vice president Danny Martoe, according to a legal memorandum obtained by Yahoo! Sports." (emphasis added).

That article was followed by another *Yahoo! Sports* piece by the same authors published on August 16, 2012 that also explicitly mentioned, in the first paragraph, that D. Martoe's arbitration filing was "with the NFL Players Association."[4] Included therein is the following:

> "Martoe declined comment through his attorney, David Cornwell, who has a long history of representing NFL players and coaches."

In August 2013, during the same time period that Mr. Cornwell was consulting with Mr. Feldman concerning the underlying arbitration proceeding, a similar challenge was made against Arbitrator Kaplan by legal counsel for former NFL player Terrell Owens ("Owens"), using information gained from the D. Martoe arbitration. *See* **Ex. "G"**.

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[3] *See* Rand Getlin and Jason Cole, *Agent Drew Rosenhaus accused of breach of contract, fraud by employee in arbitration filing*, Yahoo! Sports, Aug. 6, 2012 (at http://sports.yahoo.com/news/nfl--agent-drew-rosenhaus-accused-of-breach-of-contract--fraud-by-employee-in-arbitration-filing.html).

[4] *See* Rand Getlin and Jason Cole, *Arbitration filing: Rosenhaus Sports vice president seeking $1M from firm*, Yahoo! Sports, Aug. 12, 2012 (at http://sports.yahoo.com/news/nfl--arbitration-filing--rosenhaus-sports-vp-seeks--1m-from-firm.html).

The brief that requested Arbitrator Kaplan's removal from the Owens dispute was later cribbed by Mr. Feldman in his request that Arbitrator Kaplan be recused.[5]

Additionally, attached hereto as **Ex. "I"** is an August 22, 2013 letter from Jackson's legal counsel, Mr. Feldman, to NFLPA Executive Director DeMaurice Smith relating to the Jackson arbitration proceeding. This Court should note that the letter lists a variety of persons to be copied on the letter. Two of those persons, Happy Walters and Eugene Parker, are D. Martoe's superiors at Mr. Martoe's new employer. Two other persons on the list are Rand Getlin and Liz Mullen, journalists who have been involved in receiving information from Mr. Cornwell about the D. Martoe arbitration. Joel Segal and Peter Schaffer, also copied on the communication, are NFLPA Contract Advisors and competitors of Drew Rosenhaus. In sum, Mr. Feldman gave notice of his intent to disclose details of the confidential Jackson arbitration proceedings to the press, Drew Rosenhaus' competitors and to D. Martoe's superiors for no apparent reason other than because such persons were connected to Mr. Cornwell and the D. Martoe dispute and that Mr. Feldman wanted to disparage Drew Rosenhaus' name to his competitors. Mr. Feldman's claim that he did not know the details of the D. Martoe arbitration proceeding is belied by this letter.

In August 2013, the NFLPA reviewed Owens' challenge to Arbitrator Kaplan's assignment and determined that it did not warrant the removal of Arbitrator Kaplan. *See* **Ex. "J"**. On August 29, 2013, almost a month before the Jackson arbitration hearing, the NFLPA determined that its members benefited from having an experienced arbitrator knowledgeable about the contractual issues between players and their agents and refused to remove Arbitrator Kaplan, stating in part,

> "Arbitrator Kaplan routinely hears cases that may have involved parties who may have been a party to a previous dispute that that he adjudicated. So the fact the Grievants were involved in a prior

[5] Compare **Ex. "G"** with Jackson's request for Arbitrator Kaplan to recuse himself from the arbitration proceeding, attached hereto as **Ex. "H"**.

> proceeding is not unusual and not a reason for recusal. Further, the argument of partiality or appearance of partiality, notwithstanding, Arbitrator Kaplan will judge this case on the merits. Accordingly, we will process this case in the typical fashion." See **Ex. "J"**.

Arbitrator Kaplan's long and distinguished tenure as an NFLPA arbitrator has resulted in numerous instances where he has arbitrated more than one dispute involving a party to an arbitration. Having rendered a decision for or against a party in a prior arbitration does not serve to disqualify Arbitrator Kaplan in a subsequent arbitration involving the same party, nor does it trigger a disclosure requirement.

To prove that point, Jackson's legal team failed to inform this Court that Jackson's principal legal counsel, Mr. Feldman, faced a two year suspension by the NFLPA relating to alleged improprieties as a Contract Advisor. Mr. Feldman hired Mr. Cornwell as his legal counsel to represent him in an NFLPA arbitration of the suspension. Arbitrator Kaplan presided over the arbitration hearing and ultimately ruled that the two year suspension should be vacated. *See* **Ex. "D"**. Neither Mr. Feldman nor Arbitrator Kaplan provided notice to the Rosenhaus Parties of the highly favorable decision by Arbitrator Kaplan, which undoubtedly saved Mr. Feldman's career as a Contract Advisor. Further, the existence of the grievance against Mr. Feldman wherein he hired Mr. Cornwell as his personal legal counsel demonstrates the very close relationship between Mr. Feldman and Mr. Cornwell. Mr. Feldman cannot proceed into an arbitration with an arbitrator who he believes will be favorable to him based on a positive prior arbitration and then, when the arbitration hearing does not go well, seek to recuse the arbitrator after the hearing based on the arbitrator's prior arbitration involving the opposing party.

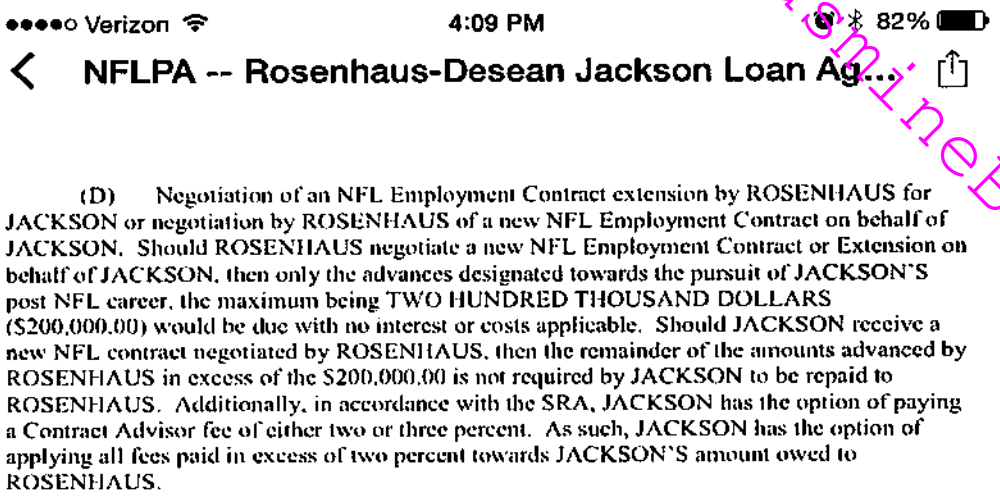
It is shocking that Jackson seeks to lay blame at the feet of Arbitrator Kaplan when it was Mr. Cornwell who held himself out to Arbitrator Kaplan that he was Jackson's co-counsel along with Mr. Feldman. Whether Mr. Cornwell explicitly told Mr. Feldman that Drew Rosenhaus paid his fifty percent share of Arbitrator Kaplan's

fee in the D. Martoe arbitration proceeding is immaterial. Mr. Cornwell had knowledge of the fee-splitting arrangement, he claimed to be part of Jackson's legal team, he engaged in lengthy discussions of strategy with Mr. Feldman concerning the Jackson dispute (*See* Declaration of Cornwell, **Ex. "A"** at ¶ 10), and Mr. Feldman as a long-time NFLPA Contract Advisor had actual and constructive knowledge that arbitrators must be paid by the parties to a dispute when the NFLPA does not agree to pay the cost of the arbitration. Arbitrator Kaplan would be paid for his services one way or another – either by the NFLPA or by the parties to the arbitration. The fact that Arbitrator Kaplan was paid by the parties in the unrelated D. Martoe case is of no significance in the Jackson case.

Mr. Cornwell in his Declaration seeks to minimize his involvement with the Jackson dispute, and he asserts that he had no involvement at the hearing or thereafter. *See* Declaration of Cornwell, **Ex. "A"** at ¶¶ 9, 11. However, even after the Jackson arbitration hearing, Mr. Cornwell was tweeting confidential documents from the Jackson arbitration proceeding. As late as October 25, 2013, Mr. Cornwell proudly demonstrated that he still had access to Jackson's confidential documents from the Jackson arbitration proceeding and that he had approval from Jackson to publicly disclose the confidential documents. *See* Mr. Cornwell's tweets attached hereto as **Ex. "K"**, including the following tweet from October 25, 2013:

David Cornwell @wmdavidcornwell

My bad Rosenhaus "only" paid Jackson $150k 2 become his client. C 4 urself.
pic.twitter.com/yNldymxb0T



Mr. Cornwell admits that he was contacted by Mr. Feldman and discussed his views regarding the claims against Jackson and Jackson's potential defenses with Mr. Feldman, all prior to the hearing in the Jackson arbitration proceeding. *See* Declaration of Cornwell, **Ex. A** at ¶ 10. Mr. Cornwell also admits that he had full knowledge of the fee sharing arrangement between his client, D. Martoe, and the Rosenhaus Parties in the D. Martoe Arbitration. *See* Declaration of Cornwell, **Ex. A** at ¶¶ 3, 5. Logically, this means that there are two possible scenarios as to how the discussions between Mr. Cornwell and Mr. Feldman played out: (i) Mr. Cornwell advised Mr. Feldman about the fee sharing arrangement in the unrelated D. Martoe case and this Court can end the analysis right there, since Jackson's legal counsel was in fact informed; or (ii) Mr. Cornwell knew about the fee sharing arrangement, but chose not to discuss it with Mr. Feldman, because Mr. Cornwell deemed it not significant enough to discuss. The second scenario should also end this Court's analysis, as it represents a tacit admission by Mr. Cornwell that the alleged lack of disclosure was an insignificant fact that did not warrant discussion with Jackson's legal counsel.

Based on the universe of known facts, Arbitrator Kaplan had every reason to believe that Jackson was aware of the fee sharing arrangement in the unrelated D. Martoe arbitration proceeding. The Court should see through Jackson's charade, take note of Mr. Cornwell's strong connection to the underlying Jackson arbitration proceeding and to Jackson's legal counsel, and rule that Jackson's legal counsel had knowledge, or at least had constructive knowledge, of Arbitrator Kaplan's fees in the unrelated D. Martoe arbitration proceeding.

3. Even If Jackson's Legal Counsel Remained Unaware Of The Fees Received By Arbitrator Kaplan, The Lack Of Notification Does Not Rise To The Level That Would Require Corrective Action.

"Under the FAA [Federal Arbitration Act], vacatur of an arbitration award is not required simply because an arbitrator failed to disclose a matter of some interest to a party." *Lagstein*, 607 F.3d at 646. An arbitrator is only required to disclose facts that indicate he "might reasonably be thought biased *against one litigant and favorable to another*." *Id.* (quoting *Commonwealth Coatings*, 393 U.S. at 150, 89 S.Ct. 337 (emphasis added)). The fact that Arbitrator Kaplan was paid an ordinary fee in a prior unrelated arbitration proceeding involving one of the parties does not lead to any reasonable conclusion of bias.

Whether or not Arbitrator Kaplan's involvement in the unrelated D. Martoe arbitration proceeding was fully known by Jackson (as explained above), Arbitrator Kaplan's role as neutral arbitrator in the unrelated action does not demonstrate any evident partiality on his part. The Court has already reached a "tentative" conclusion that no partiality or bias has been shown by Jackson's legal counsel. The issue is whether the lack of disclosure alone, in the absence of any appearance of bias, is sufficient to warrant action by this Court. A review of legal authorities indicate that no action is required and the Arbitration Award should be confirmed to protect the viability of the arbitration process.

Case law demonstrates that the courts have been pragmatic about recognizing that there will be arbitrators with connections to one side or the other in any given industry. "[An arbitration] panel will contain some actual or potential friends, counselors, or business rivals of the parties," because "[i]ndustry arbitration ... often uses panels composed of industry insiders, [who are] better [able] to understand the trade's norms of doing business and the consequences of proposed lines of decision." *U.S. Care, Inc. v. Pioneer Life Ins. Co.*, 244 F. Supp. 2d 1057, 1064 (C.D. Cal. 2002) (quoting *Sphere Drake Ins. Ltd. v. All American Life Ins.*, 307 F.3d 617, 620 (7th Cir.2002)).

The unrelated D. Martoe arbitration proceeding was an "industry arbitration," as it was a dispute between individuals engaged in the representation of professional athletes (despite D. Martoe not being certified as a Contract Advisor by the NFLPA) and governed by the NFLPA arbitration procedures. Arbitrator Kaplan, the arbitrator for both the D. Martoe and Jackson arbitration proceedings, has been a full-time arbitrator for over thirty years and has presided over countless arbitration proceedings for the NFLPA. [D.E. 23-1]. He is the definition of an industry expert and is better able than most to understand the norms of doing business between NFL teams, agents and players, along with the consequences of his decisions.

Courts "do not want to encourage the losing party in every arbitration to conduct a background investigation of each of the arbitrators in an effort to uncover evidence of a former relationship with the adversary." *Merit Insurance Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 683 (7th Cir.1983) (Posner, J.). The failure to disclose information still must rise to the level of giving the impression of bias in favor of one party in order for vacatur to be appropriate. *Woods*, 78 F.3d at 427. Not only was Arbitrator Kaplan not selected by Drew Rosenhaus in the unrelated D. Martoe arbitration proceeding, Arbitrator Kaplan was also not selected by Drew Rosenhaus in the underlying Jackson dispute. *See* Declaration of Cornwell, **Ex. A** at ¶ 3 (General Counsel Thomas DePaso said he would promptly forward the D. Martoe dispute to Arbitrator Kaplan); **Ex. "C"**;

[D.E. 23-1] (Todd Flanagan, Staff Counsel of the NFLPA, notified Arbitrator Kaplan of his appointment in the Jackson arbitration proceedings; **Ex. "L"**. Thus, contrary to the grossly inaccurate allegation asserted by Jackson's legal counsel, Drew Rosenhaus was not providing business to Arbitrator Kaplan; the NFLPA unilaterally selected Arbitrator Kaplan to preside over the proceedings. Arbitrator Kaplan may believe the NFLPA, "the union for professional football players in the National Football League" that "has a long history of assuring proper recognition and representation of players' interests[6]," is in a position to give him more work, but that is well outside the control of Drew Rosenhaus. Absolutely no impression of bias or any harm in the selection of Arbitrator Kaplan is evident from Jackson's pleadings.

The Court should strongly consider the negative precedent that would be set should it choose to vacate or even to allow an evidentiary hearing on the Arbitration Award based on Jackson's 9 U.S.C. § 10(a)(2) claim. It would turn the entire arbitration process on its head, as it would effectively invalidate the general maxim that agreements containing arbitration provisions are to be favored and presumed valid, unless a claimant can demonstrate how such would not have been valid at common law or in equity. *See Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000); 9 U.S.C. § 2. It would seriously jeopardize the finality of arbitration.

In *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, the court analyzed research and briefs to determine that no case had come close to vacating an arbitration award for nondisclosure when there was a slender connection between the arbitrator and a party's counsel. 476 F.3d 278, 284 (5th Cir.2007). The court in *Positive Software Solutions, Inc.* (a case where the connection between the arbitrator and the party was much closer than the instant case) noted that courts have consistently refused vacatur where the undisclosed connections were much stronger. The court

[6] *See About-Us – NFLPlayers.com*, NFL Players Association (at https://www.nflplayers.com/about-us/) (accessed on August 8, 2014). *See* **Ex. "M"**.

reviewed the case law that uniformly supports a refusal to vacate an arbitration award due to a lack of disclosure issue:

> *See, e.g.*, *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 982, 984 (8th Cir.2001) (no vacatur; as general counsel for a company, arbitrator had employed sixty-eight attorneys, paying them $2.8 million in fees, from the law firm representing one of the parties in the arbitration); *ANR Coal*, 173 F.3d at 495-96 (no vacatur; arbitrator's law firm represented company that indirectly caused the dispute in the arbitration by buying less from the defendant, who in turn sought to buy less from the plaintiff); *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682 (D.C.Cir.1996) (no vacatur where arbitrator's former law firm represented party to the arbitration on unrelated matters); *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 432-34 & n. 3 (11th Cir.1995) (no vacatur where arbitrator had memorialized prior scheduling dispute with an attorney from the law firm representing one of the parties and mentioned it eighteen months later at the arbitration; arbitrator also failed to disclose that he became "of counsel" to a law firm the prevailing party had interviewed for the purpose of obtaining representation in the instant dispute and that had reviewed the contract involved in the case two years prior; court found this, at best, showed a "remote, uncertain, and speculative partiality"); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1255, 1264 (7th Cir.1992) (arbitrator knew one of the parties, had worked in the same office with him twenty years ago, and saw him about once a year since; the court found this relationship "minimal" and insufficient to vacate); *Merit Ins.*, 714 F.2d at 677, 680 (no vacatur; arbitrator had worked directly under the president and principal stockholder of one of the parties for three years, ending fourteen years prior to the arbitration; the Seventh Circuit noted that "[t]ime cools emotions, whether of gratitude or resentment"); *Ormsbee Dev. Co.*, 668

F.2d at 1149-50 (no vacatur where arbitrator and law firm representing a party had clients in common; requiring vacatur under such facts would request that potential neutral arbitrators sever all their ties with the business world" (internal quotation omitted)).

Here, there is not a scintilla of evidence of an undisclosed connection between Arbitrator Kaplan and the Rosenhaus Parties. The professional connection is between Arbitrator Kaplan and the NFLPA, as the NFLPA is the body that determined the arbitrator for the Jackson arbitration proceeding (*See* **Ex. "L"**) and the unrelated D. Martoe arbitration proceeding (*See* **Ex. "C"**). Thus, whether or not Arbitrator Kaplan actually disclosed his full involvement in the unrelated D. Martoe arbitration proceeding is immaterial and irrelevant. It would not rise to the level requiring corrective action by this Court.

E. REQUEST FOR ATTORNEYS' FEES AND COSTS

Drew Rosenhaus filed the Petition [D.E. 1] in the U.S. District for the Central District of California in Los Angeles, California, because Jackson purposefully availed himself to be subject to this District. Specifically, the Loan Agreement (**Ex. "N"**; [D.E. 1, Ex. "A"]) under which Jackson owes Drew Rosenhaus monies pursuant to the Arbitration Award, includes a dispute resolution clause that states, "[a]ny award of such arbitration shall be enforceable in Federal District Court venues in Los Angeles, California."

Jackson's Answer to Petition to Confirm Arbitration Award admitted that the Arbitration Award is based in part on certain loan agreements [D.E. 20, p. 5, ¶ 4], including that which was attached as Ex. "A" to the Petition. As suggested by Jackson, "[t]hose agreements are documents which speak for themselves." [D.E. 20, p. 5, ¶ 4]. Further, in Jackson's Cross-Petition, he asserts venue in this District because "one of the agreements on which the Arbitration Award is predicated provides that this dispute is properly venued in this District." [D.E. 20, p. 7, ¶ 7].

The Loan Agreement, which the parties agree is controlling in this litigation, includes a very clear section titled, "ATTORNEY FEES."

> "**(13) ATTORNEY FEES.** In the event this Loan Agreement shall be in default and placed in collection, then the JACKSON agrees to pay all reasonable attorney fees, interest due from the date of the loan and costs of collection. Otherwise attorney fees and costs shall be awarded to the prevailing party. All payments hereunder shall be made to such address as may from time to time be designated by ROSENHAUS." *See* **Ex. "N", p. 9**.

The section of the Loan Agreement is unambiguous. Drew Rosenhaus is entitled to reasonable attorney fees, interest and costs, because the Loan Agreement has been in default and placed in collection. The "DISPUTE RESOLUTION" section of the Loan Agreement required that the parties "exclusively resolve the dispute in binding arbitration before an Arbitrator as designated in the SRA and the Rules and Regulations of the NFLPA." [D.E. 1, p. 15]. Thus, even if the Court determines that Drew Rosenhaus is not entitled to reasonable attorney fees, interest due from the date of the loan and costs of collection under the first sentence of the "ATTORNEY FEES" section, then at a minimum the "prevailing party" should be awarded attorney fees and costs under the second sentence of the same section. If the Court confirms the Arbitration Award, then there is no doubt that Drew Rosenhaus should be entitled to be made whole for all fees and costs incurred in conjunction with this litigation.

F. CONCLUSION

WHEREFORE, Drew Rosenhaus, Jason Rosenhaus and Rosenhaus Sports Representation, Inc. request that this Court enter an Order: (1) denying DeSean Jackson's Cross-Petition to Vacate Arbitration Award; (2) confirming the Arbitration Award; (3) requiring DeSean Jackson to pay Drew Rosenhaus' attorneys' fees, interest due from the date of the loan and costs; and (4) providing for such other relief as the Court sees fit. Drew Rosenhaus seeks an award of only those attorneys' fees and costs

that he has incurred since he filed the Petition [D.E. 1], and requests that this Court permit him to provide a calculation of reasonable attorneys' fees.

Dated: August 28, 2014

Edwin F. McPherson
Pierre B. Pine
McPHERSON RANE LLP

Darren A. Heitner
HEITNER LEGAL, P.L.L.C.

By: _____/s/_____
DARREN A. HEITNER
Attorneys for Petitioner and Cross-Respondent DREW ROSENHAUS and Cross-Respondents JASON ROSENHAUS and ROSENHAUS SPORTS REPRESENTATIONS, INC.

EXHIBIT E

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

JASON ROSENHAUS and DREW ROSENHAUS, **Claimants,** **v.** **DeSEAN JACKSON,** **Respondent.**	**Case No: NFLPA 13-31**

CLAIMANTS' OPPOSITION TO MOTION TO RECUSE ARBITRATOR KAPLAN

The Claimants, Drew Rosenhaus and Jason Rosenhaus, hereby oppose DeSean Jackson's belated effort to seek the removal of the Arbitrator, Roger Kaplan. The Arbitration Hearing has been fully completed and briefed. A decision from the Arbitrator is expected in the near future. During the entire process, neither Mr. Jackson nor his counsel asserted that there was any evidence of bias, or even an appearance of bias in any ruling by the Arbitrator.

Only after Mr. Jackson and his counsel had an opportunity to review the Post-Hearing Brief filed by Rosenhaus – a brief that dispassionately computes the amounts owed to Rosenhaus Sports and sets forth in detail the crucial admissions of debt that Jackson made during the Arbitration Hearing – does Mr. Jackson seek to upset the Arbitration process by an unwarranted attack on the integrity of the Arbitrator. To literally add insult to injury, Mr. Jackson and his counsel leaked his defamatory recusal motion to Yahoo Sports reporter Rand Getlin who published an insulting attack on the professionalism and neutrality of the Arbitrator. (See Yahoo Sports "*DeSean Jackson, Terrell Owens question NFLPA's arbitration procedures*," November 21, 2013 attached as **Exhibit 1**).

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Jackson's counsel's tactic is a desperate, but not unheard of, strategy used by parties anticipating a losing decision: Target the arbitrator with vicious attacks on his integrity, smear the arbitrator publicly in the press, so that even if the arbitrator were solidly neutral before the attacks were made, perhaps the arbitrator will no longer feel neutral after coming under public attack by a party. However, we remain confident that Arbitrator Kaplan has the requisite experience and judicial demeanor to deflect such a strategy and render the just decision in this case. We note that this case is primarily a computation of amounts owed – a task that can be carried out dispassionately and with the neutrality inherent in math computations.

With Jackson's desperate strategy in mind, let us review the facts that underlie Jackson's recusal motion:

1. Arbitrator Kaplan was designated by the NFLPA as the Arbitrator in another dispute involving Rosenhaus Sports filed by a former employee, Danny Martoe.

2. Rosenhaus Sports was required to pay Arbitrator Kaplan one-half of his fees and expenses as a condition of defending against the Martoe arbitration request.

3. Danny Martoe was required to pay Arbitrator Kaplan one-half of the Arbitrator's fees and expenses as a condition of bringing his arbitration request.

4. The *Martoe v. Rosenhaus* arbitration is being carried out under the auspices of the NFLPA and pursuant to the NFLPA Arbitration Rules.

5. Danny Martoe's attorney in the arbitration is William David Cornwell.

6. In July 2013, Attorney Cornwell identified himself to Rosenhaus as co-counsel to DeSean Jackson in the *Rosenhaus v. DeSean Jackson* Arbitration. Cornwell also informed Arbitrator Kaplan that he was co-counsel to Jackson during the Martoe arbitration.

7. In recognition of Attorney Cornwell's co-counsel role in the Jackson case, Arbitrator Kaplan copied Mr. Cornwell on a September 11, 2013, Notice of Hearing (copy attached as **Exhibit 2**).

8. At all times during Jackson's preparation for the hearing and during the hearing, Co-Counsel Cornwell knew exactly how much Arbitrator Kaplan was being compensated by both sides in the Martoe v. Rosenhaus dispute because Co-Counsel Cornwell was arranging for Martoe to pay precisely the same amount as Rosenhaus Sports.

9. The assertion by Jackson's other counsel, Attorney Feldman, that "Respondent Jackson has just recently become aware of the financial transaction between Rosenhaus and Kaplan" is false.

10. Attorney Feldman does not reveal how he became aware of this "financial transaction" because such revelation would point directly at his co-counsel, Attorney Cornwell, who has known for entire duration of the Jackson arbitration that his client, Martoe, and Rosenhaus Sports were splitting the Arbitrator fees in the Arbitration, as required by the NFLPA.

11. Attorney Feldman also failed to reveal that his Motion for Recusal plagiarizes and copies – often word for word – a prior pleading filed in another confidential NFLPA arbitration proceeding between Terrell Owens and Rosenhaus Sports seeking to disqualify Arbitrator Kaplan from that Arbitration proceeding. See attached Owens' pleading, **Exhibit 3**.

12. Attorney Feldman failed to reveal how he came in possession of the confidential pleading in the Owens arbitration.

13. Attorney Feldman failed to inform Arbitrator Kaplan that the NFLPA Staff Counsel denied Terrell Owens' request for disqualification of Arbitrator Kaplan on August 29, 2013 – almost a month before the DeSean Jackson September 20, 2013

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Arbitration Hearing in this case. See attached denial issued by NFLPA Staff Counsel Todd Flanagan, **Exhibit 4.**

14. Attorney Feldman failed to inform Arbitrator Kaplan how the Yahoo Sports reporter came into possession of his Motion for Recusal that was the subject of Rand Getlin's November 21, 2013 article – one day after Attorney Feldman submitted his Motion to Recuse in this case. (See Yahoo Sports "DeSean Jackson, Terrell Owens question NFLPA's arbitration procedures," **Exhibit 1**).

15. Feldman's co-counsel, David Cornwell, has a well-established relationship with the Yahoo Sports reporter, Rand Getlin, that is publicly documented on Twitter, but for which David Cornwell refused to testify in the *Martoe* Arbitration about similar leaks to Rand Getlin of confidential and proprietary information relating to Rosenhaus Sports.

Mr. Jackson's pernicious and public attack on the integrity of the Arbitrator, as well as the NFLPA itself, is completely outside the boundaries of a civil process to resolve a financial dispute through arbitration. The leaking of the Motion to Recuse is nothing more than a bullying tactic by Jackson's co-counsel designed to intimidate the Arbitrator -- implying that the Arbitrator should find against Rosenhaus or face further public attacks from Rand Getlin with his national press platform.

The NFLPA has already denied the virtually identical attack on Arbitrator Kaplan in the *Terrell Owens* arbitration, so there is no need to reiterate the issues and arguments herein. Instead, Rosenhaus Sports provides the following documents that were filed in the *Terrell Owens* dispute and incorporates the arguments and legal authorities in those pleadings herein. Specifically, the following recusal documents are provided herewith:

- The Terrell Owens Request to Have This Matter Assigned to Arbitrators Other Than Roger Kaplan – August 12, 2013 (**Exhibit 3**)
- Grievants' Opposition To Respondents Request to Have This Matter Assigned To Arbitrators Other Than Roger Kaplan – August 19, 2013 (**Exhibit 5**)

- NFLPA Staff Counsel Todd Flanagan's Decision Denying Terrell Owens' Request – August 29, 2013 (**Exhibit 4**)

Rosenhaus Sports notes that the Grievants' Opposition (**Exhibit 5**) in the Terrell Owens Arbitration contains all of the legal authorities applicable to the circumstances here in the DeSean Jackson Arbitration as Mr. Jackson's counsel merely copied the authorities used by Mr. Owens' counsel and rejected by the NFLPA without adding any new authorities.

Not only has the NFLPA rejected the argument that Arbitrator Kaplan should not hear and decide a dispute involving Rosenhaus Sports, but a state court judge in Florida also heard the same arguments from Terrell Owens' attorneys and the judge sent the dispute back to Arbitrator Kaplan, trusting in his ability to render an appropriate decision. See the November 22, 2013 decision of the Circuit Court for Miami-Dade County, Florida attached as **Exhibit 6**.

WHEREFORE, Rosenhaus Sports submits that the decision on recusal or removal of Arbitrator Kaplan in the Jackson case should be the same as the decision in the *Terrell Owens* matter – a swift denial of the motion to recuse. In addition, Rosenhaus seeks an admonition to Mr. Jackson and his counsel that the Arbitration Proceeding is a confidential proceeding and the allegations and pleadings in the arbitration should not be disclosed to the press in an effort to impugn the arbitration process, the Arbitrator, or the opposing party.

ROSENHAUS SPORTS REPRESENTATION, Inc.
Respectfully submitted,

Dated: November 26, 2013

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Telephone: (202) 628-4199

Jason Rosenhaus
Rosenhaus Sports Representation
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cc: Steve Feldman, Esq.

Feldman Law Center
30100 Town Center, Suite #196
Laguna Niguel, CA 92677

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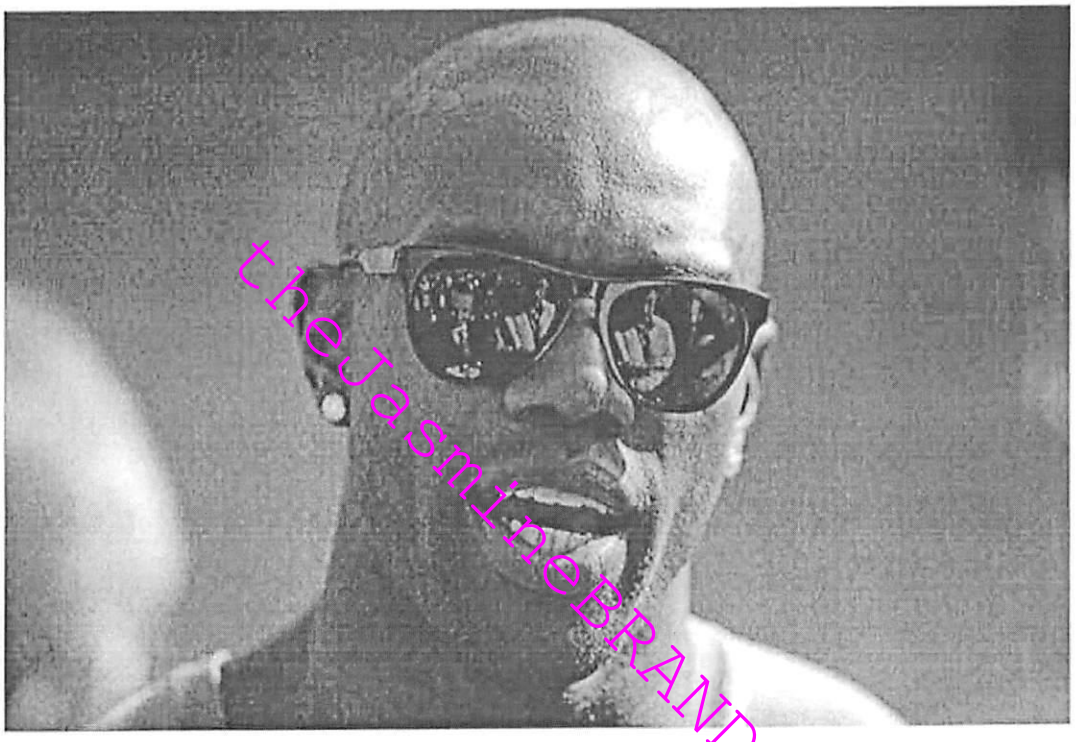
DeSean Jackson, Terrell Owens question NFLPA's arbitration procedures

By Rand Getlin
November 21, 2013 11:04 AM
Not for Attribution



Terrell Owens (Getty Images)

Philadelphia Eagles wide receiver DeSean Jackson and former NFL wide receiver Terrell Owens have raised questions about the fairness of the NFL Players Association's arbitration procedures, according to league sources and documents obtained by Yahoo Sports.

Owens alleges the union is attempting to force him to use an arbitrator who he says is "essentially on [Drew] Rosenhaus' payroll," in a $6.5 million dispute between he and his former agent.

EXHIBIT
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Jackson raised concern with being forced to use the same arbitrator — Roger Kaplan — in a dispute between he and Rosenhaus over more than $400,000. The wide receiver alleges he was never informed Kaplan was receiving money from Rosenhaus for serving as an arbitrator in an unrelated dispute between the agent and a former employee. Jackson says the financial relationship between Rosenhaus and Kaplan gives rise to the appearance of bias, and Jackson has asked Kaplan to recuse himself from his matter.

As for the unrelated dispute, documents obtained by Yahoo Sports indicate Rosenhaus and former employee Danny Martoe were responsible for placing in excess of $70,000 each in an escrow account for Kaplan to draw upon as costs were incurred in their arbitration. It is not known how much Kaplan will ultimately make for serving as the arbitrator in that matter.

Kaplan declined comment on the Owens and Jackson arbitration proceedings and the player's allegations of perceived bias.

Owens is suing Rosenhaus in state court for breach of fiduciary duty, fraud and negligence for allegedly introducing him to now-banned financial adviser Jeff Rubin and recommending Owens hire Rubin to manage his finances. Rosenhaus wants the case kicked out of court — where details of the dispute would become publicy available — and has requested Kaplan hear the matter instead.

Owens is adamant his dispute with Rosenhaus is a matter for the courts to decide, that the NFLPA doesn't have jurisdiction over the matter and does not want the player's association or their arbitrator involved.

While attorneys for Owens and Rosenhaus have privately fought over the issue since August, broader concerns about procedural fairness in NFLPA arbitrations have been raised in the past. The most notable example arose during a December 2006 U.S. House Subcommittee hearing that called the system's neutrality into question.

In the current matter, Owens says the Players Association is putting him at a significant disadvantage in his dispute with Rosenhaus by forcing him to have his case heard by Kaplan.

"Kaplan is essentially on Rosenhaus' payroll at the moment and, if the NFLPA cares anything about fairness and avoiding the appearance of bias, it should not hesitate to grant Owens' request [to provide the parties with a different arbitrator]," said Owens' attorneys, Curtis and Chase Carlson of Miami-based Carlson Lewittes in an August memo addressed to the NFLPA.

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DeSean Jackson (Getty Images)

Rosenhaus' attorneys argued the money Kaplan stood to make while working on that matter wouldn't affect the arbitrator's objectivity. They also argued Rosenhaus would "be prejudiced" if the NFLPA appointed a different arbitrator to hear the dispute between he and Owens.

"[T]here is not even an "appearance of bias" arising from the unremarkable fact that Mr. Kaplan's fees are being split by Rosenhaus and another party in a wholly unrelated arbitration. At best, [Owens'] assertion that there will be an appearance of bias if Mr. Kaplan is appointed as the arbitrator is rank speculation."

Rosenhaus' claim relied, in part, on the fact Kaplan was the union's most experienced and knowledgeable arbitrator, and that he has been used "almost exclusively" to arbitrate NFLPA grievances for more than ... (15) years." A review of NFLPA records reveals that the union has used Kaplan almost exclusively since 1994.

The NFLPA found Rosenhaus' arguments persuasive. NFLPA staff counsel Todd Flanagan sent a letter to the parties denying Owens' request for a different arbitrator shortly after reviewing the exchange between the parties, saying Kaplan was "the only 'skilled and experienced person' selected by the NFLPA" to hear these kinds of disputes.

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"[The] argument of partiality, or the appearance of partiality, notwithstanding, Arbitrator Kaplan will judge this case on its merits. Accordingly, we will process this case in typical fashion."

Union spokesman George Atallah did not respond to an email, call or text for comment.

The NFLPA's approach confounded one former Congressman who questioned the union's arbitration practices during the congressional hearing in 2006.

"I have a bit of a problem; you know, there is an assertion by some that [Roger Kaplan] — and I know nothing about him — might not fit the definition of 'neutral arbitrator,' U.S. Rep. Bill Delahunt said during the hearing. "Has the NFLPA considered, as these cases come individually, rotating arbitrators?

"I am looking at it in a systemic way, to ensure that there is a random quality, if you will, to … the process of arbitration, as opposed to reliance on a single individual over an extended period of time. Because clearly, after 13 years, you know, you can be Mother Teresa, but you are going to start to develop an attitude on different issues, I mean, that is just human nature. And I wonder if there is a better system in terms of ensuring that the individual selected is a neutral—underscore "neutral"—arbitrator and doesn't have a certain preordained view of individuals …because that does happen."

Delahunt concluded his time in office in 2011, but recently expressed concern to Yahoo Sports about what appeared to be the NFLPA disregarding Congress' direction and said it's possible they could renew their concern with the union's arbitration procedures.

"Given everything that's occurred, I'm really surprised that the NFLPA system itself hasn't accommodated the recommendations that were made by members of congress back in 2006 regarding the issue of procedural fairness in arbitration," Delahunt said this week.

"Many of us echoed the same sentiment that I expressed [in 2006]. I would have believed that at this point in time, simply for purposes of bolstering public confidence in the integrity of the system, meaningful changes would have been made."

> View Comments (17)

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ROGER P. KAPLAN
Arbitrator

211 North Union Street
Suite 100
Alexandria, Virginia 22314
rpkaplan@yahoo.com

703-684-4844
Fax: 703-684-4864

September 11, 2013

Jason Rosenhaus, Esq.
6400 Allison Road
Miami Beach, Florida 33141

Steven Feldman, Esq.
30100 Town Center Suite 196
Laguna Niguel, California 92677

Re: Rosenhaus v. Jackson,
NFLPA 13-31;

Dear Gentlemen:

This confirms arrangements made for the scheduling of the above-captioned cases for arbitration hearing. The pertinent information is set forth below:

DATE: Tuesday, September 24, 2013
PLACE: Regus Offices
1650 Market Street Suite 3600
Philadelphia, Pennsylvania 19103
TIME: 9:30 a.m. 267-319-7900

Please be prepared to present your evidence when the hearing commences at 9:30 a.m. A court reporter will record the hearing verbatim. I look forward to seeing you September 24. If you have any questions prior to September 24, please call me.

Sincerely,

Roger P. Kaplan

RPK/jb
cc: Todd Flanagan
David Cornwell

EXHIBIT
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NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

In the matter of arbitration between:

DREW ROSENHAUS, an individual,
JASON ROSENHAUS, an individual, and
ROSENHAUS SPORTS REPRESENTATION,
INC., a Florida corporation,

Grievants,

v.

TERRELL OWENS, an individual,

Respondent.
_____/

RESPONDENT'S REQUEST TO HAVE THIS MATTER ASSIGNED TO ARBITRATORS OTHER THAN ROGER KAPLAN

Respondent Terrell Owens, by his undersigned counsel, without waiving his Motion to Stay and Motion to Dismiss, submits this request to have this matter assigned to arbitrators other than Roger Kaplan, and if he is appointed, recuse himself, and would show the following:

Introduction

We believe, in order to have a fair arbitration for Respondent, it is necessary that the NFLPA assign this matter to arbitrators other than Roger Kaplan, or if Kaplan is assigned, he should recuse himself. The main reason for this request is that Drew Rosenhaus, Jason Rosenhaus, and Rosenhaus Sports Representation Inc., the three Grievants in this matter, have privately paid Kaplan to arbitrate a claim for them, which is currently pending. Therefore, since Kaplan is currently deriving income directly from the Grievants in this matter, we believe partiality exists and it would be unfair to the Respondent to have Kaplan as an arbitrator in this

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dispute.

Legal Background

The U.S. Supreme Court stated in *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968):

> This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

Clearly, there is an appearance of bias present if Kaplan were to be an arbitrator selected in this matter. Justice White, in his concurring opinion stated:

> And it is far better that the relationship be disclosed at the outset, when the **parties are free to reject the arbitrator** or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award. (Bold added).

The Supreme Court has made it clear that if a relationship (of any financial transactions which the arbitrator has had or is negotiating with either of the parties) is disclosed from the outset, the Parties should be free to reject the arbitrator.

In *Tumey v. State of Ohio*, 273 U.S. 510 (1927), the Supreme Court held that a conviction could not stand because a small part of the judge's income consisted of court fees collected from convicted defendants. The *Tumey* Court held that a decision should be set aside where there is "the slightest pecuniary interest" on the part of the judge, and specifically rejected the State's contention that the compensation involved there was "so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty." The

Commonwealth Coatings Corp. case states that the same concept should be applied to arbitration proceedings.

Conclusion

Because Kaplan is currently deriving income directly from the Grievants in this matter, we believe partiality exists and it would be unfair to the Respondent to have Kaplan as an arbitrator in this dispute, and the proceeding should be assigned to arbitrators other than Roger Kaplan, or if Kaplan is assigned, he should recuse himself.

Attorneys for Terrell Owens:

CARLSON & LEWITTES, P.A.
One S.E. Third Avenue
Suite 1200
Miami, FL 33131
Telephone: 305-372-9700

By: S/Curtis Carlson
CURTIS CARLSON

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing ws sent via electronic mail on this 12th day of August, 2013, to Peter Homer (phomer@homerbonner.com), Homer Bonner Jacobs, 1200 Four Seasons Tower, 1441 Brickell Avenue, Miami, FL 33131, and William Griffith (william.griffith@nflplayers.com), and Todd Flanagan (todd.flanagan@nflplayers.com) 133 20th Street, NW, Washington, D.C. 20036.

By: S/Curtis Carlson

1133 20th Street, NW • Washington, DC 20036 202.756.9100 tel 202.756.9317 fax

August 29, 2013

VIA EMAIL

Peter Homer
Homer Bonner Jacobs
1200 Four Seasons Tower
1441 Brickell Ave.
Miami, FL 33131

Chase Carlson
Carlson & Lewittes
ONE S.E. 3rd Ave.
Suite 1200
Miami, FL 33131

NFL PLAYERS ASSOCIATION
LEGAL DEPARTMENT

Re: **Rosenhaus, Drew v. Owens, Terrell**

Dear Sirs:

We considered the arguments on the questions of whether of the NFLPA should appoint a three person arbitration panel and whether the NFLPA should appoint an Arbitrator other than Roger Kaplan.

Section 5 (D) of the NFLPA Regulations Governing Contract Advisors ("Regulations") allows the appointment of one "person to serve as the outside impartial Arbitrator" in Section 5 cases. While we can select such person from a panel of up to three arbitrators, we can only select one person to hear each case.

Roger Kaplan is the only "skilled and experienced person" selected by the NFLPA to hear cases arising under Section 5 of the Regulations. Therefore, per the Regulations, the case must be assigned to him.

In addition, Arbitrator Kaplan routinely hears cases that involve parties who may have been a party to a previous dispute he adjudicated. So, the fact that Grievants were involved in a prior proceeding is not unusual and not a reason for recusal. Further, the argument of partiality, or the appearance of partiality, notwithstanding, Arbitrator Kaplan will judge this case on its merits. Accordingly, we will process this case in the typical fashion.

A copy of the case file has been sent to Arbitrator Kaplan. You should contact him at (703) 684-4844 to discuss scheduling and any additional arguments.

Sincerely,

Todd Flanagan
Staff Counsel

Cc: Roger Kaplan

EXHIBIT 4

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

IN THE MATTER OF THE ARBITRATION BETWEEN:	)
	)
DREW ROSENHAUS, an individual, JASON ROSENHAUS, an individual, and ROSENHAUS SPORTS REPRESENTATION, INC., a Florida corporation,	)
	)
Grievants,	)
	)
v.	)
	)
TERRELL OWENS, an individual,	)
	)
Respondent.	)

GRIEVANTS' OPPOSITION TO RESPONDENT'S REQUEST TO HAVE THIS MATTER ASSIGNED TO ARBITRATORS OTHER THAN ROGER KAPLAN

Drew Rosenhaus, Jason Rosenhaus, and Rosenhaus Sports Representation, Inc. (collectively "Rosenhaus") submit this opposition to the request to have this matter assigned to arbitrators other than Roger Kaplan filed by Respondent Terrell Owens ("Respondent").

INTRODUCTION

Respondent's assertion that NFLPA Arbitrator Roger Kaplan ("Mr. Kaplan") will be partial to Rosenhaus if he is appointed, as he should be, to arbitrate this grievance is factually and legally baseless. Respondent does not, because he cannot, explain how the fact that Mr. Kaplan is being paid by two consenting parties to serve as a neutral arbitrator in a wholly unrelated dispute will cause Mr. Kaplan to be partial to Rosenhaus in this matter. For it to matter under the Federal Arbitration Act, the "evident partiality" must demonstrate clear financial or other meaningful incentives for an arbitrator to rule in favor of one party. Speculation about some hidden interest or motive will not suffice. Respondent relies on dicta from a 45 year-old

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EXHIBIT 5 tabbies

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Supreme Court case, which numerous courts have rejected, to argue that the NFLPA should not appoint Mr. Kaplan merely because of an alleged "appearance of bias." However, as a legal matter, it is well established that the mere appearance of bias is insufficient to demonstrate evident partiality. Here there is not even an "appearance of bias" arising from the unremarkable fact that Mr. Kaplan's fees are being split by Rosenhaus and another party in a wholly unrelated arbitration. At best, Respondent's assertion that there will be an appearance of bias if Mr. Kaplan is appointed as the arbitrator is rank speculation.

Respondent disguises his request as being about fairness. In reality, Respondent seeks to prejudice Rosenhaus by asking the NFLPA to appoint a less experienced and less knowledgeable arbitrator that does not possess Mr. Kaplan's understanding of NFLPA case precedent, the NFLPA Regulations Governing Contract Advisors (the "NFLPA Regulations"), and the contract advisor/player relationship. In other words, Respondent does not seek an even playing field, but rather a playing field tilted in his favor.

However, this is precisely the type of dispute that the NFLPA should want its most experienced and knowledgeable arbitrator, Roger Kaplan, presiding over. As indicated in the Statement of Grievance and Respondent's August 30, 2012 demand letter attached hereto as Exhibit A, this matter involves an ongoing dispute between the parties regarding, among other things, whether Rosenhaus owed specific duties to Respondent under the parties' Standard Representation Agreement (the "Agreement") and the NFLPA Regulations, and whether Rosenhaus breached any such duties (Rosenhaus breached no such duties). Statement of Grievance at ¶¶ 31, 35-36. Some of the issues that will be litigated in this matter may well be issues of first impression in a NFLPA arbitration. For example, the NFLPA Regulations provide that contract advisors are required to act at all times in a fiduciary capacity on behalf of their

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players. NFLPA Regulations at § 3(A)(17). However, the NFLPA Regulations do not define the scope of what duties (fiduciary or otherwise) contract advisors owe to their clients. Accordingly, this matter will likely have a precedent setting effect on future NFLPA grievances between players and contract advisors. Mr. Kaplan is best-suited to arbitrate such issues. The NFLPA should want, and the parties to this grievance (and future parties) deserve, to have such issues determined by Mr. Kaplan, whom the NFLPA has used almost exclusively to arbitrate NFLPA grievances for more than fifteen (15) years. Mr. Kaplan's track record as a fair and neutral arbitrator is above reproach, and Rosenhaus (and perhaps future parties) will be prejudiced if the NFLPA appoints an arbitrator other than Mr. Kaplan in this matter. Accordingly, the NFLPA should deny Respondent's request, and appoint Mr. Kaplan as the arbitrator in this matter.

MEMORANDUM OF LAW

Respondent's request depends upon a showing of real partiality on Mr. Kaplan's part that exceeds sheer speculation. With no such showing and only wild supposition, Respondent attempts to cite cases showing that this may be enough. However, the cases do not support Respondent's argument. Respondent's reliance on *Tumey v. State of Ohio*, 273 U.S. 510 (1927) is misplaced. In *Tumey*, the Court considered a constitutional challenge to Ohio statutes providing that a person accused of violating the Prohibition Act of Ohio would be tried by the village mayor. The accused asserted that deprivation of due process of law and violations of the Fourteenth Amendment occurred because of the mayor's pecuniary interest in the result of the trial. *Id.* at 514-515. Specifically, the mayor had a pecuniary interest in convicting the defendant because there was "no way by which the mayor may be paid for his service as judge, if he does not convict those who are brought before him; nor is there any fund from which marshals, inspectors and detectives can be paid for their services in arresting and bringing to trial and

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furnishing evidence to convict in such cases..." *Id.* at 520. The concerns at issue in *Tumey* do not exist in the instant grievance because Mr. Kaplan is going to be paid his fees regardless of the outcome of the arbitrations. He therefore has no pecuniary interest in the outcome of the instant grievance or the private arbitration. In both cases, Mr. Kaplan's compensation is not dependent on ruling in favor of a particular party. He is paid to act as a third-party neutral.

Respondent's reliance on *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968) is likewise misplaced. In that case, a supposedly neutral arbitrator was found to have an undisclosed business relationship with the successful party to the arbitration. The arbitrator had been paid approximately $12,000 in consulting fees by the successful party, and the relationship between them "went so far as to include the rendering of services on the very projects involved in [the arbitration]." *Id.* at 146. Justice Black, writing for a plurality of four justices, appeared to impose upon arbitrators the same ethical standards required of Article III judges, by writing that arbitrators, like judges, must avoid even the "appearance of bias." *Id.* at 150. "Four justices, however, do not constitute a majority of the Supreme Court." *Morelite Const. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 82 (2d Cir. 1984) (emphasis added). Justice White, who concurred in the result, made clear that the Court was not holding that arbitrators and judges are subject to the same ethical standards. Justice White stated, in relevant part, that

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from that of the marketplace, that they are effective in their adjudicatory function. This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.

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Id. (emphasis added). Accordingly, Justice Black's suggestion that the mere appearance of bias warrants vacating an arbitration award for failure to disclose a business relationship is dicta and has been rejected. *See Morelite*, 748 F.2d at 82-83 (treating Justice Black's opinion as dicta, rejecting the "appearance of bias" test of evident partiality, and holding that evident partiality within the meaning of 9 U.S.C. § 10 exists where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005) (explaining that the Sixth Circuit has adopted *Morelite*'s objective test of evident partiality, and rejected, as dicta, the appearance of bias standard espoused in the plurality opinion in *Commonwealth Coatings.*); *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) (stating that "the mere appearance of bias or partiality is not enough to set aside an arbitration award," and explaining that "[i]n order to vacate on the ground of evident partiality in a nondisclosure case, the party challenging the arbitration award must establish that the undisclosed facts create a 'reasonable impression of partiality.'"); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (stating that "[i]t is well established that a mere appearance of bias is insufficient to demonstrate evident partiality."); *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 621 (7th Cir. 2002) ("Arbitration differs from adjudication, among many other ways, because the 'appearance of partiality' ground of disqualification for judges does not apply to arbitrators; only *evident* partiality, not appearances or risks, spoils an award."). The proper standard for determining evident partiality in cases of nondisclosure (which is not an issue in the instant matter) is an objective or reasonable person standard. *Id.* Here, because there is not a scintilla of factual evidence indicating that Mr. Kaplan, if appointed, will be anything but fair, objective, open-minded in deliberations and not predisposed to rule in favor of either party before hearing

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the evidence, no reasonable person would conclude that Mr. Kaplan will be partial to Rosenhaus. *Peoples Sec. Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993) (stating that [t]he party asserting evident partiality has the burden of proof," and that "[t]he alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain or speculative.").

One of the chief reasons courts have rejected the appearance of bias standard for determining evident partiality in non-disclosure cases is because the most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose and, therefore, it is not unusual that those who are selected as arbitrators have had prior dealings with one or more parties or their counsel. *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551-52 (2d Cir. 1981); *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002) (recognizing that "[t]he more experience the panel has, and the smaller the number of repeat players, the more likely it is that the panel will contain some actual or potential friends, counselors, or business rivals of the parties."); *Morelite*, 748 F.2d at 83 (stating that "specific areas tend to breed tightly knit professional communities. Key members are known to one another, and in fact may work with, or for, one another, from time to time."). To disqualify an arbitrator or vacate an arbitration award where nothing more than an alleged appearance of bias based on professional dealings, would be automatically to disqualify the best informed and most capable arbitrators, and make it impossible, in some circumstances, to find a qualified arbitrator at all. *Int'l Produce, Inc.* 638 F. 2d at 552; *Morelite,* 748 F.2d at 83-84. Here, the NFLPA should not hesitate to follow its normal practice of appointing Mr. Kaplan as the arbitrator because unlike many arbitrators who also practice law or conduct business in a particular arena, Mr. Kaplan is a true third-party neutral.

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Having no real facts to contradict this point, Respondent baldly asserts that he should be free to reject Mr. Kaplan as the arbitrator for speculative reasons. However, Respondent has "agree[d] to be bound by the provisions of th[e] [NFLPA] Constitution and by any by-laws, rules or other regulations duly adopted by the NFLPA." *Id.* The NFLPA Regulations, which were duly adopted by the NFLPA, provide that the NFLPA, not the parties, selects an impartial arbitrator for all Section 5 grievances. NFLPA Regulation § 5(D). Thus, Respondent is not free to reject Mr. Kaplan. This is especially the case where, as here, Respondent's allegation of evident partiality is legally and factually meritless.

The practical implications of granting Respondent's request could have unintended consequences. If Respondent's request is granted based on rank speculation, it will create a dangerous precedent that future NFLPA litigants will use to gain a perceived tactical advantage. Mr. Kaplan could be automatically barred from arbitrating separate proceedings involving the same agent or player at the same time merely because he is being paid for his work. Yet, his ability to render fair and impartial rulings in every arbitration remains unquestioned. Mr. Kaplan is best-suited to preside over this matter, and Respondent has no basis to claim otherwise.

CONCLUSION

For all the foregoing reasons, the NFLPA should summarily reject Respondent's request to have this matter assigned to arbitrators other than Mr. Kaplan. Instead, Mr. Kaplan should be appointed as the arbitrator for this grievance. For these same reasons, Mr. Kaplan, if appointed, should not recuse himself.

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Respectfully submitted:

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By: _____
Peter W. Homer
Florida Bar No. 291250
Andrew Vitali, III
Florida Bar No. 57828

Attorneys for Grievants Drew Rosenhaus, Jason Rosenhaus, and Rosenhaus Sports Representation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that this 19th day of August 2013, a true and correct copy of the foregoing was sent via e-mail to:

Curtis Carlson
Carlson & Lewittes, P.A.
One S.E. Third Avenue
Suite 1200
Miami, FL 33131
E-mail: carlson@carlson-law.net

Counsel for Respondent

_____
Peter W. Homer

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IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO. 13-27602-CA-01 (40)

TERRELL OWENS,

Plaintiff,

vs.

DREW ROSENHAUS, JASON ROSENHAUS, AND ROSENHAUS SPORTS REPRESENTATION, INC.,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION TO STAY THE PROCEEDINGS OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION AND STAY THE PROCEEDINGS, AND DENYING PLAINTIFF'S CROSS-MOTION TO STAY OR ENJOIN THE ARBITRATION

THIS MATTER came before the Court on November 21, 2013 upon (1) Defendants' Motion To Stay The Proceedings Or, In The Alternative, To Compel Arbitration And Stay The Proceedings (the "Motion"), and (2) Plaintiff's Cross-Motion To Stay Or Enjoin The Arbitration (the "Cross-Motion"). The Court having reviewed and considered the Motion, the Cross-Motion, and the record, having heard extensive oral argument, and being otherwise fully and duly advised in the premises, it is hereby

ORDERED and **ADJUDGED** that:

Defendants' Motion is **GRANTED**. Plaintiff's alleged claims are compelled to arbitration before the National Football League Players Association for the arbitrator to determine any issues of arbitrability and to decide all arbitrable claims. This matter is stayed pending the arbitrator's determinations.

Plaintiff's Cross-Motion is hereby **DENIED**.

EXHIBIT 6 68

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 11/22/13.

JOHN W. THORNTON
CIRCUIT COURT JUDGE

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed and stamped original Order sent to court file by Judge Thornton's staff.

Copies furnished to:

Curtis Carlson
carlson@carlson-law.net
Peter Homer
phomer@homerbonner.com

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EXHIBIT F

ROGER P. KAPLAN
Arbitrator

211 North Union Street
Suite 100
Alexandria, Virginia 22314
rpkaplan@yahoo.com

703-684-4844
Fax: 703-684-4864

July 23, 2013

Jason Rosenhaus, Esq.
6400 Allison Road
Miami Beach, Florida 33141

Steven Feldman, Esq.
30100 Town Center Suite 196
Laguna Niguel, California 92677

Re: Rosenhaus v. Jackson,
NFLPA 13-31;

Dear Gentlemen:

This confirms arrangements made for the scheduling of the above-captioned cases for arbitration hearing. The pertinent information is set forth below:

DATE: Tuesday, September 27, 2013
PLACE: Philadelphia, Pennsylvania
location TBA
TIME: 9:30 a.m.

Please be prepared to present your evidence when the hearing commences at 9:30 a.m. A court reporter will record the hearing verbatim. I look forward to seeing you September 27. If you have any questions prior to September 27, please call me.

Sincerely,

Roger P. Kaplan

RPK/jb

cc: Todd Flanagan
David Cornwell

EXHIBIT F

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ROGER P. KAPLAN
Arbitrator

211 North Union Street
Suite 100
Alexandria, Virginia 22314
rpkaplan@yahoo.com

703-684-4844
Fax: 703-684-4864

September 11, 2013

Jason Rosenhaus, Esq.
6400 Allison Road
Miami Beach, Florida 33141

Steven Feldman, Esq.
30100 Town Center Suite 196
Laguna Niguel, California 92677

Re: Rosenhaus v. Jackson,
NFLPA 13-31;

Dear Gentlemen:

This confirms arrangements made for the scheduling of the above-captioned cases for arbitration hearing. The pertinent information is set forth below:

DATE: Tuesday, September 24, 2013
PLACE: Regus Offices
1650 Market Street Suite 3600
Philadelphia, Pennsylvania 19103
TIME: 9:30 a.m. 267-319-7900

Please be prepared to present your evidence when the hearing commences at 9:30 a.m. A court reporter will record the hearing verbatim. I look forward to seeing you September 24. If you have any questions prior to September 24, please call me.

Sincerely,

Roger P. Kaplan

RPK/jb
cc: Todd Flanagan
David Cornwell

EXHIBIT G

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

In the matter of arbitration between:

DREW ROSENHAUS, an individual,
JASON ROSENHAUS, an individual, and
ROSENHAUS SPORTS REPRESENTATION,
INC., a Florida corporation,

Grievants,

v.

TERRELL OWENS, an individual,

Respondent.
_____/

RESPONDENT'S REQUEST TO HAVE THIS MATTER ASSIGNED TO ARBITRATORS OTHER THAN ROGER KAPLAN

Respondent Terrell Owens, by his undersigned counsel, without waiving his Motion to Stay and Motion to Dismiss, submits this request to have this matter assigned to arbitrators other than Roger Kaplan, and if he is appointed, recuse himself, and would show the following:

Introduction

We believe, in order to have a fair arbitration for Respondent, it is necessary that the NFLPA assign this matter to arbitrators other than Roger Kaplan, or if Kaplan is assigned, he should recuse himself. The main reason for this request is that Drew Rosenhaus, Jason Rosenhaus, and Rosenhaus Sports Representation Inc., the three Grievants in this matter, have privately paid Kaplan to arbitrate a claim for them, which is currently pending. Therefore, since Kaplan is currently deriving income directly from the Grievants in this matter, we believe partiality exists and it would be unfair to the Respondent to have Kaplan as an arbitrator in this

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dispute.

Legal Background

The U.S. Supreme Court stated in *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968):

> This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

Clearly, there is an appearance of bias present if Kaplan were to be an arbitrator selected in this matter. Justice White, in his concurring opinion stated:

> And it is far better that the relationship be disclosed at the outset, when the **parties are free to reject the arbitrator** or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award. (Bold added).

The Supreme Court has made it clear that if a relationship (of any financial transactions which the arbitrator has had or is negotiating with either of the parties) is disclosed from the outset, the Parties should be free to reject the arbitrator.

In *Tumey v. State of Ohio*, 273 U.S. 510 (1927), the Supreme Court held that a conviction could not stand because a small part of the judge's income consisted of court fees collected from convicted defendants. The *Tumey* Court held that a decision should be set aside where there is "the slightest pecuniary interest" on the part of the judge, and specifically rejected the State's contention that the compensation involved there was "so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty." The

Commonwealth Coatings Corp. case states that the same concept should be applied to arbitration proceedings.

Conclusion

Because Kaplan is currently deriving income directly from the Grievants in this matter, we believe partiality exists and it would be unfair to the Respondent to have Kaplan as an arbitrator in this dispute, and the proceeding should be assigned to arbitrators other than Roger Kaplan, or if Kaplan is assigned, he should recuse himself.

Attorneys for Terrell Owens:

CARLSON & LEWITTES, P.A.
One S.E. Third Avenue
Suite 1200
Miami, FL 33131
Telephone: 305-372-9700

By: S/Curtis Carlson
CURTIS CARLSON

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing ws sent via electronic mail on this 12th day of August, 2013, to Peter Homer (phomer@homerbonner.com), Homer Bonner Jacobs, 1200 Four Seasons Tower, 1441 Brickell Avenue, Miami, FL 33131, and William Griffith (william.griffith@nflplayers.com), and Todd Flanagan (todd.flanagan@nflplayers.com) 133 20th Street, NW, Washington, D.C. 20036.

By: S/Curtis Carlson

EXHIBIT H

Steven C. Feldman, Esq.
Feldman Law Center
30100 Town Center
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Laguna Niguel, California 92677
TELEPHONE (949) 697- 8763
FAX (949) 495 -5642

Attorney for DESEAN JACKSON

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

In The Matter of DREW ROSENHAUS, et al Grievant VS. DESEAN JACKSON Respondent	RESPONDENT'S REQUEST FOR ARBITRATOR KAPLAN TO RECUSE HIMSELF FROM THIS PROCEEDING CASE NO: NFLPA 13-31

I

INTRODUCTION

Respondent, DeSean Jackson, by his undersigned counsel submits this request to Arbitrator Kaplan to recuse himself as the arbitrator in the above matter of Rosenhaus v. Jackson. The main reason for this request is that Drew Rosenhaus, Jason Rosenhaus and Rosenhaus Sports Representation, Inc., the three Grievants in this matter, have privately paid Kaplan to arbitrate a claim for them that is currently pending. *(Martoe v. Rosenhaus et al.)* Therefore, since Kaplan is currently deriving income directly from the Grievants in this matter, we believe that the possibility for partiality may exist and it would be unfair to the Respondent to have Kaplan continue as the arbitrator in this dispute.

EXHIBIT H

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LEGAL BACKGROUND

The U.S. Supreme Court stated in *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393U.S. 145 (1968) , stated that'this rule of arbitration and this cannon of judicial ethics rests on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the ***appearance of bias***. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.' Clearly there is the ***'appearance'*** of evident bias if Kaplan were to continue in this matter as the arbitrator. Justice White in his concurring opinion stated, "And it is far better that the relationship be disclosed at the outset when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award". The Supreme Court has made it clear that if a relationship (of any financial transactions which the arbitrator has had or is negotiating with either party) is disclosed from the outset, the Parties should be free to reject the arbitrator.

Respondent Jackson has just recently become aware of the financial transaction between Rosenhaus and Kaplan. Said disclosure was not made available to Jackson at the time Kaplan was handpicked to arbitrate this matter by either Kaplan or the NFLPA. Jackson believes that there is the potential for bias. Rule 15 of the American Arbitration Association (Disclosure and Challenge Procedure) reads: Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstances likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or financial or personal interest in the result of the arbitration. Such obligation shall remain in effect throughout the arbitration.

Upon receipt of this information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems appropriate to do so, to the arbitrator. Upon objection of a party to the continued service of a neutral arbitrator, the AAA, after consultation with the parties and the arbitrator, shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

At no time prior to or during the pendency of this matter, was the financial arraignment between Rosenhaus and Kaplan disclosed to Jackson. Had such information been made available Jackson prior to the arbitration, Jackson would have requested that Kaplan be disqualified and another neutral arbitrator be selected. In *Tumey v. State of Ohio*, 273 U.S. 510 (1927), the Supreme Court held that a conviction could not stand because a small part of the judges incomes consisted of court fees collected from the convicted defendants. The *Tumey* Court held that a decision should be set aside when there is the " slightest pecuniary interest" on the part of the judge, and specifically rejected the State's contention that the compensation involved there was "so small that it is not to be regarded as likely to influence a judicial officer in the discharge of his duty". Jackson has been informed, believes and herein alleges the fees paid to Kaplan in the private matter will total into the tens of thousands of dollars. Certainly this is not an insignificant amount. The *Commonwealth Coatings Corp.* case states that the same concept should be applied to arbitration proceedings.

The mere appearance of bias is the applicable standard for the NFLPA to apply in the appointment process. It would be unfair to Jackson to place him in a situation where he must seek to vacate the judgment after an award has been rendered. It is common law that provides the standard for when someone should or should not be appointed an arbitrator. Not coincidentally, the "**appearance of bias**" is the same standard that judges must apply when determining whether

or not it is proper to serve as the trier of fact. In the federal courts, 28 U.S.C. Sec. 455 (a) states, that "[a]ny justice, or magistrate judge of the United States shall disqualify himself from the proceedings in which his impartiality might be reasonably be questioned. In the Florida courts, "[a] judge shall avoid the impropriety and appearance of impropriety in all of the Judges activities. Florida Code of Judicial Conduct, Canon 2. The mere appearance of bias is enough to prevent a judge from serving and it should be the same for persons appointed to act as an arbitrator.

CONCLUSION

Because Kaplan is currently deriving income directly from the Grievant in this matter, Jackson believes that partiality may exist. It would therefore be unfair to have Kaplan continue to arbitrate this dispute. Kaplan should recuse himself and the proceeding should be assigned to another arbitrator. If Respondents request is granted, it will not create a dangerous precedent that future litigants will use Kaplan's evident bias as a basis to disqualify him in the future. Jackson speculates that Rosenhaus is the only certified agent to date that has hired and continues to hire and pay Kaplan for arbitration services outside of the NFLPA process. If such involvement results in Kaplan removing himself from arbitrating any future proceeding that involves Rosenhaus within the NFLPA process, the process itself would only benefit by the removal of any fear by litigants that a financial relationship between Kaplan and Rosenhaus may adversely affect the outcome of an arbitration where Rosenhaus is directly involved as a Grievant or Respondent.

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/

Respectfully submitted

Steven C. Feldman, Esq.

Date : November 20, 2013

CERTIFICATE OF SERVICE

I HEREBY, certify that a true and correct copy of the foregoing was sent via electronic mail/fax on November 20, 2013 to Roger Kaplan (rpkaplan@yahoo.com) and Tom DePaso (tom. depaso@nflplayers.com and to

EXHIBIT I

FELDMAN
LAW CENTER

30100 TOWN CENTER SUITE 196 LAGUNA NIGUEL CA. 92677

TELEPHONE: (949) 697-8763 FAX: (866) 569-6169

DeMaurice Smith
National Football League Players Association
63 Upshaw Place
1133 20th Street NW
Washington, D.C. 20036

RE: Rosenhaus v Jackson August 22, 2013

Dear Mr. Smith,

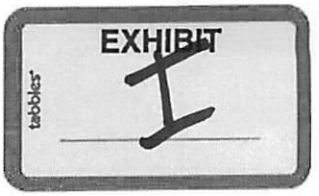
On or about Aug 1, 2012, I forwarded a letter to Drew Rosenhaus and Jason Rosenhaus regarding DeSean Jackson, wherein I requested, pursuant to Section 3(a) (9) and 3(a) 10 of the NFLPA Regulations Governing Contract Advisors, financial information required by section 3(a) 9 and the financial backup documentation required to perform an audit as permitted by section 3(a) 10.

In addition to wanting to make sure that you have actual notice of this request, I am requesting that you compel Drew and Jason Rosenhaus to immediately comply with this request. Drew and Jason Rosenhaus are claiming that Mr. Jackson owed them over $782,297.00 but to date they have not complied with their obligation to provide financial information outside of the arbitration process. I look forward to your prompt and complete assistance.

Respectfully,

Steven C. Feldman, Esq.

Cc: Heather McPhee
Todd Flanagan
Happy Walters
Liz Mullin
Joel Segal
Eugene Parker
Rand Getlin
Peter Schaffer



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