UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TODD FRANCE,
4600 Roswell Rd, Ste. D-200
Atlanta, GA 30342

Plaintiff and Petitioner,

v.

JASON BERNSTEIN
9412 Crimson Leaf Terrace
Potomac, MD 20854

Defendant and Respondent.

Case No. 1:24-cv-448

COMPLAINT AND PETITION TO VACATE OR MODIFY ARBITRATION AWARD

Plaintiff and Petitioner Todd France ("France") brings this Complaint and Petition against defendant and respondent Jason Bernstein ("Bernstein") pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"), sections 6, 10, 11, & 12 of the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. ("FAA"), and sections 8.01-581.010-8.01-581.011, and 8.01-581.013 of the Virginia Uniform Arbitration Act, Va. Code §§ 8.01-581.010-8.01-581.016 ("VUAA"), to vacate or modify the December 28, 2023 arbitration award made by arbitrator Roger P. Kaplan ("Award"). Non-party National Football League Players Association ("NFLPA" or "Union") unilaterally designated Mr. Kaplan to arbitrate a grievance between rival NFL player-agents Bernstein and France that allegedly arose under Section 5 of the NFLPA Regulations Governing Contract Advisors, as amended through August 2016 ("Regulations"). The underlying Award France challenges in this action is attached as Exhibit A. The Regulations are attached as Exhibit B.

PRELIMINARY STATEMENT

1. This Complaint and Petition to Vacate or Modify Arbitration Award (the "Petition") presents the Court with the rare arbitration award that must be set aside. The Award is the product of prejudicial arbitral misconduct as the arbitrator who made it refused to hear or consider evidence pertinent and material to the controversy. It denies France fundamental fairness and prejudiced him as a result. The Award fails to draw its essence from the parties' agreement, which was embodied in the Regulations and the Collective Bargaining Agreement ("CBA")—it is not even arguably based on the Regulations or any other aspect of the parties' contractual relationship. It violates the fundamental principles of notice, fairness and consistency and disregards the "law of the shop," which prohibits punitive damage awards. There is no even arguable basis in that law or the parties' agreement for the punitive damages awarded. Before and during the arbitration hearing, Arbitrator Kaplan himself unequivocally proclaimed that to be so, and ruled that no punitive damages would be or could be awarded in this or any other NFLPA Section 5 grievance dispute. But after the close of evidence, the arbitrator inexplicably reversed course, denied France the opportunity to present further evidence and argument contesting punitive damages, and awarded Bernstein $450,000 in punitive damages. Arbitrator Kaplan's abrupt, post-close-of-evidence shift in position denied France the opportunity to submit material evidence and argument against punitive damages and France was economically prejudiced accordingly. As further detailed below, Arbitrator Kaplan exceeded his powers and rendered an award in manifest disregard of the law.

2. The infirmities with the Award stem in large part from the twisted procedural litigation history that preceded it and Arbitrator Kaplan's refusal to hear or consider a mountain of evidence favorable to France that developed - and continues to develop – in Bernstein's related lawsuit against CAA Sports, France's former employer, and several independent memorabilia

companies, which is pending in the Middle District of Pennsylvania. *Clarity Sports Int'l, LLC v. CAA Sports, LLC*, M.D.Pa. case no. 1:19-CV-00305 (YK) ("the parallel action"). France is *not* a party to the parallel action, but the arbitrator allowed Bernstein to weaponize, selectively and strategically, portions of the evidentiary record from the parallel action to demonize France in the separate NFLPA arbitral forum and successfully obtain the unjust Award.

3. Fundamental fairness principles and traditional due process considerations strongly favor the resolution of disputes on the merits, including in arbitration with its relaxed, evidence-admission standards applied to all sides of a dispute.

4. France has been denied a full and fair opportunity to defend on the merits the contentions Bernstein made or repackaged in the arbitration, which ultimately allowed Bernstein to obtain the Award that is the subject of this Petition.

5. France – like any party to any arbitration proceeding – is entitled to equal treatment and a reasonable opportunity to have all material and pertinent evidence heard and fairly considered by the arbitrator charged with adjudicating the parties' dispute. But the playing field was decidedly uneven in the arbitration because of Arbitrator Kaplan's misconduct, his preconceived notions concerning France's guilt and liability, and Arbitrator Kaplan's own misguided brand of industrial justice, without resort to any impartial consideration of *all the facts* or the truth of what actually occurred.

6. Truth matters. Due process matters. Fairness matters. Shortcuts taken in arbitration should not be overlooked or countenanced by a reviewing court, especially when France's personal and professional reputation and livelihood are at stake and precariously hang in the balance.

7. The arbitrator far overstepped his limited authority under the Regulations when, after embracing it during the hearing, he dramatically changed course when he announced, post-

close-of-evidence that he was disregarding binding NFLPA arbitral precedent in favor of his own notions of industrial (or commercial) justice and would impose punitive damages against France. Those punitive damages are not expressly or even arguably provided for under the Regulations or the CBA so Arbitrator Kaplan exceeded his powers by imposing punitive damages against France as part of the Award. *E.g.*, *Island Coal Creek Co. v. District 28, United Mine Workers of Am.*, 29 F.3d 126, 129-132 (4th Cir. 1994) ("Absent an express provision in the collective bargaining agreement, the law of this circuit does not permit an arbitrator to impose a punitive award or punitive damages."), *cert. denied* 513 U.S. 1094.

8. Vacatur of the Award is required to prevent manifest injustice and fundamental unfairness to France.

PARTIES

9. Plaintiff-Petitioner Todd France is a citizen of the State of Georgia.

10. Defendant-Respondent Jason Bernstein is a citizen of the State of Maryland.

11. France and Bernstein are NFLPA certified contract advisors - more commonly referred to as "NFL player-agents" - who are each authorized to represent professional football players competing in the National Football League ("NFL") in individual contract negotiations and related matters with NFL member clubs.

RELEVANT NON-PARTIES

12. The NFLPA is a non-profit corporation duly organized and existing under the laws of the Commonwealth of Virginia and is the union and exclusive collective bargaining representative of all present and future NFL players. The NFLPA's offices are located at 1133 20th Street, N.W., Washington, D.C. 20036.

13. The NFLPA is a "labor organization" within the meaning of 29 U.S.C. § 152(5),

representing employees in an industry affecting commerce within the meaning of 29 U.S.C. § 185(a).

14. The NFL is an unincorporated association consisting of 32 separately owned and operated professional football franchises.

15. The National Football League Management Council ("NFLMC") is the exclusive bargaining representative of all present and future employer member franchises of the NFL, including among other member franchise clubs the Detroit Lions, New York Giants, and Washington Commanders. The NFL and its member franchise clubs, as well as the NFLPA and its player membership, routinely conduct and are actively engaged in business and interstate commerce in Virginia, including within this District.

16. At all relevant times, the NFLPA and the NFLMC were bound by a collective bargaining agreement negotiated between the NFLPA, on behalf of all NFL players, and the NFLMC, on behalf of the NFL member teams ("CBA").

17. Kenny Golladay is a professional football player and a member of the NFLPA. Golladay was selected in the third round of the 2017 NFL Draft by the Detroit Lions and played for Detroit for four NFL seasons (2017 – 2020).

18. In March 2021, Golladay became an unrestricted free agent, and while represented by France, Golladay entered a lucrative NFL playing contract with the New York Giants. Golladay was a member of the Giants for two NFL seasons, until his playing contract was terminated by New York in March 2023.

19. Roger P. Kaplan is an attorney and professional arbitrator. Arbitrator Kaplan's offices are located within this judicial district at 211 North Union Street, Suite 100, Alexandria, VA 22314.

20. For nearly three decades, Arbitrator Kaplan has been the primary arbitrator selected by the NFLPA to hear and adjudicate grievances that allegedly arise under the NFLPA Regulations Governing Contract Advisors.

JURISIDICTION AND VENUE

21. This Complaint and Petition to Vacate or Modify Arbitration Award is submitted pursuant to (i) section 301 of the LMRA, 29 U.S.C. § 185, (ii) subsections 10(a)(3) and (4) of the FAA, 9 USC § 10(a)(3) – (4), and (iii) subdivisions (3) and (4) of section 8.01-581.010 of the VUAA, Va. Code § 8.01-581.010. Alternatively, the Complaint and Petition seeks partial vacatur and/or modification of the Award pursuant to section 11(b) of the FAA, 9 U.S.C. § 11(b). This Court has subject matter jurisdiction in this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332, and 28 U.S.C. § 1367.

22. Federal question subject matter jurisdiction exists over this dispute as France seeks vacatur of the Award pursuant to Section 301 of the LMRA.

23. France also seeks vacatur of the Award pursuant to the FAA. This Complaint and petition are brought as a predicate for a formal motion to vacate and/or modify the Award to be made and heard by the Court pursuant to 9 U.S.C. § 6. Notice of Petition and Motion, and all other supporting papers, will be served within the three-month period prescribed by 9 U.S.C. § 12.

24. This Court also has subject matter jurisdiction over this dispute because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000, exclusive of interest and costs.

25. The arbitration hearing in this dispute was held in Alexandria, Virginia and the Award was rendered in Alexandria, Virginia.

26. Additionally, because the arbitration was held in Virginia and the arbitrator's

misconduct occurred in Virginia, France also seeks vacatur of the Award under the VUAA, Va. Code § 8.01-581.010.

27. This Court has supplemental jurisdiction over France's claim arising under the VUAA and applicable state law pursuant to 28 U.S.C. § 1367. It also has diversity jurisdiction over that VUAA claim.

28. The NFLPA Regulations do not require that post-award proceedings be held in any particular court.

29. Venue is proper in this Court under 28 U.S.C. §§ 1391 and 1392, 29 U.S.C. § 185, and 9 U.S.C. §§ 10 and 11.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The NFLPA Regulations

30. The Regulations were adopted and amended by the NFLPA pursuant to the authority and duty conferred upon the NFLPA as the exclusive bargaining representative of NFL players pursuant to Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a).

31. The NFLPA's authority and duty to promulgate the Regulations are also derived from the CBA between the NFL and the NFLPA.

32. Article 48, Section 1 of the operative CBA in effect at the time this dispute arose between Bernstein and France provided, among other things, that: "The NFL and the Clubs recognize that, pursuant to federal labor law, the NFLPA will regulate the conduct of agents in individual contract negotiations with Clubs." The current CBA in effect between the NFL and the NFLPA contains an identical provision.

33. The NFLPA requires that persons serving or wishing to serve as the NFLPA's "agent" pursuant to relevant portions of the CBA must agree to be governed by the Regulations,

including the mandatory arbitration provisions set forth in Section 5 of the Regulations.

34. As agents for NFL players, Bernstein and France must comply with the NFLPA Regulations, which are a product of the collective bargaining agreement the players have with the NFL and its constituent teams.

B. Background Facts Relating to Golladay's Decision to Fire Bernstein

35. Bernstein first filed a grievance against France through the NFLPA's mandatory arbitration system mechanism in July 2019 ("the Initial 2019 Grievance"). In the Initial 2019 Grievance, Bernstein accused France of tortiously interfering with Bernstein's Standard Representation Agreement with NFL player Golladay ("the Bernstein-Golladay SRA") and providing improper inducements to Golladay that supposedly caused Golladay to switch his NFL agent representation to France. Bernstein claimed that France's conduct violated Sections 3.B.(2) and 3.B.(21) of the Regulations.

36. Before bringing the Initial 2019 Grievance against France, Bernstein responded to his ouster as Golladay's agent by filing the parallel action. There, Bernstein speciously claims that a few independent memorabilia dealers organized a private autograph signing event for Golladay to attend on January 21, 2019 ("the Chicago Signing Event"), ostensibly at the bidding of CAA Sports, to sway Golladay (which appearance paid Golladay approximately $7,700) and supposedly convince Golladay that he should fire Bernstein in favor of France and CAA Sports.

37. France denied and continues to deny any wrongdoing relating to Golladay's decision to fire Bernstein or Golladay's switching of representation. France also denied and continues to deny having any personal involvement with arranging the Chicago Signing Event or providing any improper inducements to Golladay to convince Golladay into making an agent switch.

38. Golladay denied and continues to deny that France provided him with any inducement to fire Bernstein. Golladay repeatedly testified in the parallel action that the Chicago Signing Event had nothing to do with his decision to fire Bernstein and switch agents from Bernstein to France, and that Golladay began contemplating making a switch in agent representation away from Bernstein many months before the Chicago Signing Event.

i. *Golladay Initiates Communications with France in the Fall of 2018 Near the Start of the 2018 NFL Season About Switching Representation*

39. Long before the Chicago Signing Event, on September 24, 2018, Golladay approached France at a teammate's charity bowling event in Novi, Michigan to introduce himself to France. Golladay confided to France at the charity event that he was considering making an agent switch and gave France his cell phone number.

40. Golladay later asked France if he would be interested in arranging a dinner meeting to become better acquainted. France accepted Golladay's invitation.

41. Golladay "vibed" with France at their subsequent dinner meeting in Detroit in October 2018 and was impressed by France's credentials and knowledge.

42. By any objective measure, France's experience as an NFL player-agent and stellar track record with negotiating top-of-market deals for NFL players, especially for wide receivers like Golladay, was (and is) far superior to Bernstein's relative experience and professional achievements as an NFL player-agent.

43. Golladay and France regularly communicated with each other over the remainder of the 2018 NFL Season while Golladay was still represented by Bernstein. The Regulations expressly permit such communications between NFLPA members like Golladay and prospective contract advisors like France where, as here, the player initiated the communication(s) about switching representation.

44. Golladay subsequently arranged for France to meet with Golladay's mother, a Chicago public school teacher, in early December 2018. That meeting in Chicago with Golladay's mother likewise went great.

ii. *Golladay Informs France in December 2018 of the Player's Decision to Fire Bernstein and Intent to Hire France as his next NFL Agent*

45. On December 5, 2018, some six weeks *before* the Chicago Signing Event and long before Golladay ever learned about the potential autograph opportunity, Golladay informed France that he decided to fire Bernstein and wanted to hire France to become his contract advisor.

46. While Golladay initially wanted to immediately inform Bernstein of his decision in early December about making an agent switch, at France's suggestion, Golladay elected to wait until the conclusion of the 2018 NFL Season and the December holidays before formalizing Bernstein's termination to avoid unnecessary distractions as Golladay was finishing the 2018 NFL season.

iii. *The Chicago Signing Event Had Nothing to Do with Golladay's Decision to Change Representation From Bernstein to France and CAA Sports*

47. Shortly after Golladay told France on December 5, 2018 of his decisions to fire Bernstein and related desire to hire France to be his next NFL player-agent and CAA Sports to be his off-the-field marketing representative, France shared the news about Golladay's decisions with a few of his then fellow co-workers in his offices at CAA Sports, including Jake Silver. At that time, Silver worked at CAA Sports in its Atlanta office's marketing department.

48. Silver is not a certified contract advisor with the NFLPA and is not bound by the Regulations. Similarly, CAA Sports is not a certified contract advisor with the NFLPA, and as a corporate entity, CAA Sports is not bound by the Regulations.

49. After suffering a late-season injury that required surgery in early January 2019,

Golladay decided to wait until after the surgery and a brief recuperation to address business issues, including formally transitioning his NFL representation from Bernstein to France.

50. At some point in late December 2018, during a routine business conversation between Silver and Craig Boone (one of Silver's professional contacts who works in the athlete and sports memorabilia space), Silver suggested Golladay's name as a potential candidate for a small, private autograph signing opportunity. Boone told Silver that he would look into the matter and determine if there was a commercial market for Golladay autographs. Boone, through his related memorabilia business Boone Enterprises, ultimately agreed to organize and sponsor a private signing event for Golladay to attend if Golladay in turn would sign a pre-established minimum number of autographs.

51. France was not privy to the Silver-Boone discussions that took place in December 2018 and January 2019. France also did not ask or instruct Silver to seek out marketing opportunities for Golladay.

52. Unbeknownst to France, Silver contacted Golladay through social media channels in late December 2018 or early January 2019 to see if Golladay was mutually interested in appearing for the private signing opportunity sponsored by Boone Enterprises. Golladay informed Silver that he was willing to do the appearance with Boone and requested that the private signing event be scheduled for a date in late January when he was planning to be back in his hometown of Chicago visiting friends and family.

53. Shortly thereafter, unbeknownst to France, Silver prepared a draft contract relating to Golladay's intended appearance at the Chicago Signing Event and sent it to Boone Enterprises for Boone's reciprocal review and approval. Boone made no changes to the draft contract, signed it on behalf of Boone Enterprises, and returned the partially executed contract to Silver for

Golladay's review and countersignature as well.

54. Golladay underwent a medical surgical procedure on January 8, 2019. That same day, *Silver* sent an email to Golladay *from France's CAA work e-mail account* (todd.france@caasports.com) attaching the partially-executed contract relating to the Chicago Signing Event for Golladay to review, sign and return. Earlier that same morning, Silver sent an email containing the contract attachment from Silver's work email account to France's work email account for the convenient purpose of readily forwarding the contract attachment to Golladay from France's work email account, which Silver believed would be a more effective way to get the contract attachment noticed and returned by Golladay.

55. France did not send the January 8, 2019 email to Golladay with the contract attachment relating to the Chicago Signing Event.

56. France also does not recall seeing, receiving, or contemporaneously reviewing the earlier January 8 email that Silver sent to France's work email account containing the attachment with the draft contract for Golladay to review, sign and return.

57. France was unaware that Silver used France's cell phone and/or accessed France's work email account on January 8, 2019 to communicate with Golladay via email about the Chicago Signing Event.

58. France did not have any conversations with Golladay in December 2018 or January 2019 concerning the Chicago Signing Event.

59. France and Golladay did not exchange text messages with one another concerning the Chicago Signing Event.

60. France did not have any conversations with Boone concerning Golladay or the Chicago Signing Event. France also did not have any conversations with any of the other

memorabilia dealers who were tangentially involved with the Chicago Signing Event.

61. France and Boone did not exchange text messages with one another concerning Golladay or the Chicago Signing Event. France also did not exchange text messages with any of the other memorabilia dealers who were tangentially involved with the Chicago Signing Event.

62. France did not have any conversations with Silver in December 2018 or January 2019 concerning Golladay's attendance at the Chicago Signing Event.

63. France and Silver did not exchange text messages with one another in December 2018 or January 2019 concerning the Chicago Signing Event.

64. France was unaware in December 2018 and January 2019 that Silver or CAA Sports had any involvement with the Chicago Signing Event or that CAA Sports played any role whatsoever in connecting Golladay with the independent memorabilia dealers.

65. The Chicago Signing Event took place on January 21, 2019. France was not in attendance, nor was anyone from CAA Sports.

66. The Chicago Signing Event produced approximately $7,700 in gross income for Golladay, hardly an amount that would cause Golladay to make a life-altering decision to switch agents.

67. Golladay terminated the Bernstein-Golladay SRA on January 24, 2019.

68. Golladay entered a Standard Representation Agreement with France to authorize France to serve as his NFL player-agent on January 30, 2019.

C. The Initial 2019 Grievance

69. Arbitrator Kaplan presided over the Initial 2019 Grievance. Hearings were held in November and December 2019.

70. On or about March 27, 2020, Arbitrator Kaplan ruled in France's favor and

determined that Bernstein did not meet his burden of proving that France violated either provision of the NFLPA Regulations invoked in the Initial 2019 Grievance. A copy of Arbitrator Kaplan's Award in the Initial 2019 Grievance ("Initial 2019 Grievance Award") is attached as Exhibit C.

71. The arbitrator ruled that there was no tortious interference under Section 3.B.(21) of the Regulations because the undisputed evidence showed that Golladay initiated discussions with France about switching agents as early as September 2018. Additionally, Arbitrator Kaplan found there was no violation of Section 3.B.(2) in connection with the Chicago Signing Event conducted by the third-party memorabilia companies, largely because Golladay had already made up his mind by early December 2018 to terminate Bernstein and to hire France. Hence, Arbitrator Kaplan concluded that the January 21, 2019 Chicago Signing Event could not logically have influenced Golladay's decision to switch agents. Secondarily, Arbitrator Kaplan noted that "France had nothing to do with the signing event" and therefore could not have used the event to induce Golladay to switch agents. [Ex. C, p. 20].

D. Competing Post-Hearing Motions to Confirm or Vacate the Initial 2019 Grievance Award

72. In April 2020, France moved to confirm the Initial 2019 Grievance Award in this Court. *See France v. Bernstein*, E.D.Va. case no. 1:20-cv-479 (RDA/MSN), Dkt. nos. 1, 5.

73. Meanwhile, seizing on after-acquired evidence obtained in the parallel action that appeared to show that CAA Sports employee Silver participated in arranging the Chicago Signing Event with memorabilia dealer defendant Boone and that France presumably must have been aware of it too, Bernstein cross-moved to vacate the Initial 2019 Grievance Award. *Id*., Dkt. nos. 27, 28.

74. Around that same time in June 2020, Bernstein sought leave in the parallel action to file his Third Amended Complaint, which added CAA Sports as a party-defendant.

75. Rather than reach the merits of the parties' competing post-hearing motions relating to the Initial 2019 Grievance Award, on or about August 13, 2020, this Court transferred the dueling confirmation/vacatur motions to the Middle District of Pennsylvania. *Id*., Dkt. no. 39. The confirmation/vacatur matter was assigned a new case number in the Middle District of Pennsylvania, case no. 1:20-cv-01443-YK ("confirmation/vacatur matter") and referred to Judge Yvette Kane who is also presiding over the parallel action.

76. Coincidentally and unconnected to the ongoing litigation over Golladay's decision to switch representation, France's fixed term employment contract with CAA Sports expired in the summer of 2020. France subsequently resigned from CAA Sports and accepted employment in approximately August or September 2020 with Athletes First, a competitor to CAA.

77. In late October 2020 during further discovery in the parallel action, and presumably after conducting a search of its computer servers at its California headquarters for electronically stored information relating to the parallel action (following France's departure), CAA Sports produced in discovery the two January 8, 2019 emails that were transmitted either to or from France's work email account relating to the Chicago Signing Event. Bernstein claimed these two emails were "smoking gun" evidence of perjury by France in the 2019 arbitral proceedings.

78. Notably however, given France's lack of personal involvement in the Chicago Signing Event and his lack of contemporaneous knowledge concerning Silver's or CAA's involvement in it at the time the Chicago Signing Event occurred too, France was unaware throughout the course of the Initial 2019 Arbitration proceedings that any emails existed at CAA Sports or were stored on its servers relating to Golladay's participation in that event.

79. Previously, during the 2019 arbitration proceedings, France's counsel took a firm position in a discovery dispute with Bernstein's counsel, arguing that France was only required by

the Regulations to produce documents within his personal possession and was not required to search for or produce documents that might be within the possession, custody or control of non-parties or persons/entities not covered by the Regulations. France's attorneys further emphasized that France was not required to produce any documents that may be within the "possession, custody or control" of his then-employer at CAA Sports, including any documents or electronically stored information that resided on CAA's servers. Bernstein took a similar position in arbitral discovery, claiming that his sports agency Clarity Sports International, LLC (of which Bernstein is the majority owner) was not bound by the Regulations and likewise did not have any obligation to produce documents to France.

80. As of November 2019, given France's lack of personal involvement with or knowledge of CAA's involvement in the Chicago Signing Event, France understandably did not search for potentially responsive documents located on CAA's servers or within his CAA work email account (which France rarely uses when communicating with players). Rather, France searched for potentially responsive documents that he was aware existed at that time and was able to locate. France ultimately produced approximately 63 pages of documents to Bernstein before the November 2019 hearing date in the Initial 2019 Grievance, including all of his text messages with Golladay, several flyers and receipts relating to the charity bowling event, and corresponding travel receipts relating to France's in-person meetings with Golladay in October 2018 and Golladay's mother in December 2018.

81. France wasn't trying to hide the ball in discovery during the Initial 2019 Grievance as he had nothing to hide. He performed a good faith search of his files and text messages and produced what he believed to be the universe of responsive documents within his possession and knowledge at that time. Critically, France did not know then that Silver had used France's work

email account to send the draft contract to Golladay or that CAA had any involvement in the Chicago Signing Event either. It thus did not occur to France to search his email account or CAA's servers for documents or emails involving Golladay that France was unaware even existed.

82. France's pre-hearing document production and the cabined arbitral discovery responses from his attorneys led Bernstein to seek subpoenas against CAA Sports and the memorabilia companies from Arbitrator Kaplan for production of relevant documents within their custody and control and for related in-person testimony at the 2019 arbitration hearing. But Bernstein never attempted to enforce those subpoenas, including the subpoena directed to CAA Sports.

83. Partly because Bernstein never sought enforcement of the arbitral subpoenas, the district court confirmed the Initial 2019 Grievance Award in France's favor on October 30, 2020, which Bernstein appealed to the Third Circuit Court of Appeals on November 30, 2020. [Confirmation/vacatur matter, Dkt. nos. 66, 67, and 72].

84. Bernstein moved the district court to reconsider its October 30, 2020 judgment, largely on the basis of "newly discovered evidence" and the two January 8 emails from France's work email account obtained in the parallel action from CAA Sports. [*Id.*, Dkt. no. 70 at pp. 6, 15-19].

85. The district court denied Bernstein's motion for reconsideration on January 8, 2021 and issued another final judgment confirming (for a second time) the Initial 2019 Grievance Award in France's favor. [*Id.*, Dkt. no. 75]

E. <u>The Third Circuit Appeal and Ongoing Discovery in the Parallel Action</u>

86. By January 2021, Bernstein was actively waging litigation over Golladay's termination of their player-agent relationship on three separate fronts, in three separate forums,

and against multiple parties: (1) prosecution of state law claims for tortious interference with contract and tortious interference with prospective economic advantage against CAA Sports, Redland Sports, Gerry Ochs, MVP Authentics, Daryl Eisenhour, Jason Smith, Boone Enterprises, and Craig Boone in the United States District Court for the Middle District of Pennsylvania in the parallel action; (2) an appeal to the Third Circuit Court of Appeals of the judgment confirming the Initial 2019 Grievance Award, which sought vacatur pursuant to the FAA, 9 U.S.C. §10(a), case no. 20-3425 ["the Third Circuit Appeal"]; and (3) a second and separate grievance against France under Section 3.B.(14) of the Regulations ["the collateral Section 3.B.(14) grievance"].

87. Bernstein filed an amended notice of appeal with the Third Circuit on January 20, 2021.

88. The appellate record effectively closed on January 8, 2021. Fed. R. App. 10.

i. *Bernstein Files a Collateral Grievance Alleging a New Standalone Violation of the Regulations by France for Supposedly Having Lied under Oath during the Initial 2019 Grievance*

89. Separately in the NFLPA forum, Bernstein initiated a collateral attack on the district court's judgment confirming the Initial 2019 Grievance Award by filing a *new* and *different* standalone grievance against France on November 27, 2020. The collateral (or second) grievance alleged that France violated Section 3.B.(14) of the Regulations, a claim that was never raised by Bernstein during the Initial 2019 Grievance. [Bernstein's November 2020 collateral grievance is attached as Exhibit D]. The collateral grievance also relied upon several items of newly-acquired evidence that Bernstein obtained in discovery from the parallel action (including the two January 8, 2019 emails containing the appearance contract attachment), but which were not a part of the arbitral record in the Initial 2019 Grievance.

90. France timely answered the collateral Section 3.B.(14) grievance on December 17,

2020. [France's Answer to Section 3.B.(14) collateral grievance is attached as Exhibit E].

91. Due to Bernstein's pending appeal to the Third Circuit involving the Initial 2019 Grievance Award, the NFLPA issued a stay of all arbitration activity in the collateral Section 3.B.(14) grievance.

ii. *Bernstein Continues to Wage Litigation and Take Discovery in the Parallel Action*

92. After the appellate record closed in the Third Circuit Court of Appeals, Bernstein engaged in extensive discovery and deposition practice in the parallel action throughout 2021 and continuing through much of 2022.

93. Besides thousands of pages of new deposition testimony from fact and expert witnesses, ongoing discovery in the parallel action yielded plenty of additional documentary evidence, including phone records, flight records, expense reports, etc. that were not part of or included in the evidentiary record before the Third Circuit Court of Appeals.

94. Disregarding the stay imposed by the NFLPA on the collateral Section 3.B.(14) grievance, Bernstein filed a "first amended" Section 3.B.(14) grievance with the NFLPA on May 10, 2022. Bernstein again cited "newly-acquired" evidence from discovery in the parallel action and oral argument commentary (not evidence) from the Third Circuit Appeal as factual grounds for amending the stayed Section 3.B.(14) grievance. [*See, e.g.*, First Amended Section 3.B.(14) Grievance at ¶¶ 4-8, 48-49, 55-59, 66-67, attached as Exhibit F].

iii. *The Third Circuit Vacates the Award in the Initial 2019 Grievance Based in Large Part on an Incomplete Factual Record from the Parallel Action*

95. On August 9, 2022, the Third Circuit issued an opinion reversing the district court's order confirming the Initial 2019 Grievance Award in France's favor and remanding with instructions to vacate it. *France v. Bernstein*, 43 F.4th 367 (3d Cir. 2022).

96. Based "[o]n the record before us", the Third Circuit found by clear and convincing evidence that France procured the Initial 2019 Grievance Award by fraud and ordered it to be vacated. *Id.* at 378.

97. The Third Circuit also determined, on the record before it (*which was incomplete given the ongoing discovery in the parallel action*), that France had lied under oath and withheld important discovery demanded by Bernstein during discovery in the underlying arbitration proceedings. *Id.*

98. The Third Circuit noted that "***[w]hile it is not for us to make those factual findings*** [whether France violated sections 3.B.(2) or 3.B.(21) of the Regulations or whether the Chicago Signing Event did in fact encourage Golladay to sign with France and damage Bernstein], it is clear that ***the arbitrator's fact-finding task*** would have looked much different had Bernstein possessed the concealed evidence to support the core allegation of his grievance." [*Id.* at 382 (emphasis added)].

99. Unbeknownst to the Third Circuit panel, *after* the appellate record closed in January 2021, Bernstein deposed several witnesses regarding the signing event and questioned many of them about whether France had any contemporaneous knowledge of the Chicago Signing Event or supposedly used it to induce Golladay to switch agents. Bernstein also questioned many of those witnesses about France's purported fraud, including whether France allowed other CAA Sports employees to occasionally access or use his work email account for business reasons. All told,

Bernstein deposed at least six fact witnesses (totaling approximately 1,354 pages of testimony) in the parallel action after the Third Circuit appellate record closed: (1) Kenny Golladay (deposed August 30, 2021; 191 pages); (2) Todd France (deposed October 22, 2021 and January 24, 2022; 243 pages); (3) Jake Silver (deposed April 16, 2021; 368 pages); (4) former CAA Sports employee and NFLPA contract advisor Brian Ayrault (deposed February 3, 2021; 106 pages); (5) CAA Sports General Counsel Niloofar Shepherd (deposed March 3, 2021; 296 pages); and (6) CAA Sports administrative assistant Marco Critelli (deposed September 10, 2021; 150 pages).

100. But *none* of that testimony (nearly all of which supports France's defenses to Bernstein's grievances and which further undermines the Third Circuit's rationale for vacatur on the basis of purported fraud by France) post-dating January 8, 2021 was part of the record before the Third Circuit appellate panel when it presumed (erroneously), based on an incomplete and still developing factual record in the parallel action, that France supposedly committed fraud or lied under oath during the 2019 arbitration.

F. The Consolidated 2023 Grievance Arbitration Proceedings Following Vacatur

101. On February 3, 2023, the district court applied the mandate from the Third Circuit and vacated its earlier judgment confirming the Initial 2019 Grievance Award in France's favor.

102. All parties, with Arbitrator Kaplan's consent, agreed to lift the earlier stay in the collateral grievance and further agreed to consolidate the rehearing of the initial or "original" grievance alleging violations under Sections 3.B.(2) and 3.B.(21) of the Regulations with the collateral Section 3.B.(14) grievance ["the Consolidated 2023 Grievances"].

103. On March 20, 2023, Bernstein filed "second amended grievances" against France with the NFLPA and the Section 5 arbitrator. [Bernstein's Second Amended Grievances are attached as Exhibit G].

104. In the consolidated Second Amended Grievances, Bernstein abandoned and/or dismissed any claim under Section 3.B.(21) of the Regulations that France interfered with the contractual relationship between Bernstein and Golladay.

105. Both of the remaining claims in the "second amended grievances" further rely on "newly-acquired" evidence, including by selectively quoting portions of the Third Circuit's Opinion as factual allegations. [See Second Amended Section 3.B(2) grievance at ¶¶ 57-64; and Second Amended Section 3.B.(14) grievance at ¶¶ 6-14, 52-53, 67-71, 75, 78-79].

106. Conspicuously absent from Bernstein's allegations in the Second Amended Grievances is any discussion of France's "newly-acquired" exculpatory evidence obtained during ongoing discovery in the parallel action after the Third Circuit appellate record closed.

107. France filed an initial Answer and general denial to the Consolidated Second Amended Grievances on April 11, 2023, which France later supplemented on July 24, 2023 ["France Supplemental Answer" is attached as Exhibit H]. Upon the filing of France's Supplemental Answer, the pleadings were closed.

108. In April 2023, Arbitrator Kaplan notified the parties that two days of hearings would be held in the matter on October 16 and October 17, 2023 at his offices in Alexandria, Virginia.

i. *Arbitrator Kaplan Denies France an Opportunity to Defend Against Liability on the Merits on Collateral Estoppel Grounds Via the Clearly Erroneous Adoption of the Third Circuit's Opinion Before Any Evidentiary Hearing on Remand.*

109. After the pleadings were closed, Arbitrator Kaplan – on his own motion and without any earlier prehearing demand by Bernstein to apply collateral estoppel offensively – unilaterally instructed the parties to submit pre-hearing briefs on whether the Third Circuit's Opinion "should preclude me from deciding the same issues it considered."

110. On or about September 16, 2023, France submitted his pre-hearing brief on why

collateral estoppel and law of the case principles did not apply, especially given the incomplete factual record before the Third Circuit. [France's Pre-Hearing Brief Regarding Arbitrator Kaplan's Vast Discretion to Consider New Evidence on Remand at Upcoming Arbitration Hearing and Inapplicability of Collateral Estoppel/Law of the Case Principles After Vacatur of Earlier Award is attached as Exhibit I].

111. Contrary to judicial admissions Bernstein previously made when arguing for vacatur in the district court and in the Third Circuit Court of Appeals, Bernstein submitted a pre-hearing brief that sought to apply the doctrine of collateral estoppel offensively against France at the arbitration (re)hearing on the Consolidated 2023 Grievances. [Brief of Claimant Jason Bernstein on the Preclusive Effect of the Third Circuit's Findings on this Arbitration is attached as Exhibit J].

112. Previously, when seeking relief from judgment and reconsideration of the district court's order confirming the Initial 2019 Grievance Award in France's favor, Bernstein argued in the concluding paragraph of his opening brief that the Initial 2019 Award should be vacated and requested a rehearing by the arbitrator so that both parties could present their respective versions of events with all available pertinent and material evidence. There, Bernstein judicially admitted that: "*Bernstein is not asking the Court to declare that he wins the Arbitration*. He is merely asking for a rehearing now that evidence has emerged proving that France committed perjury on the central issue in the Arbitration." [Confirmation/vacatur matter, Dkt. no. 70 at p. 20 (emphasis added)].

113. In Bernstein's reply brief in support of his motion for reconsideration and request for relief from judgment, Bernstein again highlighted in his legal arguments that "[v]acating the Arbitration Award does not require this Court to pass judgment on the *merits* of the Award. …

Vacating the Award also does not require the Court to find that the result in the Arbitration would have been different but for the fraud." [Confirmation/vacatur matter, Dkt. no. 73 at p. 19 (emphasis in original)].

114. Bernstein made further judicial admissions to the same effect in his briefing before the Third Circuit. In fact, a full rehearing before the NFLPA Section 5 Arbitrator is the precise relief that *Bernstein* requested (and later received) from the Third Circuit. Bernstein made the following judicial admission in his appellate reply brief: "The case should be remanded to the district court …, ***and then ultimately the Arbitrator can consider the credibility of France's arguments on a rehearing***." [*France v. Bernstein,* USCA Third Circuit No. 20-3425, Dkt. no. 36, Bernstein's October 11, 2021 Reply Brief at pp. 12-13 (emphasis added)].

115. But Bernstein slyly changed tunes after he successfully obtained vacatur relief from the Third Circuit and the entire dispute was back before Arbitrator Kaplan on remand. When this matter returned to Arbitrator Kaplan's docket, Bernstein strategically advanced a contrary position regarding the proper scope of evidentiary matters to be decided by the Section 5 arbitrator on rehearing. Realizing that the more comprehensive factual record developed in the parallel action undermined his remaining claims in the Consolidated 2023 Grievances, Bernstein advocated on remand that the Arbitrator should *not* consider – and supposedly could *not* consider - the credibility of France's arguments on a rehearing, claiming instead that the Third Circuit effectively already declared Bernstein the winner. As one example (of many), Bernstein urged the arbitrator that "it would be reversible error for the Arbitrator to reopen the issues of whether France was involved in the Signing Event and then committed fraud by falsely denying his involvement and suppressing evidence." [Exhibit J, at p. 2].

116. On or about September 28, 2023, Arbitrator Kaplan issued a pre-hearing Order on Collateral Estoppel. [Arbitrator Kaplan's Order on Collateral Estoppel is attached as Exhibit K].

In his interlocutory ruling on collateral estoppel and the scope of his jurisdiction, Arbitrator Kaplan allowed Bernstein to successfully change tunes on remand. Contrary to the requirements in Section 5.E. of the Regulations favoring resolution of disputes on their merits *after* the introduction and consideration of all relevant evidence, Arbitrator Kaplan foreclosed any defense by France to the merits of the Consolidated 2023 Grievances at the grievance hearing, ruling as follows:

> Based on my authority and discretion as the Arbitrator and the binding effect of the Appeals Court's clear holding, *the issues of liability are final and will not be litigated again*. Therefore, the only issues before me as the Arbitrator in the upcoming arbitration hearing are what, if any damages, France owes to Bernstein.

[Id., at p. 6 (emphasis added)].

117. On or about October 6, 2023, France asked the arbitrator to reconsider his Order on Collateral Estoppel. [France's Motion for Reconsideration and/or Clarification of Arbitrator Kaplan's Pre-Hearing Interlocutory Order on Collateral Estoppel and Request for Oral Argument in Advance of Hearing is attached as Exhibit L]. France also submitted a supplemental brief and exhibit in support of his motion for reconsideration on October 9, which is attached as Exhibit M.

118. On October 9, 2023, Bernstein filed his opposition to France's motion for reconsideration, which is attached as Exhibit N.

119. On October 11, 2023, Arbitrator Kaplan denied France's motion for reconsideration of his Order on Collateral Estoppel. [A copy of Arbitrator Kaplan's ruling denying the motion for reconsideration is attached as Exhibit O].

ii. *In a separate pre-hearing ruling, Arbitrator Kaplan Initially Rules that Bernstein Cannot Recover Punitive Damages, Emotional Distress Damages, Reputational Damages or Attorneys Fees*

120. A discovery dispute arose between the parties concerning Bernstein's refusal to produce documents concerning his alleged damages, including any documents relating to attorneys fees, costs, and Bernstein's purported emotional distress damages. [A copy of a September 21,

2023 email from France's counsel to Bernstein's counsel and the arbitrator concerning the discovery dispute, and Bernstein's corresponding objections to producing the requested documents are attached as Exhibit P].

121. On September 26, 2023, just two days before the arbitrator issued his ruling on collateral estoppel, the parties held a pre-hearing conference call to address their discovery dispute concerning Bernstein's refusal to produce documents concerning his alleged damages. During the pre-hearing discovery dispute call, Arbitrator Kaplan "ruled that under the NFLPA Regulations Governing Contract Advisors, Mr. Bernstein, as the claimant, cannot be awarded punitive damages, emotional distress damages, or attorneys' fees." Bernstein's counsel memorialized Arbitrator Kaplan's ruling that same day. A copy of the September 26, 2023 email from Bernstein's counsel to France's counsel and the arbitrator regarding the pre-hearing ruling foreclosing punitive damages and other forms of requested relief sought by Bernstein is attached as Exhibit Q.

iii. *The October 16, 2023 Hearing on Economic Damages Issues Only*

122. A hearing limited to Bernstein's alleged economic damages only was held at the Arbitrator's offices in Alexandria, Virginia on October 16, 2023.

123. France, Bernstein and their respective legal counsel (along with the Arbitrator) attended all aspects of the October 16 arbitration hearing and, in accordance with the Regulations, the proceedings were transcribed by a court reporter. A copy of the transcript from the October 16 hearing is attached as Exhibit R.

124. During opening statements, Bernstein's counsel highlighted the Arbitrator's pre-hearing ruling that foreclosed the introduction of any evidence concerning punitive damages:

> MR. COMERFORD: You have said that we cannot claim damages for emotional distress in this forum, and so we are not prepared to present that today based on that ruling. ***You have said that we cannot claim punitive damages in this forum, and so we are not presenting any argument about that today***. And I believe you said

> that we are not able to recover damages to Mr. Bernstein's reputation caused by Mr. France's fraud. And if that is your ruling, then we're not prepared to present on that today.

[Ex. R, 10/16/23 Tr. at 20 (emphasis added)]

125. To support his request for economic damages, Bernstein testified on his own behalf at the October 16 hearing. At the outset of direct examination, Bernstein's counsel again highlighted the Arbitrator's pre-hearing ruling that foreclosed any testimony concerning punitive damages issues:

> MR. COMERFORD: So just preliminarily, Mr. Kaplan, we're going to be very brief. We're just going to talk about the contract damages and the attorney's fees and expenses and costs. ***We're not going to talk about emotional distress claims or punitive damages claims or reputational damages based on your ruling that this is not a forum where those are available***. So that's –
>
> THE ARBITRATOR: If it goes to attorney's fees, I would just say you want to put it in your post-hearing brief and not even deal with it.
>
> MR. COMERFORD: Okay.
>
> THE ARBITRATOR: And you'll see my decision when you see it.

[10/16/23 Hearing Tr. at 110-111 (emphasis added)].

126. Similarly, given Arbitrator Kaplan's pre-hearing ruling on collateral estoppel and the prohibitions on introducing any evidence relating to liability, France's counsel highlighted in his opening statement the "travesty of justice" and the prejudice that France suffers from being denied the opportunity to contest liability on the merits. [10/16/23 Hearing Tr. at 29-36].

127. Tellingly, Arbitrator Kaplan responded that he did not want to hear any testimony from France or Golladay (or other witnesses) on any liability issues. The following exchange occurred during France's opening statement remarks:

> MR. HUMENIK: And what I'm saying, especially as we hear like I [Bernstein] want costs, I [Bernstein] want all these fees I incurred in another court, in another forum, and jumping up and down and saying Todd France lied, and Todd France

> isn't given an opportunity to respond. He's been foreclosed [France]. And that, you know, from – because, you know we're getting to issues on damages and the potential drastic consequences that Todd France faces because of a prejudgment on the merits where he has not been given an opportunity to say, you know what, I didn't lie. Roger, I will look you in the eye and I tell you that and I'll explain it.
>
> THE ARBITRATOR: All right, Well –
>
> MR. HUMENIK: And Kenny Golladay will come in and say, as I [Golladay] did at my deposition, I made up my mind. This signing event, zero impact.
>
> THE ARBITRATOR: Okay. ***But I've already made the decision. We're not going to claim or deal with liability***. So you can make a further argument in your post-hearing brief, but that is my decision as we sit here today.
>
> MR. HUMENIK: And I understand that and I just need to put on the record given, you know, like I said, the expectation of further proceedings, how unfair, from this side of the table, we believe that decision is.

[10/16/23 Hearing Tr. at 35-36 (emphasis added); see also, *id.* at 11, 14].

128. Given the arbitrator's pre-hearing rulings on collateral estoppel and foreclosure of punitive damages, France did not offer any evidence or witness testimony at the October 16 hearing relating to liability issues or punitive damages.

129. Moreover, at the October 16 hearing, Arbitrator Kaplan sustained several objections to questions by France's counsel that even remotely touched on liability issues. The Arbitrator admonished France's counsel several times about straying into liability matters, stating: "I've made a decision what the Court of Appeals decided, in my consideration, I will not deal with liability." [10/16/23 Tr. at 161]. Arbitrator Kaplan emphasized that restriction even during Golladay's testimony: "As the arbitrator, I'm not going to allow any questions on what was decided by the Court of Appeals. We're only here – I've sent out a memo that's pretty clear, that I'm only going to hear evidence on the question of damages. You can make an argument in your post-hearing brief that I'm in error, but we're only here to – for any witness, not only Mr. Golladay, for every witness we've heard today, it's only because of damages." [Id. at 162-163].

130. Because the arbitrator already had prejudged France's liability before the October 16 hearing, France was prohibited from testifying in his own self-defense at the hearing concerning liability issues. If the Arbitrator would have properly followed the Regulations and allow France an opportunity to submit all relevant evidence in defense of the Consolidated 2023 Grievances, France would have testified that he: (1) did not lie under oath or commit perjury during the Initial 2019 Grievance, (2) did not send the January 8 email to Golladay that originated from France's work email account, (3) was unaware that Silver (or CAA Sports) had any involvement in the Chicago Signing Event, (4) was unaware that Silver had accessed France's cell phone and work email account to send the January 8 email with the contract attachment to Golladay, and (5) did not utilize the Chicago Signing Event as an inducement to cause Golladay to fire Bernstein as his player-agent.

131. Similarly, due to the "damages issues only" restrictions on other witness testimony, France was unable to call Silver as a live witness to testify in the arbitrator's presence at the October 16 hearing concerning (i) France's lack of knowledge or involvement in the Chicago Signing Event, (ii) the circumstances surrounding the January 8 emails sent to and from France's CAA work email account, or (iii) the past practices at CAA Sports where Silver and others used or accessed France's cell phone or work email account for business purposes to communicate with various player-clients of CAA Sports. France likewise did not have the opportunity to submit further evidence showing that he was hardly the only agent at CAA who routinely allowed an assistant or key team member to access an agent's email account or cell phone to communicate with clients on routine matters (as further discovery and sworn deposition testimony from Marco Critelli and Niloofar Shepherd in the parallel action also corroborated).

132. While the Arbitrator prohibited any live witness testimony concerning liability

issues at the October 16 hearing, the parties were permitted to introduce various exhibits, including depositions taken in the parallel action, into the arbitration record to preserve the arbitral record in anticipation of further judicial review of the irregular proceedings. [The parties' lists of additional exhibits offered into evidence at the October 16 hearing are attached as Exhibit S].

133. The hearing closed on October 16, 2023. [Exhibit R, at p. 181].

134. The parties agreed on the record to submit their post-hearing briefs to the Arbitrator on or before November 30, 2023, which the Arbitrator later agreed to extend to December 7, 2023.

135. The Arbitrator instructed the parties that "there will be no reply briefs" allowed. [Id.].

iv. *Post-hearing, Arbitrator Kaplan Reverses Course and Allows Bernstein to Seek Punitive Damages through Closing Briefs Only and without a full and fair evidentiary hearing or any adversarial hearing whatsoever on punitive damages issues*

136. On or about November 9, 2023, Arbitrator Kaplan sent a letter to the parties via overnight delivery reversing course from his earlier decision on punitive damages and indicating *for the very first time* that he "will consider awarding punitive damages." A copy of Arbitrator Kaplan's November 9 notice concerning the post-hearing submission of punitive damages is attached as Exhibit T. The parties were further instructed to brief the issue of punitive damages in their closing briefs.

137. France submitted his closing brief to the arbitrator by the December 7 deadline. A copy of France's post-hearing brief on damages is attached as Exhibit U.

138. In his closing brief, France objected to the Arbitrator's belated notice concerning the unauthorized submission of punitive damages for adjudication by the Section 5 arbitrator. [Id. at pp. 1-5]. France also restated his objection to having been denied a full or fair opportunity to contest liability on the merits, and by extension, being deprived of the ability to challenge France's

purported fraud in conjunction with anything related to the Third Circuit Opinion or for allegedly having lied under oath during the Initial 2019 Grievance proceedings. [Id. at p. 4].

139. Notwithstanding the Arbitrator's belated notice concerning punitive damages, France submitted a declaration from former NFLPA President Trace Armstrong, who served in various high-ranking capacities with the Union for almost a decade and during which time the NFLPA first adopted the Regulations. A copy of the Declaration of Trace Armstrong is attached as Exhibit V.

140. Armstrong stated in his declaration that the drafters of the Regulations never intended to - and in fact did not - authorize punitive damages as an available remedy under the Regulations. Armstrong testified that the NFLPA, through its Executive Board and/or Board of Player Representatives:

- determined that, as a regulatory body, it would be improper to allow for the imposition of punitive damages in disputes arising under the NFLPA Regulations [¶12];
- decided not to include any provision in the 1994 NFLPA Regulations that would permit the Section 5 appointed arbitrator to award punitive damages [¶12];
- determined that the disciplinary provisions set forth in Section 6 of the NFLPA Regulations were sufficient to regulate the professional behavior and conduct of player-agents/contract advisors [¶13].

141. Moreover, just five years ago, Arbitrator Kaplan unequivocally ruled in another arbitration between rival NFL agents that punitive damages are not an authorized type of recovery under the Regulations in Section 5 grievance disputes. *Wasielewski v. Simms and Recchion*, NFLPA 18-CA-3 at p. 20 (Kaplan, 2018) ("As to the request for punitive damages, **the NFLPA Regulations make no provision for punitive damages. If the NFLPA had intended to provide a remedy for punitive damages within its system, it would have done so. In the absence of such a provision, punitive damages cannot be awarded here.**") (emphasis added). A copy of

the *Wasielewski* decision is attached as Exhibit W.

142. It is thus the "law of the shop," as held by the same Section 5 arbitrator who presided over the underlying arbitration here, that the Regulations make no provision for punitive damages.

143. On December 11, 2023, Bernstein submitted an unauthorized reply brief challenging the admissibility of Armstrong's Declaration, belatedly asking to strike portions of Golladay's October 16 hearing testimony and offering further counterargument in support of Bernstein's request for punitive damages. A copy of Bernstein's December 11 reply letter is attached as Exhibit X.

144. The very next day, December 12, France moved to strike Bernstein's reply brief and asked the arbitrator to disregard it entirely. A copy of France's December 12 letter to the arbitrator and motion to strike Bernstein's unauthorized reply brief is attached as Exhibit Y.

145. The Arbitrator did not rule on France's motion to strike Bernstein's unauthorized reply brief, implicitly denying France's motion to strike.

G. <u>The 2023 Arbitration Award is Issued</u>

146. Arbitrator Kaplan issued his Award on December 28, 2023 and sent it to the parties via overnight mail.

147. France's counsel first received a copy of the Award on December 29, 2023.

148. Upon information and belief, Bernstein's counsel also received a copy of the Award on December 29, 2023.

149. Arbitrator Kaplan's Award rejected or otherwise ignored every single one of France's arguments against punitive damages and credited virtually every counterargument raised by Bernstein, except for Bernstein's demand for $6,068,382.30 in punitive damages.

150. The arbitrator discounted Armstrong's declaration and entirely ignored the "law of the shop" established in previous NFLPA arbitral precedent that punitive damages are not available under the Regulations. Arbitrator Kaplan likewise failed to address precedent that "the law of this circuit does not permit an arbitrator to impose a punitive award or punitive damages" absent express authority granting an arbitrator such powers. *E.g.*, *Island Creek Coal Co.*, 29 F.3d at 129 citing *Cannelton Indus. Inc. v. District 17, United Mine Workers of Am.*, 951 F.2d 591, 594 (4th Cir. 1991); *Norfolk & W. Ry. Co. v. Brotherhood of Ry., Airline and Steamship Clerks,* 657 F.2d 596, 602 (4th Cir.1981); *Westinghouse Elec. Corp., Aerospace Div. v. International Bhd. of Elec. Workers,* 561 F.2d 521, 523–24 (4th Cir.1977), *cert. denied,* 434 U.S. 1036 (1978). The Arbitrator also failed to address his September 26 pre-hearing decision in which he initially concluded that Bernstein could not recover punitive damages because such damages are not an available remedy under the Regulations.

151. In the Award, Arbitrator Kaplan reaffirmed his earlier interlocutory order on collateral estoppel in cursory fashion, stating "the merits of Bernstein's underlying liability claim have been decided and may not be re-litigated in this proceeding." [Award at p. 16].

GROUNDS FOR VACATING THE AWARD

I. DENIAL OF FUNDAMENTAL FAIRNESS

152. Judicial review of an arbitration award is narrowly circumscribed and deferential. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). That deference does not mean, however, that arbitration awards are inviolate. *See Int'l Union, United Mine Workers of Am. v. Marrowbone Development Co.*, 232 F.3d 383, 388 (4th Cir. 2000) (*Marrowbone*), citing with approval *Hoteles Condado Beach, La Concha Convention Ctr. v. Union De Tronquistas, Local 901,* 763 F.2d 34, 38 (1st Cir.1985).

153. Many labor arbitrations fall within the ambits of both the FAA and the LMRA, including the arbitration and Award at issue in this action. *See PG Publishing Inc. v. Newspaper Guild of Pittsburgh*, 19 F.4th 308, 312 (3d. Cir. 2021). France can use both procedural vehicles, or either of them, to pursue judicial review and vacatur of the underlying Award. *Id.*

154. Federal courts "have often looked to the [FAA] for guidance in labor arbitration cases" involving LMRA Section 301, *Misco*, 484 U.S. at 40 n.9, and courts have also looked to LMRA Section 301 cases for guidance on the FAA. *E.g., Oxford Health Plans, LLC v. Sutter,* 569 U.S. 564, 569 (2013).

155. Under either the FAA or the LMRA, bare minimum standards of fairness must characterize every legitimate arbitration. Where the arbitral process falls short of those standards and deprives a party of a full and fair hearing, the resulting award should be vacated. FAA, 9 U.S.C. § 10(a)(3); *see also Marrowbone*, *supra,* 232 F.3d at 388-390 (applying fundamental fairness principles in labor arbitration case and vacating award where arbitrator did not conduct a full and fair grievance hearing); *Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 850 (5th Cir. 1995) (citing FAA in affirming vacatur of award procured from "fundamentally unfair" labor arbitration proceedings); *Int'l Chem. Workers Union v. Columbian Chems. Co.*, 331 F.3d 491, 494 (5th Cir. 2003); *Move v. Citigroup Global Markets, Inc.*, 840 F.3d 1152, 1158 (9th Cir. 2016) (vacating award under FAA on fundamental fairness grounds and stating "[i]n determining whether an arbitrator's misbehavior or misconduct prejudiced the rights of the parties, we ask whether the parties received a fundamentally fair hearing.").

156. Courts across jurisdictions have recognized that a fundamentally fair hearing requires that a party be afforded an "adequate opportunity to present its evidence and arguments," or the resulting award is subject to vacatur. See, e.g., *Hoteles Condado Beach*, 763 F.2d at 39-40

(affirming vacatur, in part, on fundamental fairness grounds); *cf. El Dorado Sch. Dist. No. 15 v. Cont'l Cas. Co*., 247 F.3d 843, 848 (8th Cir. 2001) ("each party must be given the opportunity to present its arguments and evidence"); *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20-21 (2d Cir. 1997) (vacating award because arbitration panel "excluded evidence plainly 'pertinent and material to the controversy,'" which "amounts to fundamental unfairness") (citing 9 U.S.C. § 10(a)(3)); *Gulf Coast*, 70 F.3d at 850 (vacating award under "pertinent and material" standard in LMRA proceeding because arbitrator refused to consider crucial evidence); *Murphy Oil USA, Inc. v. United Steel Workers AFL-CIO Local 8363*, No. CIV.A.08-3899, 2009 WL 537222, at *3 (E.D. La. Mar. 4, 2009) (vacating award and noting that a "fundamentally fair hearing is one that meets the minimal requirements of fairness – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.").

157. The Fourth Circuit is no exception, holding that "[v]acatur is appropriate ... when the exclusion of relevant evidence 'so affects the rights of a party that it may be said that he was deprived of a fair hearing.'" *Marrowbone*, 232 F.3d at 389-390 citing *Hoteles*, 763 F.2d at 40 (quoting *Newark Stereotypers Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d. Cir. 1968)); *see also*, *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 300–01 (5th Cir. 2004); *Prudential Securities, Inc. v. Dalton,* 929 F.Supp. 1411, 1417 (N.D.Okla.1996) (finding arbitrator guilty of misconduct in making a final decision without hearing "evidence pertinent and material to the controversy") (cited with approval in *Marrowbone*); *Lindsey v. Travelers Commercial Ins. Co.*, 636 F.Supp.3d 1181, 1186 (N.D.Cal. 2022) (granting vacatur where the arbitrator "excluded or refused to consider the only evidence a party offered to support a crucial aspect of its claim" or defense), aff'd, No. 22-16795, 2023 WL 8613598 (9th Cir. Dec. 13, 2023); *ICAP Corporates, LLC v. Drennan*, 2015 WL 10319308, at *6

(D.N.J. Nov. 18, 2015) (parties "must be allowed to present evidence without unreasonable restriction . . . and must be allowed to confront and cross-examine witnesses," or the award will be subject to vacatur).

158. Virginia's Uniform Arbitration Act likewise authorizes vacatur due to arbitrator misconduct where the arbitrator "refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 8.01-581.04, in such a way as to substantially prejudice the rights of a party." Va. Code § 8.01-581.010(4); *see also*, *Bates v. McQueen*, 270 Va. 95, 102-103 (2005) (vacating arbitral award where arbitrator failed to conduct a hearing on disputed issues, did not give notice of a hearing to one of the parties, and did not afford the losing party an opportunity to be heard, to present evidence, or cross-examine witnesses).

159. The arbitration proceedings before Arbitrator Kaplan on remand did not satisfy these most rudimentary elements of fundamental fairness.

160. France has not been given a full, fair or equal opportunity to defend against the serious allegations lodged by Bernstein in the Consolidated 2023 Grievances, including whether France supposedly committed fraud and/or lied under oath during the earlier NFLPA arbitration proceeding between the parties. *See* Regulations, Section 5.E. ("The hearing shall be conducted in accordance with the Voluntary Labor Arbitration Rules of the American Arbitration Association. At the hearing, *all parties* to the dispute and the NFLPA *will have the right to present*, by testimony or otherwise, *any evidence relevant to the grievance*." (emphasis added)); AAA Labor Arbitration Rule 25 (requiring that the arbitrator "shall afford full and equal opportunity to all parties for the presentation of relevant proofs") and AAA Labor Arbitration Rule 27 (the parties "may offer such evidence as is relevant and material to the dispute"). Contrary to all fundamental notions of due

process and basic fairness, the Arbitrator denied France any reasonable opportunity to defend either of the grievance claims brought by Bernstein on the merits in the 2023 Grievance, choosing instead to limit the arbitration hearing to compensatory damages issues only.

161. Never in the history of the NFLPA's mandatory arbitration system had the Section 5 arbitrator precluded a litigant like France from presenting a defense to a grievance on the merits, especially one involving reputation-altering allegations of fraud, perjury, and providing improper inducements to an NFL player.

162. The arbitrator attempted to justify the deprivation of France's due process rights and corresponding right to a full and fair hearing on the merits of liability under the guise that collateral estoppel principles and the Third Circuit's Opinion required a finding of liability against France under the Regulations.

163. Arbitrator Kaplan pre-judged France's guilt/liability and ruled that France was not permitted to introduce evidence or live witness testimony at the October 16 hearing that was pertinent and material to the controversy, including concerning whether (i) France had engaged in fraud or other acts of dishonesty in violation of Section 3.B.(14) of the Regulations, or (ii) France utilized the Chicago Signing Event as an improper inducement to persuade Golladay to fire Bernstein in violation of Section 3.B.(2) of the Regulations.

164. By prejudging the merits of the dispute on collateral estoppel grounds, it was not possible for France to have a fundamentally fair hearing on remand considering the demonstrably incomplete factual record presented to the Third Circuit Court of Appeals. The Arbitrator's refusal to meaningfully consider further testimony and the far more comprehensive evidence that was uncovered in the parallel action after the appellate record closed in January 2019 fundamentally destroyed the fairness of these proceedings. *See Gulf Coast*, 70 F.3d at 850; *Karaha Bodas*, 364

F.3d at 300–01; *ICAP Corporates*, 2015 WL 10319308, at *6; *Tempo Shain*, 120 F.3d at 20-21 (vacating award where panel "excluded evidence … pertinent and material to the controversy") (citation omitted).

165. Compounding the unfairness to France resulting from the arbitrator's rush to impose liability on the merits without the benefit of a full evidentiary record, some 24 days *after* the "compensatory damages only" arbitration hearing was held, the arbitrator took another unprecedented step and made a complete about-face change to allow Bernstein to seek punitive damages. [See Exhibit T]. The arbitrator's *post-hearing* notice to belatedly permit argument concerning punitive damages in the parties' closing briefs only, and the Award's subsequent grant of punitive damages to Bernstein in a purported "case of first impression," was prejudicial to France for many reasons. [Exhibit A at p. 28].

166. First, just five years ago, Arbitrator Kaplan unequivocally held in *Wasielewski*, an earlier Section 5 arbitration dispute between rival NFL agents, that "the NFLPA Regulations make no provision for punitive damages. If the NFLPA had intended to provide a remedy for punitive damages within its system, it would have done so. In the absence of such a provision, punitive damages cannot be awarded." [Exhibit W at p. 20].

167. Yet, in the Award, Arbitrator Kaplan falsely stated that Bernstein's request for punitive damages in the underlying grievance against France was a "case of first impression." [Exhibit A at p. 28]. Remarkably, the arbitrator failed to cite, let alone discuss in the Award, his earlier decision in *Wasielewski*, which definitively held to the contrary that punitive damages are not recoverable in the NFLPA grievance system forum.

168. Second, in pre-hearing motion practice in *this* arbitration proceeding between Bernstein and France, Arbitrator Kaplan determined that the parties could not introduce any

evidence, witness testimony, or argument concerning punitive damages at the October 16 hearing because such damages are not available under the Regulations (consistent with his earlier decision in *Wasielewski*). Indeed, as Bernstein's counsel contemporaneously confirmed in pre-hearing correspondence, Arbitrator Kaplan ruled on September 26 that "under the NFLPA Regulations Governing Contract Advisors, Mr. Bernstein, as the claimant, cannot be awarded ***punitive damages***, emotional distress damages, or attorneys' fees." [Exhibit Q (emphasis added)].

169. Third, both parties relied on Arbitrator Kaplan's pre-hearing ruling that purportedly foreclosed any attempted recovery of punitive damages by Bernstein, with each party tailoring their evidentiary presentations and witnesses accordingly at the October 16 hearing. [Exhibit R, 10/16/23 Tr. at 20 (Bernstein Opening Statement): "***You have said that we cannot claim punitive damages in this forum, and so we are not presenting any argument about that today.***"; Tr. at 110: (Direct examination of Bernstein): "So just preliminarily, Mr. Kaplan, we're going to be very brief. We're just going to talk about the contract damages and the attorney's fees and costs. ***We're not going to talk about*** emotional distress claims or ***punitive damages claims*** or reputational damages ***based on your ruling that this is not a forum where those are available***.) (emphasis added)].

170. Fourth, given the arbitrator's pre-hearing ruling confirming the unavailability of punitive damages in the arbitration, France's evidentiary presentation at the October 16 hearing and related cross-examination of NFLPA-affiliated witness Heather McPhee was conducted entirely differently than it otherwise would have been presented had the arbitrator disclosed his true intentions *before* the hearing about any possible consideration of punitive damages. For example, McPhee likely would have been examined about the Section 5 arbitrator's decision in *Wasielewski*, whether there have been any discussions or considerations by the NFLPA's Board of

Player Representatives to amend the Regulations to expressly provide for punitive damages in Section 5 disputes (whether before or after *Wasielewski*), and whether player-members could be subject to punitive damages in certain types of disputes under the Regulations [i.e., when a party or a witness to a dispute under section 5.A.(2), (3) or (4)].

171. Fifth, had the possibility of punitive damages been flagged as an open issue before the October 16 hearing, France would have demonstrated that the NFLPA-appointed Arbitrator has no power to award punitive damages in a Section 5 dispute. In lieu of merely introducing a Declaration from former NFLPA Player President Trace Armstong as part of his post-hearing submission, France would have called Armstrong and several other NFLPA officials with first-hand knowledge of the drafters' intentions to testify that the NFLPA did not intend to provide a remedy for punitive damages within its system and that is why the Regulations do not contain any remedial provision authorizing punitive damage awards. France likely also would have called current NFLPA officials and NFLPA player representatives as additional witnesses to testify concerning (1) whether the NFLPA considered or discussed amending the Regulations before or following *Wasielewski* to expressly provide for punitive damages in Section 5 disputes, (2) whether the NFLPA ever provided official notice to contract advisors regarding the potential availability of punitive damages in Section 5 disputes between rival contract advisors, or (3) the NFLPA's lack of disclosure of the Union's official position on punitive damages under the Regulations before the October 16 hearing or its intention to provide any testimony regarding that subject at the hearing. But because the arbitrator lulled France into believing that the September 26 pre-hearing ruling foreclosing Bernstein from seeking punitive damages (or reputational damages, emotional distress, or attorneys fees) at the forthcoming October 16 hearing could be relied upon, France did not have any reason to submit additional relevant evidence, witness testimony, or tailored cross-

examination of Ms. McPhee relating to punitive damages issues at the October 16 arbitration hearing. Moreover, France had no reason to request pre-hearing discovery from the NFLPA (whether via document requests or depositions) regarding punitive damages issues.

172. Sixth, France was denied proper notice and the right to a fair hearing to contest the underlying merits of both the compensatory and punitive damages elements of the Award that the arbitrator ultimately issued -- especially because the Arbitrator barred introduction of fact-witness testimony at the October 16 hearing that concerned liability issues, or by extension, France's purported fraud in conjunction with anything relating to the Third Circuit Opinion or the first arbitration proceeding. [Exhibit R, 10/16/23 Tr. at 35-36, 38-40, 51, 53, 90, 110, 127, 134-135, 137, 141-143, 145, 157, 160-163, 166, 168-169].

173. Given the Arbitrator's intersecting decisions to apply collateral estoppel offensively and the strict limitations on witness testimony that the arbitrator imposed at the October 16 hearing, France was deprived the opportunity to present material evidence that would have shown the absence of any *factual* basis for punitive damages. For instance, France also would have offered: (1) testimony that the appellate evidentiary record presented to the Third Circuit was materially incomplete, (2) new pertinent evidentiary materials (i.e., text messages, etc.) that further support and corroborate France's testimony at the initial arbitration hearing, (3) live in-person testimony from Silver and France himself concerning the Signing Event and France's lack of awareness about it, (4) cross-examination of Bernstein about the purported basis for his claimed punitive damages, and (5) additional testimony from France and Golladay concerning whether France deserves punishment for allegedly providing the Signing Event as an "inducement" to Golladay to switch agents or for France's purported "fraud" in supposedly lying about the Signing Event at the first arbitration proceeding (neither is true).

174. By any objective measure, France was denied a full and fair opportunity to defend against the grievance. France was not permitted to contest liability on the merits and France likewise was deprived of reasonable notice or a fair opportunity to defend against the imposition of punitive damages by the Section 5 Arbitrator under the Regulations. The Award is not worthy of any deference and should be vacated.

II. ARBITRATOR KAPLAN EXCEEDED HIS AUTHORITY UNDER THE REGULATIONS BY IMPOSING PUNITIVE DAMAGES FOR THE FIRST TIME EVER IN NFLPA ARBITRATION HISTORY AND THE AWARD FAILS TO DRAW ITS ESSENCE FROM THOSE REGULATIONS

175. The Award must be set aside, or modified, based on its unprecedented imposition of punitive damages against France and the failure of the arbitrator to provide proper notice to France regarding the possible consideration of punitive damages before the October 16 evidentiary hearing. The Award's imposition of punitive damages, without proper notice, disregards the "law of the shop" in NFLPA Section 5 disputes and thus violates the Regulations, a clear ground for vacatur.

176. Binding Fourth Circuit precedent holds "that an arbitrator cannot award punitive damages where the collective bargaining agreement does not specifically so provide." *Island Creek Coal Co.*, 29 F.3d at 132; *see also*, *Baltimore Regional Joint Bd. v. Webster Clothes*, 596 F.2d 95, 98 (4th Cir. 1979).

177. Because the Regulations do not expressly provide for punitive damages, Arbitrator Kaplan "exceeded his jurisdiction" by imposing punitive damages against France. *Westinghouse Elec. Corp., Aerospace Div.*, 561 F.2d at 523.

178. An arbitration award must "draw [] its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *see also Misco*, 484 U.S. at 38. If an arbitral award fails to do so, it must be vacated or

modified because it exceeds the arbitrator's powers. *Enterprise Wheel*, 363 U.S. at 597; 9 U.S.C. § 10(a)(1)-(4); *see also*, *Baltimore Regional Joint Bd.*, 596 F.2d at 98 (vacating an arbitration award containing $80,000 punitive element because "[t]he award of damages in the present case does not draw its essence from the bargaining agreement, for the agreement's essence does not contemplate punitive, but only compensatory awards … In the absence of any provision for punitive awards, … an arbitrator may not make an award of punitive damages for breach of a collective bargaining agreement."); *Cannelton Industries*, 951 F.2d at 594 (remanding with instructions that if the arbitrator's "award is purely punitive, it does not draw its essence" from the collective bargaining agreement and should be modified or vacated). The same is true under the FAA. *Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, 556 U.S. 662, 671-672 (2010) (vacatur under FAA section 10(a)(4) is coterminous with the "essence" test articulated in LMRA section 301 cases and *Steelworkers* trilogy on ground that the arbitrator "exceeded [his] powers" when he strayed from agreement and effectively dispensed his own brand of industrial justice).

179. In evaluating a labor arbitration award on "essence of the agreement" grounds, "an arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1423 n.12 (8th Cir. 1986) (internal quotations omitted).

180. Where a "prior decision involves the interpretation of the identical contract provision, between the same company and union, every principle of common sense, policy and labor relations demands that it should stand until the parties anul it by a newly worded contract provision." *Trailway Lines*, 807 F.2d at 1425.

181. As highlighted above, Arbitrator Kaplan unequivocally ruled in an earlier

arbitration between rival NFL agents that punitive damages are not an authorized type of recovery under the Regulations in Section 5 grievance disputes between rival player-agents. *Wasielewski*, NFLPA 18-CA-3 at p. 20 (Kaplan, 2018). Once Arbitrator Kaplan issued the decision in *Wasielewski* in 2018 that the Regulations "make no provision for punitive damages," that arbitral decision became "law of the shop" and part and parcel of the Regulations. *See Trailways Lines,* 807 F.2d at 1426 (affirming vacatur because the "Award did not draw its essence from the agreement"); *see also Misco,* 484 U.S. at 38; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960); *Enterprise Wheel*, 363 U.S. at 597.

182. Section 5.E. of the Regulations has a "zipper clause" that strictly limits the arbitrator's authority in NFLPA grievance arbitration hearings. That section of the Regulations further provides that the "Arbitrator shall not have the jurisdiction or the authority to add to, subtract from, or alter in any way the provisions of these Regulations." [Exhibit B at p. 15]. Yet, that is exactly what Arbitrator Kaplan did below through his post-hearing addition of a punitive damages remedy to Section 5 arbitration disputes in stark disregard of his earlier—and quite accurate—pronunciation in *Wasielewski* that "the Regulations make no provision for punitive damages."

183. Arbitrator Kaplan was not authorized in his limited Section 5 role as Arbitrator to disregard the controlling authority in *Wasielewski* that "the NFLPA Regulations make no provision for punitive damages." *Wasielewski*, at p. 20; *see, e.g.*, *Trailway Lines*, 807 F.2d at 1425 (expressing "grave concern" over arbitrator's treatment of prior relevant arbitration award and vacating on essence of agreement grounds). Nor was he authorized to violate the "zipper clause" in the Regulations, which are part of the parties' agreement.

184. After *Wasielewski* was decided in 2018, the NFLPA did not amend or alter its

Regulations in any way to provide the Section 5 Arbitrator with new or additional authority to impose financial penalties or punitive damages in Section 5 disputes (which also encompass disputes where NFLPA player-members might be parties, and by extension, creates situations where a player-member could likewise be potentially found responsible for punitive damages) or in any special subset of Section 5 disputes.

185. Arbitrator Kaplan's disregard for this settled "law of the shop" was inconsistent with the essence of the Regulations and thus must be vacated. *See, Island Creek Coal Co.*, 29 F.3d at 129-132; *Baltimore Regional Joint Bd.*, 596 F.2d at 98. Indeed, courts have repeatedly vacated labor arbitration awards "solely because of the arbitrator's failure to consider … an extremely relevant source of common law – the law of the shop." *Trailway Lines*, 807 F.2d at 1423; *see also Norfolk Shipbuilding & Drydock Corp. v. Local No. 684 of Int'l Bhd. of Boilermakers*, 671 F.2d 797, 798-800 (4th Cir. 1982) (vacating arbitration award and remanding to district court with instructions to consider existing law of the … industry" or "any custom and practice relating to the dispute," which "the arbitrator must take into account"); *Ohio Valley Coal Co. v. United Mine Workers of Am. Int'l Union*, 417 F.Supp.3d 760, 766-68 (N.D.W.Va. 2019) (vacating arbitration awards, reasoning "this Court must insist that the plain language of the contract and the existing common law of the industry be adhered to and followed" [*id*. at 768] and highlighting that "[t]he common law, as described above, does not allow the arbitrator to impose punitive damages unless they are provided for in the agreement" [*id.* at 766]); *cf.* Elkouri & Elkouri, *How Arbitration Works*, BNA Bloomberg (8th ed. 2020), at § 12.1.A. at p. 590 ("custom and past practice may be held enforceable through arbitration as being, in essence, a part of the parties' whole agreement").

186. The Award also must be overturned on the related legal ground that Mr. Kaplan "exceeded his jurisdiction" and authority as an arbitrator by imposing punitive damages, a remedy

not authorized by the Regulations. *See Westinghouse*, 561 F.2d at 523-24.

187. Arbitrator Kaplan also exceeded his powers by his *post-hearing* notification to the parties – three-plus weeks after the October 16 evidentiary hearing on economic damages only - that he also was going to consider imposing punitive damages as part of the parties' submission of issues for his determination. But the parties never agreed to submit the issue of punitive damages to the Section 5 arbitrator, and they certainly did not agree to do so based on the incomplete evidentiary record made at the October 16 hearing either. Remarkably, Arbitrator Kaplan's post-hearing notice regarding the unilateral submission of punitive damages for his determination makes no mention whatsoever of: (i) his earlier September 26 ruling that punitive damages are not available under the Regulations, (ii) his prior decision in *Wasielewski*, or (iii) the parties' reliance on the Arbitrator's September 26 ruling striking punitive damages from Bernstein's grievance and their related failure to present evidence or contra-evidence at the October 16 hearing on that topic.

188. Section 10(a)(4) of the FAA permits vacatur of an arbitration award where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. Section 11 of the FAA also gives reviewing courts the power to modify arbitration awards when appropriate. 9 U.S.C. § 11.

189. Similarly, under section 301 of the LMRA, "an arbitrator cannot exceed the authority given to him by the collective bargaining agreement or decide matters parties have not submitted to him." *Doerfer Eng'g, a Div. of Container Corp. of Am. v. N.L.R.B.*, 79 F.3d 101, 103 (8th Cir. 1996); *see also Enterprise Wheel*, 363 U.S. at 597-598 (an "opinion of [an] arbitrator … based solely upon the arbitrator's view of [textual authority], … would mean that he exceeded the scope of the submission").

190. Where an arbitrator exceeds his powers by addressing a question not submitted to

him or beyond his jurisdiction, the award must be vacated or modified. *Westinghouse*, 561 F.2d at 523 (vacating portion of arbitration award containing punitive damages, reasoning that "[t]hough nominally compensatory, the award was actually punitive. Because no provision of the contract warranted this punishment, the arbitrator exceeded his jurisdiction"); *N. States Power Co., Minnesota v. Int'l Bhd. of Elec. Workers, Local 160*, 711 F.3d 900, 903 (8th Cir. 2013) (affirming vacatur of an award where arbitrator decided a question the parties had not submitted to him).

191. Arbitrator Kaplan exceeded his authority under the Regulations by deciding an issue not submitted to him by the parties for consideration at the October 16 evidentiary hearing (which already had been narrowed to economic damages only). Relying on Arbitrator Kaplan's earlier September 26 ruling that Bernstein could not recover punitive damages in the NFLPA arbitral forum, ***both*** parties did not introduce any evidence or witness testimony concerning punitive damages at the October 16 evidentiary hearing. Punitive damages therefore were no longer in dispute between the parties as of the October 16 hearing date, and the parties thus did not submit the issue of punitive damages to Arbitrator Kaplan for determination at or following the hearing.

192. Because Arbitrator Kaplan was apparently biased by and pre-determined to rule in Bernstein's favor on the basis of the Third Circuit Opinion alone and otherwise had no way around his earlier September 26 decision foreclosing the submission of punitive damages for his consideration, Arbitrator Kaplan delayed until November 9 – three-plus weeks after the October 16 evidentiary hearing – to announce his intention to consider potentially awarding punitive damages to Bernstein. This determination exceeded Mr. Kaplan's arbitral authority under the Regulations and in and of itself compels vacatur.

III. ARBITRATOR KAPLAN ACTED IN MANIFEST DISREGARD OF THE LAW

193. A court may vacate an arbitral award for manifest disregard of the law where it is shown that (1) the disputed legal principle is clearly defined and not subject to legal debate, and (2) the arbitrator refused to apply that legal principle. *Jones v. Dancel*, 792 F.3d 395, 402 (4th Cir. 2015); *Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) (manifest disregard continues to exist as a ground for vacatur either as an independent ground or as a judicial gloss on the enumerated grounds for vacatur set forth in the FAA).

194. France repeatedly informed Arbitrator Kaplan that collateral estoppel and law of the case principles did not have any preclusive effect in NFLPA arbitration, especially since the Third Circuit Opinion was based on a materially incomplete evidentiary record in the parallel action, the Third Circuit appeal involved distinct legal issues under the FAA that were separate and apart from whether France allegedly violated any provision of the Regulations, and because the Third Circuit did not – and could not - address the merits of Bernstein's factual claims against France under Sections 3.B.(2) (improper inducements) and 3.B.(21) (tortious interference with the Bernstein-Golladay SRA) of the Regulations as a matter of well-settled law. Arbitrator Kaplan manifestly disregarded these well-settled principles of law and refused to allow France an opportunity to defend against the merits of Bernstein's recently amended claims advanced in the 2023 Grievance.

195. Arbitrator Kaplan understood but refused to apply well-settled law and NFLPA arbitral precedent that cases should be decided on their merits and that any evidence relevant or pertinent to liability or damages should be considered by the Section 5 arbitrator before reaching a final award.

196. Arbitrator Kaplan understood but refused to apply the mandate in Section 5.E. of

the Regulations, and the corresponding requirements in Rules 25 and 27 of the AAA Labor Arbitration Rules, that provides arbitral parties with considerable leeway in introducing "any evidence relevant to the grievance." Regulations at p. 15; *see also Gulf Coast*, 70 F.3d at 850; *Karaha Bodas*, 364 F.3d at 300–01; *Lindsey*, 636 F.Supp.3d at 1186; *ICAP Corporates*, 2015 WL 10319308, at *6; *Tempo Shain*, 120 F.3d at 20-21.

197. Notwithstanding the arbitrator's irregular and untimely notice concerning the alleged submission of punitive damages as an issue for consideration, France also informed Arbitrator Kaplan that punitive damages are not an authorized form of recovery in Section 5 disputes and reminded the arbitrator of his binding precedent in *Wasielewski* to that effect. Having authored the decision in *Wasielewski*, Arbitrator Kaplan clearly was aware of the precedent, understood it governed the issue of punitive damages, refused to apply *Wasielewski,* and failed to even mention that binding precedent (or his purported rationale for rejecting it) when he issued the Award.

198. Arbitrator Kaplan understood but ignored evidence that the Regulations do not contain any express provision authorizing the Section 5 arbitrator to award punitive damages. The arbitrator also understood but ignored evidence that the Regulations have not been amended in any respect since his 2018 decision in *Wasielewski*.

199. Arbitrator Kaplan understood but refused to apply the law of the shop foreclosing the recovery of punitive damages in Section 5 disputes, as enunciated in *Wasielewski*, to the underlying arbitration.

200. Arbitrator Kaplan acted in manifest disregard of the law. The Award should be vacated in its entirety or modified to eliminate the portion of the Award granting punitive damages to Bernstein.

SUMMARY OF GROUNDS FOR VACATUR

201. For any one or more of the above reasons, the arbitration conducted by Mr. Kaplan was fundamentally unfair and inconsistent with the most basic requirements for a fair arbitral proceeding. The Award's imposition of liability and punitive damages against France without a full and fair evidentiary hearing or proper notice also fails to draw its essence from the Regulations and exceeds the Arbitrator's limited authority under Section 5 of the Regulations.

202. The Award's imposition of punitive damages against France does not draw its essence from the Regulations and exceeded the arbitrator's jurisdiction and authority to impose such a punitive remedy under the Regulations.

203. Considering the foregoing, and from the relevant portions of the arbitral record submitted herewith, as well as after further submissions to be made in support of this Complaint and Petition to Vacate, the Court should conclude that France was denied the fundamental fairness guaranteed to him under the FAA, VUAA, and LMRA. Plaintiff-Petitioner reserves all rights to seek limited discovery in accordance with the Federal Rules of Civil Procedure and France's rights under the LMRA and FAA; however, because the arbitration record speaks for itself and the arbitrator's misconduct is apparent, France's request for vacatur is ripe for summary adjudication on the pleadings and evidence submitted therewith. The Award should thus be set aside or modified.

COUNT ONE

Violation of FAA, 9 U.S.C. § 10(a)(3)

(Vacatur or Modification of the Award pursuant to section 10(a)(3) of the FAA Because of Arbitrator Misconduct in Refusing to Hear Evidence Pertinent and Material to the Controversy and Other Misbehavior by which France's Rights Were Prejudiced)

204. France repeats and realleges each of the foregoing paragraphs as if fully set forth

herein.

205. The arbitration process on remand was fundamentally unfair to France.

206. France was deprived of a full and fair opportunity to defend the 2023 Grievance, including as to liability and the (de)merits of punitive damages.

207. The arbitrator refused to hear evidence and witness testimony pertinent and material to the controversy.

208. France was denied due process or proper notice.

209. France was prejudiced.

210. The Award was rendered in violation of section 10(a)(3) of the FAA.

211. The unjust Award has resulted in serious, substantial, material harm to France, to France's professional and personal reputation, and to France's rights and interests.

COUNT TWO

Violation of FAA, 9 U.S.C. § 10(a)(4)

(Vacatur or Modification of the Award pursuant to section 10(a)(4) of the FAA because the Arbitrator Exceeded His Powers or So Imperfectly Executed Them That a Mutual, Definite Award Was Not Rendered on the Issues Submitted)

212. France repeats and realleges each of the foregoing paragraphs as if fully set forth herein.

213. Arbitrator Kaplan exceeded his powers under Section 5 of the Regulations or so imperfectly executed them that a mutual, definite award was not rendered on the issues the parties submitted to him at the October 16 hearing.

214. France was prejudiced.

215. The Award was rendered in violation of section 10(a)(4) of the FAA.

216. The unjust Award has resulted in serious, substantial, material harm to France, to

France's professional and personal reputation, and to France's rights and interests.

COUNT THREE

Violation of VUAA, § 8.01-581.010, subdivisions (3) and (4)

217. France repeats and realleges each of the foregoing paragraphs as if fully set forth herein.

218. Subdivision (4) of Section 8.01-581.010 of the VUAA authorizes vacatur due to arbitrator misconduct where the arbitrator "refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 8.01-581.04, in such a way as to substantially prejudice the rights of a party." Va. Code § 8.01-581.010(4)

219. Subdivision (3) of Section 8.01-581.010 of the VUAA authorizes vacatur due to arbitrator misconduct where the arbitrators exceeded their powers.

220. Arbitrator Kaplan refused to hear evidence material to the controversy.

221. Arbitrator Kaplan exceeded his powers under the Regulations.

222. France's rights to a full and fair hearing were substantially prejudiced by Arbitrator Kaplan's misconduct.

223. The Award was rendered in violation of subdivisions (3) and (4) of Section 8.01-581.010 of the VUAA.

224. The unjust Award has resulted in serious, substantial, material harm to France, to France's professional and personal reputation, and to France's rights and interests.

COUNT FOUR

Violations of Section 301 of the LMRA, 29 U.S.C. § 185

(Vacatur or Modification of the Award pursuant to section 301 of the LMRA Because it Fails to Draw its Essence from the Agreement or Regulations and Because the Arbitration Process Was Fundamentally Unfair)

225. France repeats and realleges each of the foregoing paragraphs as if fully set forth herein.

226. The Award is illegitimate because it fails to draw its essence from the Regulations.

227. Arbitrator Kaplan failed to comply with Section 5.E. of the Regulations. The arbitrator (i) refused to allow France the right to present, by testimony or otherwise, any evidence relevant to the grievance, including concerning the underlying merits of the allegations made against France or concerning punitive damages, (ii) failed to provide proper notice to France before or during the October 16 hearing that punitive damages would be taken under submission, (iii) ignored binding precedent that the Arbitrator himself established in *Wasielewski* that punitive damages are not recoverable under the Regulations, and (iv) ignored the limitation in Section 5.E. of the Regulations that the arbitrator may not add to, subtract from, or alter in any way any provision of the Regulations.

228. Arbitrator Kaplan further exceeded the powers delegated to him in the Section 5 arbitration, including by taking the issue of punitive damages under submission following the October 16 hearing *after* previously ruling and instructing the parties that Bernstein could not recover punitive damages in the underlying arbitration.

229. The arbitral hearing procedures were so errant as to amount to affirmative misconduct and to deny France the fundamentally fair adjudication expressly guaranteed by the Regulations.

230. By ignoring the "law of the shop" in *Wasielewski* concerning the unavailability of punitive damages as a form of recovery in Section 5 disputes between contract advisors, the Award cannot be said to arguably construe or apply the Regulations.

231. The Award conflicts with *Wasielewski* and the express terms of the Regulations, imposed unreasonable and unfair procedural limitations on France's ability to respond to the merits of

the grievance and that are not rationally supported by or derived from the Regulations, and the Award improperly reflects Arbitrator Kaplan's own brand of industrial or economic justice.

232. The arbitrator exceeded his limited jurisdiction and authority under the Regulations by imposing punitive damages against France.

233. The unjust Award has resulted in serious, substantial, material harm to France, to France's professional and personal reputation, and to France's rights and interests.

COUNT FIVE

Violations of FAA, 9 U.S.C. §§ 10(a)(3) and 10(a)(4), Section 301 of the LMRA, 29 U.S.C. § 185 and the Common Law

(Vacatur or Modification of the Award Due to Manifest Disregard of Law)

234. France repeats and realleges each of the foregoing paragraphs as if fully set forth herein.

235. The FAA, the LMRA, and the common law permit the vacatur of arbitration awards that are rendered in manifest disregard of the law.

236. France presented Arbitrator Kaplan with legal arguments, legal principles, and evidence that collateral estoppel and law of the case principles do not have any preclusive effect in NFLPA arbitration, especially where the evidentiary record before the Third Circuit Court of Appeals was incomplete and not as comprehensive as the evolving factual record in the ongoing parallel action or which would have been presented by France to the arbitrator at the October 16 hearing had Arbitrator Kaplan complied with the Regulations.

237. Arbitrator Kaplan understood but refused to apply well-settled law and NFLPA arbitral precedent that cases should be decided on their merits and that any evidence pertinent to liability or damages should be considered by the arbitrator before reaching a final award.

238. France also presented Arbitrator Kaplan with legal arguments, legal principles, and

evidence that the Regulations do not permit the recovery of punitive damages in Section 5 disputes between rival contract advisors.

239. Arbitrator Kaplan understood that *Wasielewski* controlled the outcome of the portion of the Award concerning punitive damages. Arbitrator Kaplan also understood that Section 5 of the Regulations prevented the arbitrator from adding to, subtracting from, or altering in any way the Regulations.

240. Arbitrator Kaplan acted in manifest disregard of the law. The Award should be vacated in its entirety or modified to eliminate the portion of the Award granting punitive damages to Bernstein.

241. The unjust Award has resulted in serious, substantial, material harm to France, to France's professional and personal reputation, and to France's rights and interests.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and Petitioner Todd France repeats and realleges each of the foregoing paragraphs as if fully set forth herein, and in accordance with Section 301 of the LMRA, 29 U.S.C. § 185, subsections 10(a)(3) – (4) of the FAA, 9 U.S.C. § 10(a)(3)-(4), section 11 of the FAA, 9 U.S.C. § 11, and subdivisions (3) and (4) of section 8.01-581.010 of the VUAA, France respectfully requests:

A. The Court to enter an Order vacating the Award in its entirety and remanding the matter with instructions to refer the underlying arbitral dispute to a new arbitrator and for a full and fair hearing on the merits of the underlying dispute.

B. The Award must be vacated because it is the result of arbitrator misconduct in refusing to hear evidence pertinent and material to the controversy and/or due to

arbitrator misconduct by which the rights of France have been prejudiced.

C. The Award must be vacated because the arbitrator exceeded his powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

D. The Award must be vacated because it violates the essence of the Regulations, exceeded the Arbitrator's authority, and defies the requirements of fundamental fairness, notice and consistency.

E. The Award must be vacated for the additional reason that it was rendered in manifest disregard of the law.

F. The Award should be set aside for each of these independent reasons.

G. Alternatively, the Court should enter an Order vacating the Award in part or modifying the Award to strike the portion of the Award issuing punitive damages to Bernstein and entering judgment accordingly.

H. The Court grant such other declaratory, equitable, or legal relief as this Court deems just and proper.

Dated: March 21, 2024

Respectfully submitted,

By: /s/Margaret M. Marks

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VERIFICATION

I, Mark Humenik, declare as follows:

I am one of the attorneys for Todd France in the arbitration proceedings from which this Complaint and Petition to Vacate or Modify Arbitration Award ("Complaint") arises, *In the Matter of Arbitration between Jason Bernstein and Todd France*, National Football League Players Association, NFLPA Case No. 23-CA-3. I have read the foregoing Complaint and know its contents. I am familiar with the records, files, and proceedings described above. The procedural facts alleged in the Complaint are personally known to me, and I know these facts as stated to be true. Further, all exhibits attached to this Complaint are true and correct copies of original documents submitted in the underlying arbitration or exchanged between counsel and/or Arbitrator Kaplan in connection with the underlying arbitration.

I declare under penalty of perjury under the laws of the State of California and of the United States that the foregoing is true and correct.

Executed on March 21, 2024

Respectfully submitted,

/s/ *Mark Humenik*
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