

BEFORE THE NBRA/NBA VACCINATION EXEMPTION BOARD

In the Matter of the Arbitration)	
)	
between)	
)	
NATIONAL BASKETBALL REFEREES ASSOCIATION)	Case No. D-M-1018-04
)	
and)	(John Client Exemption Application)
)	
)	
NBA SERVICES CORP.)	
)	

**NATIONAL BASKETBALL REFEREES ASSOCIATION'S
POST-HEARING BRIEF**

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INTRODUCTION

In the summer of 2021, the National Basketball Referees Association (NBRA) negotiated a Letter of Agreement (LOA) with the NBA providing for mandatory COVID-19 vaccination as condition of employment. Consistent with every federal vaccination program issued to date, a core provision of the LOA was an exemption for individuals who objected to mandatory vaccination based on sincerely held religious beliefs. The LOA further provided a pre-negotiated accommodation of the objectors' unvaccinated status consisting of masking, daily COVID-19 testing, and social distancing.

In negotiating the vaccination LOA, the NBRA assumed a leadership role within organized labor eschewed by unions in general, and the NBA Players Association in particular. The NBRA expended its political capital in promoting the LOA among its members, including those with religion-based objections to vaccination. The Association achieved ratification assisted by its assurances that the NBA would honor the LOA's exception provisions. No good deed goes unpunished.

The NBA has rejected every single one of the four exemption applications it received, including that of Referee John Client. Mr. Client is a born-again Christian. He attends church every Sunday and Bible class every Wednesday. He tithes with a glad heart donating fully ten percent of his total income to the church and its good works. His deliberations on the issue of vaccination included the review of holy scripture, meetings with church leaders, prayers and fasting. He ultimately determined that submitting to a vaccination, particularly under the threat of the termination of his career as a Referee, would be an act of subordinating the divine will to a secular authority.

The NBA rejected his exemption application on astonishing grounds. The League accepted the sincerity of Mr. Client's beliefs. Nevertheless, it insisted on characterizing these beliefs as "political" because of Mr. Client's references to secular authority and the particular concerns of the African American community. However, the NBA withheld its purported rationale from both the NBRA and Mr. Client until after the hearing in this matter had commenced.

Any fair-minded review of the facts and law will compel the Vaccination Exemption Board (VEB) to grant Mr. Client's objection. Mr. Client is unquestionably a pious man whose objections to the vaccination are steeped in religious references. Instead of considering his religious objections in a deferential manner, as required by law, the NBA engaged in an improper process of legalistic sharpshooting.

The NBRA requests that the VEB grant Mr. Client's exemption request and direct that he be made whole.¹ Any failure to grant Mr. Client's exemption application will have the impermissible effect of rendering the LOA's exemption provisions null and void.

¹ As stipulated by the parties, the VEB has the authority to grant make whole relief to a qualifying Referee whose objection was previously denied. (Tr. 7-8).

STATEMENT OF FACTS AND RELEVANT CONTRACTUAL PROVISIONS

Negotiation and Ratification of the Vaccination LOA

In response to overtures from NBA management representatives – including Commissioner Adam Silver – the NBRA agreed to enter into negotiations for an agreement to adopt mandatory vaccination as a condition of employment. (Davis, Tr. 176).² Initially, at least one-third of the union’s members were opposed to mandatory vaccinations; however, the NBRA engaged in aggressive communications to convince its members that the LOA would serve their interests. (Davis, Tr. 176-77, 183).³

A critical component of the negotiated LOA was a vaccine exemption for religious objectors that provided for the “financial security of those members ... to be able to maintain their employment.” (Davis, Tr. 194). For Referees who qualified for this exemption, the parties agreed to an accommodation, which would permit them to continue their officiating work, consisting of masking, daily testing, and social distancing. (JX-1 at B.2, C.2, and F.2; Tr. 7; Davis, Tr. 193). Mr. Client relied on the parties’ commitment to a religious exemption in casting his vote in favor of the LOA during the membership ratification process. (Davis, Tr. 177-78; Client, Tr. 234-35).

John Client’s Religious Beliefs and Practices

Mr. Client has served as an NBA Referee for twenty-seven (27) years. (Stern, Tr. 73, 116; Client, Tr. 227). He has identified as Christian his entire life and became a born again Christian twenty-three (23) years ago. (Client, Tr. 227). He became born again by

² Marc Davis is 24-year NBA veteran and the member of the NBRA Executive Board who served as the lead negotiator with respect to the COVID-19 LOA.

³ As the VEB determined during the evidentiary hearings, the parties agreed to what would be the reasonable accommodation of non-vaccinated Referees and that Dr. Sims was consulted with respect to the proper means of that reasonable accommodation. (Tr. at 53-54).

receiving the Holy Spirit through a spiritual baptism similar to John the Baptist's baptism of Jesus. (Client, Tr. 227-28).

Mr. Client was a founding member of Tabernacle Church in Portsmouth, Virginia where he attends services every Sunday and Bible class every Wednesday. (Client, Tr. 228; Linnea, 200-02; Bishop Brown, Tr. 222). He described the objective of his Bible study in the following terms:

Bible study is designed to reach truth and how to live a lifestyle pleasing to God. And it eliminates a lot of the false teachings and false ideology **that comes from the world.**

(Client, Tr. 229).

The depth of Mr. Client's religious commitment is also demonstrated by his practicing of tithing – donating a full ten percent of all of his income – to the church, the purpose of which he explained as follows:

Tithing in Hebrew means tenth. So tithing is a principle or tenet that God says you should support the ministry, the church, by giving a tenth of your increase to God in support of the church. **And it also shows your obedience to God.**

(Client, Tr. 230-31; UX-3).

Mr. Client's religious practices include fasting every Wednesday. (Client, Tr. 228). Mr. Client explained that, when fasting:

you can hear more clearly from God just like Jesus did when he was tempted in the wilderness. ... At every temptation, Jesus leaned on his spirit because in his body he was weak and said, "the word of God says, Man should not live on bread alone but by the word of God.

* * *

He said, listen, the Devil is tempting him. If you would just bow down to me all this would be yours. He said, "Get behind me, Devil. All of this is mine. The word says, Thou shall worship no other God but the Lord our God."

So Jesus was able to become stronger in his spirit because his flesh was weakened to the point of malnourishment that he could clearly hear the spirit of God in those moments. [W]hen your body is craving you say no to your body, God is able to speak to you with clarity.

(Client, Tr. 247-248). Mr. Client's Wednesday fasts continue throughout the NBA season and is a practice recognized and respected by his Referee colleagues. (Client, Tr. 248). As discussed further below, the religious practice of fasting was an integral part of Mr. Client's decision not to submit to a COVID-19 vaccination.

John Client's Application for a Religious Exemption Pursuant to the LOA

The LOA does not set forth a formal process for obtaining an exemption. As NBA Senior Vice President and Assistant General Counsel Neal Stern described it: "The individual would simply notify the League office that he or she was seeking an exemption." (Stern, Tr. 69).

John Client did much more than "simply notify" the League. He submitted three documents to advise the NBA that the basis for his objection was religious. (JX-2). In a sworn affidavit he stated:

I sincerely affirm that my **religious beliefs** prevent me from being vaccinated. I further affirm that these beliefs are not merely based on grounds of personal opinion or inconvenience.

(JX-2 at 1) (emphasis supplied). A supporting letter from Senior Pastor Dr. Roderick Hawthorne of the Truth Transformation Ministries⁴ affirmed the religious basis for Mr. Client's objection and provided chapter and verse references to the New Testament Book of Revelations:

⁴ The NBA knew that Dr. Hawthorne was a very close and long-time spiritual advisor of Mr. Client and his wife who counseled Mr. Richard with respect to guiding his actions "based on scripture." (Stern, Tr. 95; RX-1 at 1).

The conscientious and sincere objection of John J. Client ... is based on **sincere religious beliefs consistent with biblical scripture, tenets, and Christian ideology.**

The objection to taking the “vaccine” is based on our belief that the mandate, behavior, and penalties being imposed (loss of salary and potential employment) if implemented, **are dangerously akin to Revelations 13:16-18 which describes the requirement to receive the Mark of the Beast in order to buy or sell to survive. We believe the Covid-19 “vaccine” mandate is conditioning and a “float” test as to what practices and mandates could be implemented and the methods necessary to accomplish compliance in the future.** We have prayed diligently to God and He has not wavered in what He has put on my spirit. Our whole trust and belief is in God for guidance and protection.

(JX-2 at 2) (emphasis supplied).⁵ Finally, a letter from Bishop Marcus D. Brown, Sr. of the Tabernacle Church, who had known Mr. Client for fourteen years as a founding member of the church, stated:

The conscientious and sincere objection of John J. Client, Referee for the National Basketball Association, to taking the Covid 19 and influenza shots **is based on sincere religious beliefs consistent with biblical scripture, tenets, and Christian ideology.**

The objection to taking the “vaccine” is based on the believer’s conscientious requirement to respond to the individualized relationship and leadership in any given situation. The deepest of our beliefs provide for **prayer, fasting, and meditation**, to ensure that the believer is being clearly motivated and inspired as it relates to specific actions and decisions.

⁵ Revelations, Chapter 13:16-18 admonishes Christians:

16 And he causeth all, both small and great, rich and poor, free and bond, to receive a mark in their right head or in their foreheads;

17 And that no man might buy or sell, save he that had the mark, or the name of the beast, or the number of his name.

18 Here is wisdom. Let him that hath understanding count the number of the beast: for it is the number of a man; and his number is six hundred threescore and six.

We believe the Covid 19 “vaccine” mandate is conditioning and a “float” test as to what practices and mandates could be implemented and the methods necessary to accomplish compliance in the future.

They have prayed diligently to God, and He has not wavered in what he has put in John’s spirit. Our whole trust and belief are in God for guidance and protection.

(JX-2 at 3) (emphasis supplied).

The NBA’s Interview of Mr. Client

On September 17, 2021, two NBA lawyers – Neal Stern and Melissa Dean – interviewed Mr. Client alone. (Stern, Tr. 85). When Mr. Client asked whether the purpose of the meeting was to establish “that my beliefs are sincere or that you believe my beliefs?”, Mr. Stern responded: “a little of both.” (RX-1; Client, Tr. 249). At no time during the interview did Stern or Dean expressed any concern to Mr. Client that his objections were political in nature.

The NBA lawyers questioned Mr. Client about his relationship with Dr. Hawthorne and Bishop Brown, the duration of his membership in the Tabernacle Church, and why he felt the COVID-19 vaccine was inconsistent with his religious beliefs. In response to the latter question Mr. Client responded by stating that:

- * His objections were based on Revelations, Chapter 13:16-18;
- * The origin of virus and vaccine mandate tracked biblical “prophecies;”
- * Revelations warns about succumbing to the “beast” which, in the COVID-19 context, served as a metaphor for government mandates;
- * The use of vaccines to control the population and serve the anti-Christ “feeds into” Revelations, Chapter 13:16-18;
- * The virus and vaccine “are designed to take us into what Revelations speaks to in the rising of the beast, it’s as obscure as Christ being born from the virgin.”

(RX-1 at 2). Mr. Client explained that the “float test” referenced in his pastors’ letters was part of the “slow walk” by which individuals were gradually conditioned to accept the mark of the beast referenced in Revelations. *Id.*

At the conclusion of Mr. Client’s explanation of his religious-based objections, Mr. Stern commented: “I understand your position on how this all holds together.” *Id.* at 2.

In his concluding remarks, Mr. Client discussed the severe impact of the COVID-19 epidemic on his family, questioned why the NBA had discontinued its COVID-19 testing program, and reported that the Veterans Administration (VA) Hospital had granted his wife a religious exemption and provided a testing-based accommodation. His final words were: “I believe COVID-19 is the beginning of Revelations.” *Id.* at 3. Mr. Stern responded that he had “no more questions.” *Id.*

Mrs. Linnea Client’s Receipt of a Religious Exemption from Her Federal Employer

As referenced above, during the NBA interview, Mr. Client compared his application to the religious exemption to vaccination granted by his wife’s employer – the Veterans Administration Hospital.

Linnea Client has been married to John Client for twenty-one (21) years. She belongs to the same faith community as her husband and shares his religious beliefs as a born again Christian. As a couple, they attend Bible study every Wednesday, church services every Sunday, and are “diligent tithers” contributing ten percent of their joint income to their church. Linnea Client’s religious faith and practices are identical to those of her husband. (Linnea, 200-02; Bishop Brown, Tr. 222).

As an occupational therapist at the Veterans Administration Hospital in Hampton, Virginia, Mrs. Client faced the identical employment issue faced by her husband – whether she would qualify for a religious exemption to her federal employer’s policy of mandatory vaccination. (Tr. 202-03).

After praying and fasting with her husband, she determined that the vaccine was inconsistent with her religious beliefs and, in support of her exemption, submitted a letter from Bishop Marcus D. Brown, Sr. identical to the letter provided by him to the NBA. (Tr. 204, 206-07, 209; JX-2 at 3; UX-1). Mrs. Client’s federal employer granted her religious exemption and has allowed her to continue to work with an accommodation similar to that provided for under the NBRA/NBA LOA. (UX-2 at 4; Tr. 209-211).

The NBA Conducts No Post-Interview Investigation and Rejects the Application

After the Client interview, the NBA terminated its investigatory process. No effort was made to contact Bishop Brown or Dr. Hawthorne. (Stern, Tr. 135-36; Spruell, Tr. 157; Bishop Brown, Tr. 224). No inquiry was made into the basis for the VA Hospital granting Mr. Client’s wife a religious exemption to COVID-19 vaccination. No further inquiry was made to Mr. Client nor any invitation to supplement his initial submission. (Stern, Tr. 142-43; Client, Tr. 251). There was no interest on the part of the League in seeking additional information. (Stern, Tr. 143). Mr. Spruell, who accepts responsibility for the final decision, never even spoke to John Client. (Spruell, Tr. 157).

On October 11, 2021, the NBA President League Operations Byron Spruell issued a letter to Mr. Client denying his exemption application. (JX-3). Mr. Spruell had engaged in no independent investigation of Mr. Client’s application and provided no reason for his decision other than to reference an unsigned memorandum containing the

conclusory statement that Mr. Client had not submitted information that established a “sincerely held religious belief that precludes him from being vaccinated.” (Spruell, Tr. 153; JX-3). The memorandum did not specify whether the NBA decision was based on Mr. Client’s supposed lack of sincerity, the purportedly non-religious nature of his beliefs, or if the religious beliefs he sincerely held simply did not preclude vaccination.

At the VEB hearing in this matter, the NBA asserted that its decision was based “only” on the League’s decision to characterize Mr. Client’s beliefs as non-religious. (Bloom, Tr. 13; Stern, 138-39). The NBA consulted no one with expertise in theology but rather, relied on its own secular analysis. (Stern, Tr. 115-16; Spruell, Tr. 158). The NBA never disclosed its position either before or after its decision in this respect; the NBRA learned of the League’s purported rationale for the first time at the hearing in this matter.

Mr. Client has continued in the employ of the NBA since the October 11 decision, albeit on an unpaid basis, and therefore continues to be under the protection of both statutory and contractual protections against religious-based discrimination. (Stern, Tr. 116-17).⁶

⁶ In the absence of a favorable VEB decision, Mr. Client will be subject to termination on September 1, 2022, unless he submits to a vaccination. (Tr. 116-17).

ARGUMENT

I. LEGAL STANDARD APPLICABLE

The LOA provides that vaccination exemptions will be granted to those who oppose vaccination based on “sincerely held religious belief(s), practice(s) or observance.” (JX-1 at § A.2). It is the VEB’s responsibility to “ensure” an eligible religious objector is “able to refrain from being vaccinated.” (*Id.*).

In evaluating Mr. Client’s contractual rights, the NBRA respectfully requests that the VEB adhere to guidance provided in federal law and case precedent. Title VII of the Civil Rights Act of 1964 prohibits, *inter alia*, employment discrimination based on religious belief. 42 U.S.C. § 2000e-2. This statutory prohibition applies with equal force to both employers and labor organizations. 42 U.S.C. § 2000e-2(a), (c).

Where an employee has established that he/she has a sincerely held religious belief, practice or observance that would prevent him/her from complying with an employer’s work rule, the employer has an affirmative duty to accommodate that individual provided that it would not impose an undue hardship on the operation of the employer’s business. 42 U.S.C. § 2000e(j). In the instant matter, the parties have pre-negotiated a mutually acceptable accommodation and, therefore, the question of undue hardship is immaterial to these proceedings. (JX-1 at B.2, C.2, and F.2; Tr. 7; Bloom, Tr. 11; Davis, Tr. 193)). As contended by the NBA, the issue in this case is whether Mr. Client’s beliefs were religious in nature.

Title VII broadly defines the term “religion” to include “all aspects of religious observance and practice, as well as belief...” 42 U.S.C. § 2000e(j). Consistent with this

statutory definition, the Equal Employment Opportunity Commission has promulgated the following regulatory standard:

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices **to include moral or ethical beliefs as to what is right and wrong** which are sincerely held with the strength of traditional religious views.

* * *

The fact that no religious group espouses such beliefs **or the fact that the religious group to which the individual professes to belong may not accept such belief** will not determine whether the belief is a religious belief of the employee or prospective employee.

29 C.F.R. § 1605.1 (emphasis supplied).

"Title VII's protections are not limited to beliefs and practices that courts perceive as 'acceptable, logical, consistent, or comprehensible to others,'" nor do EEOC guidelines on religious discrimination require a specific religious group to advocate the belief of the individual employee. *Cloutier v. Costco Wholesale*, 311 F. Supp.2d 190, 196 (D. Mass. 2004) (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981)) (citing 29 C.F.R. § 1605.1).

As the United States Supreme Court has held with respect to a court's evaluation of asserted religious beliefs:

In such an intensely personal area, of course, **the claim of the [adherent] that his belief is an essential part of a religious faith must be given great weight**.... The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these inquiries are foreclosed to Government.

United States v. Seeger, 380 U.S. 163, 184 (1965) (emphasis supplied).⁷

In a publication, dated October 25, 2021, the EEOC directly addressed an employer's treatment of an employee's religion-based objection to COVID-19 vaccination:

EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar.

Therefore, the employer should **ordinarily assume** that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is **aware of facts** that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, **the employer would be justified in requesting additional supporting information.**

EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* at K.12 (October 25, 2021) (emphasis supplied).⁸ Notably, every federal program promoting or mandating vaccination provides for a religious exemption.⁹

In short, an employer of secular humanist tendencies is not permitted to scoff at a man of religious conviction and force him to compromise his beliefs. Nor is an employer allowed to second-guess a man's sincere interpretation of the Holy Bible.

⁷ While the *Seeger* decision involved the application of a conscientious objector to avoid military service, the Court's standard of judicial analysis of religious belief has been widely applied in the Title VII context and adopted by the EEOC. (29 C.F.R. § 1605.1).

⁸ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

⁹ See, e.g., OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard, 29 C.F.R. § 1910.50(c); Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors at 10 ("A covered employer may be required to provide an accommodation for contractor employees who communicate to the contractor that they are not vaccinated ... because of a sincerely held religious belief, practice, or observance.").

II. THE UNDISPUTED EVIDENCE ESTABLISHES THAT MR. CLIENT'S OBJECTION WAS RELIGION-BASED

EEOC guidance dictates that an employer should “ordinarily assume” that an employee’s request for accommodation is based on a sincerely held religious belief, practice, or observance. In tacit recognition of this shift of the evidentiary burden to the employer, the NBA required only that a Referee “simply notify” the League of his/her desire for a religious accommodation. (Stern, JX-2). Mr. Client did much more than that.

He provided a sworn affidavit expressly affirming that his objection to vaccination was based on “religious beliefs” and not on “personal opinion or inconvenience.” (JX2-1 at 1). He provided a letter from Dr. Hawthorne, his long-time spiritual advisor, confirming that Mr. Client’s objections were based on “Christian ideology” that was “consistent with biblical scripture.” The Hawthorne letter provided specific references to the biblical mandate contained in Revelations that Christians foreswear the “mark of the beast” as a condition to “buy or sell to survive.” (*Id.* at 2). Mr. Client also provided a letter from the head of his church – Bishop Marcus D. Brown, Sr. – that further confirmed that Client’s objections were based on his Christian beliefs, biblical readings, and the religious practices of prayer and fasting as a means to obtain spiritual guidance directly from God. (*Id.* at 3). Consistent with Supreme Court and EEOC guidance that the objector’s mere self-identification as a religious adherent should be given “great weight” and “ordinarily” be accepted with deference, the inquiry should have stopped there.

Nonetheless, the NBA elected to have its lawyers cross-examine the unrepresented Mr. Client with respect to his religious beliefs. During the interview, Mr. Client confirmed that:

- * His objections were based on Revelations, Chapter 13:16-18;
- * The origin of virus and vaccine mandate tracked biblical “prophecies;”
- * Revelations warns about succumbing to the “beast” which, in the COVID-19 context, served as a metaphor for government mandates;
- * The use of vaccines to control the population and serve the anti-Christ “feeds into” Revelations, Chapter 13:16-18;
- * The virus and vaccine “are designed to take us into what Revelations speaks to in the rising of the beast, it’s as obscure as Christ being born from the virgin.”

(RX-1 at 2). Mr. Client explained that the “float test” referenced in his pastors’ letters was part of the “slow walk” by which individuals were gradually conditioned to accept the mark of the beast referenced in Revelations. *Id.*¹⁰

Both at the outset and conclusion of the interview, the NBA misinformed Mr. Client about its purported basis for challenging his religious exemption request. When, prior to the commencement of the interview, Mr. Client asked whether the issue was whether he was “sincere” or whether the League “believe[d] his beliefs,” the NBA response was “a little of both.” (RX-1; Client, Tr. 249). After hearing his religion-based objections, the NBA investigator assured Mr. Client that he understood “how all this holds together.” (RX-1 at 2). Never did the NBA disclose, either during the interview nor in its subsequent adverse determination letter, that it was rejecting Mr. Client’s letter on the grounds that it was characterizing his beliefs as political rather than religious.

¹⁰ When Client referenced Revelations or the “mark of the beast” the NBA decisionmakers knew he was referencing the Bible and religious considerations. (Stern, Tr. 126-27, 134; Spruell, Tr. 161).

Mr. Client's testimony under oath replicated the information previously provided to his NBA interviewers. He testified that the prospect of submitting to a mandatory vaccination as a condition of employment troubled his conscience or spirit, which he understood to be communication from the Holy Spirit that he needed to obtain spiritual guidance. (Client, Tr. 235-236). His pastor advised that he had not received guidance from the Holy Spirit and God and, therefore, Mr. Client must fast and pray so that God would lead him in the right direction. (Client, Tr. 236).

After fasting and praying with his wife, they received clear guidance from God advising them not to take the vaccine because: "It is the work of Satan. It is demonic and of the anti-Christ." (Client, Tr. 237). God said further:

"The anti-Christ was going to use this time, use the virus and the vaccine to condition the people of this world ... into being complicit and compliant with what the anti-Christ wants them to do."

(Client, Tr. 237-38). God told Mr. Client that he would be persecuted for the decisions that he made but referred him to Psalm 91 and its promise that God would shield him from harm. (Tr. 238-40).

The foundation of Mr. Client's life is built on a rock of faith: he is a devout Christian who constantly strives to live his life in accordance with dictates of God and the Holy Bible. He attends church every Sunday. He attends Bible school every Wednesday. He gladly donates ten percent of all income to his church. He fasts at least once a week to be in closer contact with God. Within the League he is known to be an honest and truthful adherent to Judeo-Christian moral values. (Davis, Tr. 178-79). Mr. Client is **not** an individual who, in support of a secular libertarian opposition to

vaccination, downloaded a membership from a church of convenience. Mr. Client has dedicated his life to Christian service, worship, and prayer.

Four witnesses, starting with Mr. Client himself, expressly stated that his objection to the vaccination was based on his Christian religious beliefs, not personal opinion. Thus, the League's rejection rests on the unsustainable premise that John Client, Dr. Roderick Hawthorne, Bishop Marcus D. Brown, Sr., and Mrs. Linnea Client all untruthfully represented Mr. Client's motives.

However, the League never troubled itself to interview the three supporting witnesses Mr. Client identified. (Stern, Tr. 85, 106, 117). The single witness who was interviewed – John Client – was characterized by the NBA as being an “honest individual” at all times. Indeed, NBA counsel repeatedly asserted that the League in no way questioned the sincerity of Mr. Client's beliefs. (Bloom, Tr. 13, 16). Under the circumstances, the argument that Mr. Client and two clergymen did not understand, or misrepresented, the religious nature of Mr. Client's objections is offensive.

The NBA's defense relies heavily on an effort to secularize his motives by citing his references to “government” and “one world.” (Bloom, Tr. 15-16; Stern, 83). However, the embodiment of the oppressive power that Mr. Client seeks to resist in no way defines his motives. As Mr. Client explained to the League, Revelations cannot be narrowly read as simply prophesying the arrival of a “physical beast,” but as a broader prohibition of allowing the divine will to become subordinated to secular interests through the exercise of coercive power to deny a Christian the right to buy or sell. (RX-1 at 2). As he further elucidated during his interview:

The rising of the beast is about the governments to come under the control of one government to control the population and serve the anti-Christ;

[vaccination] mandates feed into what Revelations 13:16-18 speaks to in the mark of the beast.

(*Id.*).

Mr. Client's explanation of the Revelations metaphor during his interview by two NBA lawyers was repeated, under oath, at the hearing:

this all ties together in terms of the Rapture and the period of time and float tests and all of those things is that, what this is saying is at this period of time, once they implement that you must take the mark to buy or sell, you won't be able to do anything. You won't be able to go to the grocery store, you won't be able to buy food for your family, you won't be able to provide a living for yourself unless you take this mark of the beast as mandated by the beast who is not a beast but it is a government head, it is the head of the one world order.

* * *

So I'm a living testimony to this right now because I've been mandated to take the shot. And if I don't take the shot, then I don't have the means to support myself or my family.

(Client, Tr. 243-44).¹¹

Marxists, Anarchists and Christians may on occasion, have overlapping objectives of re-distributing wealth, challenging authority, and making a better world. But Mr. Client's inspiration did not originate from *Das Kapital* or a volume authored by Pierre-Joseph Proudhon. It came from the Holy Bible, fasting and prayer, and a dialogue with God. And as the Holy Bible enjoins, when there is a conflict between secular authority and the divine, a Christian "ought to obey God rather than men." Acts 5:27-28.

¹¹ Brogan sustained the NBA's objection when NBRA counsel sought to question Mr. Stern regarding his understanding of Revelations and its metaphorical significance. (Tr. 130-34). We respectfully submit that the evidentiary ruling was an error and prevented a full response to the NBA defense that Mr. Client's beliefs were not religious in nature.

The religious inspiration for Client's resistance to secular authority was not lost on the NBA. During the hearing, Stern was confronted with the NBA's notes of its interview in which Client explained:

Dealing totally spiritually, the rising of beast is about governments to come under the control of one government to control the population and serve the anti-Christ mandates feed into what Revelations 13 verses 16 to 18 speaks to in the mark of the beast.

(RX1 at 2). When asked whether Mr. Client was connecting the government action to actions of the anti-Christ, Mr. Stern grudgingly acceded: "He was trying to connect it." (Tr. 129).

The NBA has also relied on the strategy of de-legitimizing Mr. Client's beliefs by insinuating that they deviate from the teachings of the Tabernacle Church. (Bloom, Tr. 15; Stern, 78-79). Such argumentation flies in the face of the Supreme Court injunction that the "validity of what [the objector] believes cannot be questioned" and the EEOC's specific admonition that "**the fact that the religious group to which the individual professes to belong may not accept such belief** will not determine whether the belief is a religious belief of the employee or prospective employee." *Seeger*, 380 U.S. at 184; 29 C.F.R. § 1605.1 (emphasis supplied). Bishop Brown's description of parishioner's own spiritual journey echoes the law that a man's religious conviction is not defined by the beliefs of his fellow parishioners:

Well, one observation in scripture is that each and every person, although emerged in a congregational setting, is charged with an individual responsibility to engage God themselves. So, in doing so, regardless as to what a group or crowd of people may be charged with doing, each person is charged and has responsibility to go to God and see what God's will is for their lives.

(Bishop Brown, Tr. 224). Bishop Brown’s description of the process whereby a congregant ascertains what God’s will is for his/her life alludes to a process of fasting and prayer constituting a “religious practice” which is expressly protected by both the LOA and Title VII.

III. THE MANNER IN WHICH THE NBA INVESTIGATED DEMONSTRATES DECEIT, WILLFUL IGNORANCE, AND DISCRIMINATORY INTENT

A. The League’s Pre-Determination to Not Grant Religious Exemptions

As discussed in Section I above, the Supreme Court has admonished that a petitioner’s representation that his objection is based on his religious belief must be given “great weight.” Similarly, EEOC guidance dictates that an employer must “**ordinarily assume** that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance.” Even aggressive employer-advocates of vaccination programs have approved religion-based exemptions at the rate of 80%. *See Sambrano v. United Airlines, Inc.*, 2021 U.S. Dist. LEXIS 215285, *5 (N.D. Tex., November 8, 2021).

The League’s approach sticks out like a sore thumb. The NBA has rejected every single one of the four religious-based exemption requests received. (Stern, Tr. 111-12). NBA counsel sought to mitigate this revealing statistic by eliciting testimony that, that an affiliated minor league (the G-League) has granted a single religious objection. (Stern, Tr. 110). However, on cross-examination, the League conceded that it has not permitted the concerned Referee to return to work. (Stern, 113-14). In short, the League has buyer’s remorse and has sought to evade the terms of the agreement is has negotiated.

B. The League’s Non-Disclosure to Mr. Client of Its Rationale

The League’s investigation was both deceptive and opportunistically incomplete.

At the hearing, Mr. Stern described his investigatory objective in the following terms:

I needed to know whether or not he was deciding not to be vaccinated because of a political objection to the vaccine or because of a religious belief, a religious objection.

(Stern, Tr. 99). According to Stern, his “mission” was to determine whether Mr. Client’s beliefs were religious in nature – a mission that he never disclosed to Mr. Client. (Tr. 106; RX-1).

To the contrary, at the outset of his interview, the NBA assured Mr. Client “we’re not here to debate religion; we just need to make sure your beliefs are sincerely held, consistent” thereby telegraphing to Client that the religious nature of his objections had been accepted. (RX1 at 1). During their interview, Mr. Stern never asked Mr. Client – whom he considered to be honest and sincere¹² – whether his beliefs were political rather than religious.¹³ The NBA has claimed that Mr. Client was “free to supplement” his original submission after his interview; however, by not only withholding its rationale, but actually misleading him with respect to what the rationale might be, the League deprived him of this opportunity. (Stern, Tr. 142).

Finally, in issuing its determination that Mr. Client’s application for a religious exemption would be denied, the NBA withheld its purported rationale, i.e., that his beliefs were political rather than religious. Withheld and shifting rationales justifies an inference that the NBA’s motivations were discriminatory. *See, e.g., Ameristar Airways, Inc. v. Admin. Review Bd.*, 650 F.3d 562, 569 (5th Cir. 2011).

¹² Stern determined Mr. Client was “being honest with us, which I genuinely appreciated.” (Tr. 106, 117).

¹³ Notably, during their conversation, neither Stern nor Client reference the terms politics or political.

Marathon LeTourneau Co. v. 20 NLRB, 699 F.2d 248, 252 (5th Cir. 1983); *Vieques Air Link, Inc. v. U.S. Dep't of Labor*, 437 F.3d 102 (1st Cir. 2006) ("[T]he fact that an employer offers shifting explanations for its challenged personnel action can itself serve to demonstrate pretext.").

C. The League's Failure to Conduct a Meaningful, Unprejudiced Investigation

1. The NBA Cherry-Picked the Record Rather Than Engaging in a *Bona Fide* Investigation

Because it is impossible to deny the numerous references to the Bible and religious practices in Mr. Client's submissions and interview, the League resorted to self-consciously diffident characterizations of Mr. Client's beliefs. The League's lead investigator testified that Client's beliefs "struck me as *more* secular than religious." (Tr. 83). Thus, the NBA investigator recognized the influence of Mr. Client's religious beliefs and practices on his decision while seeking to discount these influences by applying some makeshift preponderance test. However, he never asked Mr. Client whether his objections were political as opposed to religious; indeed, such a concern was never even suggested by the two lawyers that interviewed Client. (RX-1; Client, Tr. 248-50). And, ironically, the investigator's secular characterization is belied, not only by the record as a whole, but by his own description of Mr. Client's reaction to the COVID-19 outbreak from a religious perspective:

And I thought it was important to see – since he had viewed the entire pandemic as impacting him as I believe – he felt it had a religious meaning, I wanted to know if he had been consistent throughout the course of the pandemic.

(Stern, Tr. 103-04).¹⁴

The investigation and comprehension of the official decision-maker is still more troubling. He spoke to none of the witnesses, not even Mr. Client – an NBA Referee of twenty-seven (27) years. (Spruell, Tr. 157). He had no recollection that Mr. Client had referenced religious Rapture in explaining his decision. (Tr. 165). He had no knowledge of what the term “float test” refers to and made no effort to come to an understanding of the term. (Spruell, Tr. 168). Mr. Spruell based his final decision on his conclusion that the exemption application was not “totally” religious-based. (Spruell, Tr. 152). He characterized Mr. Client’s beliefs as insufficient because they were “somewhat” derived from the hesitancy of the African American community and “a bit” related to government control and political considerations. (Spruell, Tr. 154).

At times, the League’s staunch refusal to follow up on its supposed doubts regarding Mr. Client religious convictions reached levels of absurdity. For example, in an attempt to de-legitimize his exemption claim, the League submitted the jaw-slackening testimony alleging that Mr. Client had never disclosed what his religion was. (Stern, Tr. 84). However, if Mr. Stern had any confusion as to whether Mr. Client adhered to Judaism or Islam, he had every opportunity to ask.

Similarly absurd was Mr. Stern’s representation that he never made a determination, one way or the other, whether Mr. Client believes in God. (Tr. 117-18). However, Client advised Mr. Stern that he attends Bible study every Wednesday and church every Sunday and Mr. Stern conceded he had no basis for not crediting Client’s religiosity. (Stern, Tr. 118; RX-1 at 2). He made no effort to confirm the depth of Mr.

¹⁴ Mr. Stern testified that he was not able to draw a final conclusion with respect to this issue of consistency. (Tr. 104).

Client's religious adherence even with management representatives who had officiated with him for years. (Tr. 119-20).

The NBA's investigatory approach reflects the buyer's remorse prompting it to deny to every single religious objector the right to continue to officiate. The League did not engage in a sincere effort to inquire into the sincerity of Mr. Client's Christian faith; rather it abandoned the legal mandate of deference to the religious adherent in favor of strategy of cherry-picking the record for stray references, which it then blithely cites out of context. Prior to the commencement of its investigation, the League had already made its adverse decision; thereafter, it merely engaged in process of sophistry to justify that decision.

2. The NBA's Effort to Suppress Further Evidence

A stark illustration of the League's deliberate close-mindedness is its assertion of the right to ignore and exclude post-interview evidence of the religious nature of Mr. Client's beliefs. According to the League: "**Critically important** is that this is an appeal of the NBA's decision and thus the record on appeal is confined to the information that the NBA had before it when it made the decision to deny the request." (Bloom, Tr. 11).

The NBRA has already presented to the VEB its position as to why such evidence must be deemed admissible before this Board. As set forth in substantial detail in the NBRA's letter to Chairman Brogan, dated December 12, 2021, the arbitral process in general, and that provided for in the LOA in particular, make no provision for the exclusion of evidence based on the supposed creation of a complete evidentiary universe at a trial court level. Elkouri & Elkouri, *How Arbitration Works*, at 298 (4th Ed. 1985)

quoting Shulman, *Reason, Contract, and Law in Labor Relations*, Harv L. Rev. 999, 1017 (1955); LOA, § 2. The NBA's prior citations to federal rules and appellate case – which presuppose prior depositions, document requests, and an evidentiary trial – are absurdly inapposite. There is, however, a larger point to be made with respect to the League's effort to suppress additional evidence.

The NBRA is of the opinion that, even prior to the hearing, the League was in a possession of a deluge of information confirming that Mr. Client had met the deferential religious exemption standard established by the Supreme Court and the EEOC. The NBRA is of the further opinion that the League's evidentiary gamesmanship concerning post-interview information further confirms an unprincipled pre-determination to deny Mr. Client's application at any cost. The NBA has no right to stop its ears with wax as if it were Ulysses' shipmates confronting the mortal peril of the Sirens. Although on unpaid status, Mr. Client remains an NBA employee with a continuing right under statute and the collective bargaining agreement to be free from religious discrimination. (Stern, Tr. 116-17). A non-discriminatory approach to such a religious employee requires ongoing understanding and communication.¹⁵ Unfortunately, the NBA is not concerned with honoring its contractual and statutory obligations, it just wants to win. In this

¹⁵ *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) ("This statutory and regulatory framework [of Title VII], like the statutory and regulatory framework of the Americans with Disabilities Act (ADA), involves an interactive process that requires participation by both the employer and the employee."); *EEOC v. Ithaca Industries, Inc.*, 849 F.2d 116, 118 (4th Cir. 1988) (noting that the district court "found, as a matter of fact, that [the employer] made no *specific* effort to accommodate [the employee]"); *Jamil v. Sessions*, 2017 U.S. Dist. LEXIS 31815, *26 (E.D.N.Y. March 6, 2017); *Elmenayer v. ABF Freight Sys.*, 2001 U.S. Dist. LEXIS 15357, 2001 WL 1152815, at *5 (E.D.N.Y. Sept. 20, 2001), *aff'd*, 318 F.3d 130 (2d Cir. 2003); *EEOC v. Aldi*, 2008 U.S. Dist. LEXIS 25206, 2008 WL 859249 (W.D. Pa. Mar. 27, 2008); *Kenner v. Domtar Industries, Inc.*, 2006 U.S. Dist. LEXIS 14478, 2006 WL 662466 (W.D. Ark. March 13, 2006).

relentless effort to win, however, the NBA has committed fresh violations of the collective bargaining agreement and Title VII.

3. Failure to Consider the Perfect Comparator – Linnea Client

The NBA's lead investigator declined to consider the religious exemption granted to Mr. Client's wife because he purportedly did not know (1) where his wife worked, and (2) what his wife's religious beliefs were. (Tr. 105). With respect to the first justification, the truth is that Mr. Client specifically advised the NBA that his wife works for the Veterans Administration Hospital. (RX-1 at 3). With respect to the second justification, the NBA declined to even consider the likelihood that a long-married couple might share religious beliefs. Here again, the NBA made no further inquiry with respect to these issues but maintained what appears to be a deliberate ignorance.

In terms of determining the question of religious motivation, it cannot possibly be of small interest that a federal employer has granted a vaccination exemption to an individual who belongs to the same church, attends the same Bible classes, and fasted and prayed together with Mr. Client in reaching their joint decision. Nor would any compassionate employer cavalierly contribute to the creation of a house divided. But more telling still is the League's rationale for refusing to consider this information.

The NBA argued that this striking comparator evidence should be disregarded on the following grounds:

Objection, relevance. ...

She works in a completely different environment and what accommodation and whether they provided an accommodation has no bearing whatsoever on Mr. Client's claims or even the availability of an accommodation in his environment.

(Bloom, Tr. 210). The objection reflects a mind-numbing abandonment of what the NBA defined as the issue at the outset of the hearing, i.e., whether Mr. Client's beliefs and practices were religious or political. The federal government determined that these same beliefs and practices were religious.

As the VEB recognized at the outset of the hearing, the accommodation applicable to Mr. Client as a religious objector already has been agreed to by the parties and is embodied in the LOA. The desirability of that accommodation in the context of the instant case is a contractually prohibited consideration. The League's refusal to consider this evidence on the grounds asserted, once again, betrays the buyer's remorse that has led it to dishonor the parties' agreement.

CONCLUSION

For the foregoing reasons, the NBRA requests that the Mr. Client's exemption application be granted and that the Board order the reinstatement of Mr. Client with full seniority, full make whole relief, and that he be allowed to resume his normal officiating schedule with the accommodations as specified in the parties' Letter of Agreement.

Dated January 4, 2022

Respectfully submitted,

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