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13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN FRANCISCO DIVISION

17 BERNARD PAUL PARRISH, HERBERT
 ANTHONY ADDERLEY, and WALTER
 18 ROBERTS, III on behalf of themselves and
 all others similarly situated,

19 Plaintiffs,

20 vs.

21 NATIONAL FOOTBALL LEAGUE
 22 PLAYERS ASSOCIATION, a Virginia
 corporation, and NATIONAL FOOTBALL
 23 LEAGUE PLAYERS INCORPORATED
 d/b/a PLAYERS INC, a Virginia
 24 corporation,

25 Defendants.

CIVIL ACTION NO. C07 0943 WHA

**PLAINTIFFS' REPLY BRIEF IN SUPPORT
 OF PLAINTIFFS' MOTION FOR LEAVE
 TO FILE THIRD AMENDED COMPLAINT**

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1 **I. INTRODUCTION**

2 Fed. R. Civ. P. 15(a) provides that leave to amend should be freely given when justice so
3 requires. Defendants cannot show that leave to amend at this time should be denied, particularly
4 given this Court's September 6, 2007 Order ("Order"), which specifically identified what
5 Plaintiffs needed to allege in order to state a valid legal claim. Plaintiffs' motion for leave and
6 accompanying documents more than meet these standards.

7 Defendants do not dispute this point, nor can they show that a single amended cause of
8 action would be subject to a motion to dismiss. Defendants find themselves in the unenviable
9 position of attempting to disavow contract language that the NFLPA itself wrote. Defendants
10 promised to share licensing revenue for retired players "between the player and an escrow
11 account for all eligible NFLPA members who have signed a group licensing authorization." But
12 Defendants now contend that the retired player licensing was done only pursuant to "ad hoc"
13 GLAs for which all money was paid directly to the player. Thus, Defendants render the contract
14 language meaningless. Defendants choose to ignore [REDACTED] under
15 numerous license agreements, asserting, despite evidence to the contrary, that it relates only to
16 active player licensing. Plaintiffs contend that such revenue should have been shared with the
17 retired players who signed a GLA, [REDACTED]
18 [REDACTED]. Such sharing of the guaranteed minimum revenue makes meaningful the
19 GLA language and would have complied with Defendants' contractual and fiduciary obligations.

20 Instead, Defendants have levied an entirely new attack suggesting that Plaintiffs' claims
21 are asserted in "bad faith." This attack, based largely on the declarations of individuals who have
22 not yet been deposed, is both procedurally and substantively wrong. Plaintiffs' good faith is
23 supported by the agreements in question and testimony from the single witness who has been
24 deposed in this case. Plaintiffs' allegations are based upon the plain language of the GLAs as
25 well as the plain language of license agreement(s) with third parties [REDACTED].

26 Before filing the motion for leave, Plaintiffs took the deposition of Doug Allen, [REDACTED]
27 [REDACTED], to confirm
28 their understanding of the license agreement(s) and relied, and continue to rely, on the testimony

1 that Mr. Allen provided at the time of the deposition.¹ Although Defendants now attempt to
2 explain Mr. Allen's testimony in a new declaration, Plaintiffs' reliance on such information for
3 their interpretation of the language in the license agreement(s) is unquestionably a good faith
4 interpretation supporting Plaintiffs' claims.

5 By attempting to interject new evidence from witnesses who have not been deposed,
6 Defendants put the cart before the horse. It is *Defendants* who sought a stay of discovery in this
7 matter. If evidence from new undeposed witnesses is to be considered, even Defendants must
8 acknowledge that Plaintiffs are entitled to discovery from such witnesses. Thus, the very nature
9 of Defendants' response supports and requires the filing of the complaint and the reopening of
10 discovery.

11 Plaintiffs have complied with this Court's Order, which required Plaintiffs to state "how
12 the amended complaint is different from prior complaints and the good-faith basis on which the
13 amendments were made." The signed declaration from Plaintiffs' counsel, Ronald Katz,
14 precisely complies with the Order's directive. Plaintiffs' counsel also signed the proposed Third
15 Amended Complaint ("TAC"), a certification that he has done the factual and legal research to
16 comply with Fed. R. Civ. P. 11, which is all that is required at the pleading stage. Because
17 Plaintiffs have complied with the Order and the standards set forth above, they respectfully
18 request that their motion for leave be granted and that the TAC be deemed filed.

19 **II. THE STANDARDS FOR GRANTING LEAVE TO AMEND**

20 Leave to amend a complaint shall be freely given when justice so requires. Fed. R. Civ. P.
21 15(a). The strong policy permitting amendment is to be applied with "extreme liberality."
22 *Eminence Capital, L.L.C. v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (citation omitted)
23 (reversing denial of leave to amend because, among other reasons, "plaintiffs were endeavoring in
24 good faith to meet the heightened pleading requirements and to comply with court guidance").

25 In assessing whether to grant leave to amend, the Court should consider factors such as
26 "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure

27 ¹ The quotations from Mr. Allen that support the allegations of the TAC are set forth in the Declaration of
28 Lewis T. LeClair, filed simultaneously with this Reply.

1 deficiencies by previous amendments, undue prejudice to the opposing party and futility of the
 2 proposed amendment.” *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).
 3 “Prejudice to the moving party if leave is denied [also] should be considered, even if there is
 4 substantial reason to deny leave based on the other factors.” 3 Moore’s Federal Practice § 15.15.
 5 Generally, this determination should be performed with all inferences in favor of granting the
 6 motion. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

7 Defendants argue that leave to amend should be denied based on a finding of bad faith.
 8 The standard for assessing a motion for leave based on bad faith is whether leave is being sought
 9 for an improper purpose. *See, e.g., Sorosky v. Burroughs Corp.*, 826 F.2d 794, 805 (9th Cir.
 10 1987) (leave to amend denied where plaintiff’s amended pleading sought to add a defendant
 11 merely to destroy diversity jurisdiction). Defendants do not even allege such a purpose, nor could
 12 they because Plaintiffs are explicitly complying with the Order, which is the opposite of bad faith.

13 Defendants also suggest that Plaintiffs’ Third Amended Complaint is futile because it
 14 cannot survive a motion to dismiss. But, Defendants cannot succeed in making such an argument
 15 because they cannot show that Plaintiffs have failed to meet each of the elements for each of their
 16 claims. “A proposed amendment is futile only if ‘no set of facts can be proved under the
 17 amendment that would constitute a valid claim or defense.’” *Miller v. Rykoff-Sexton, Inc.*, 845
 18 F.2d 209, 214 (9th Cir. 1988); *see also Abels v. JBC Legal Group, P.C.*, 229 F.R.D. 152, 157
 19 (N.D. Cal. 2005). In ruling on a motion to dismiss, the Court cannot consider material outside the
 20 complaint like Defendants’ declarations. *Aprin v. Santa Clara Valley Transportation Agency*,
 21 261 F.3d 912, 935 (9th Cir. 2001); *Paulsen v. CNF, Inc.*, 391 F. Supp. 2d 804, 807 (N.D. Cal.
 22 2005); *see also Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). At best, Defendants’
 23 Opposition and declarations create genuine issues of material fact with respect to Plaintiffs’
 24 claims, which is precisely why there is litigation.

25 **III. DEFENDANTS MISAPPLY THE STANDARDS FOR GRANTING LEAVE TO**
 26 **AMEND, AND INSTEAD SEEK TO CONVERT PLAINTIFFS’ MOTION INTO A**
 27 **MOTION FOR SUMMARY JUDGMENT**

28 Because Defendants cannot legitimately challenge Plaintiffs’ motion for leave under the
 standards set forth above, they instead submit a variety of evidence, including declarations of

1 undeposed third parties, in an effort to convert Plaintiffs' motion into a motion for summary
2 judgment. There are several reasons why these declarations should not be considered at this stage
3 of the litigation. First, Defendants' Opposition noticeably does not include a citation to a single
4 case in which a court permits a defendant to oppose a motion for leave in this manner.

5 Second, the declarations are improper because Plaintiffs have not had the opportunity to
6 depose the declarants on their testimony. Indeed, it is *Defendants* who sought and obtained a stay
7 of discovery in this matter, but who now wish to bring in evidence outside the pleadings. During
8 the discovery process, Plaintiffs intend to depose each of the declarants, many of whom seem to
9 have ulterior motives to cooperate with Defendants.

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13 Third, the Declaration of Doug Allen cannot be used to contradict his deposition.
14 Declarations such as these are typically referred to as "sham" declarations by the courts, and have
15 long been ruled to be inadmissible. *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540,
16 543-544 (9th Cir. 1975); *Wang v. Chinese Daily News Inc.*, 435 F.2d 1042, fn. 1 (C.D. Cal.
17 2006).

18 Fourth, Defendants have not argued that the relevant agreements are ambiguous; these
19 declarations are thus irrelevant, and would remain so even if this motion were the proper vehicle
20 for resolving Defendants' fact-specific arguments. *See, e.g., SDR Capital Management, Inc. v.*
21 *American Intern. Specialty Lines Ins. Co.*, 320 F. Supp. 2d 1043, 1046 (S.D. Cal. 2004) *citing,*
22 *Dale v. Preg*, 204 F.2d 434, 435 (9th Cir. 1953) (if a contract is "free from ambiguity, its meaning
23 is a question of law to be determined by the court solely from its language."). As set out below,
24 the plain language of the Adderley GLAs, third party licenses, and the PLAYERS INC license
25 support Plaintiffs' good faith basis for their amended claims.

1 **IV. THE COURT SHOULD GRANT ADDERLEY LEAVE TO FILE HIS AMENDED**
2 **CONTRACT CLAIM**

3 In good faith reliance on agreements (produced by Defendants *after* Plaintiffs filed their
4 SAC), [REDACTED]

5 [REDACTED], Adderley alleges that Defendants participated in licensing both active and retired
6 players, but then chose not to share the guaranteed minimum revenue under such licenses with the
7 retired players as they were required to do by the GLAs. Proposed TAC, ¶¶ 17-39. In doing so,
8 Adderley has explicitly addressed the Court’s concerns that elements were missing with the prior
9 breach of contract claim. Order, pp. 14-18.

10 Defendants ignore these facts, and argue that “[a]s a matter of law, any purported
11 ambiguity [REDACTED] is legally resolved by the undisputed understanding of the
12 parties’ to those agreements; not by a third parties’ contrary ‘interpretation’”. Opposition, p. 7.
13 Defendants have grossly misstated the law and, in fact, offer no authority that their untested
14 assertions as to the meaning of certain contract provisions are controlling, particularly before
15 Plaintiffs have had any opportunity for full discovery. Defendants improperly cite the
16 unpublished *Matshushita Elec. Corp v. Loral Corp.*, 36 F. 3d 1115 (Fed. Cir. 1994) (table), and
17 the completely inapt *Waddy v. Sears, Roebuck & Co.*, 1994 WL 392483 (N.D. Cal. 1994), both of
18 which are summary judgment cases with a much fuller record than the case at bar. *See, e.g.*
19 *Waddy*, 1994 WL 392483 (summary judgment holding that “the understandings of other
20 employees as to the nature of *their* employments . . . are irrelevant to the question of whether
21 Tucker himself had an implied for-cause employment contract.”).

22 **A. The Plain Language of the GLA and Third Party Licenses Supports**
23 **Adderley’s Claim for a Share of the Guaranteed Minimum Revenue**

24 The crux of Adderley’s contract claim is that the GLA he signed entitles him to share in
25 the guaranteed minimum revenue payable under PLAYERS INC’s licensing agreements with
26 third parties – [REDACTED]

27 [REDACTED]
28 Proposed TAC, ¶¶ 17-39.

1 First, Adderley alleges that his GLA provided that “. . . money generated by *such*
2 *licensing of retired player group rights* will be divided between the player and an escrow account
3 for all eligible NFLPA members who have signed a group licensing authorization (*Id.*, ¶¶ 17-19).

4 Second, Adderley alleges that, [REDACTED]
5 [REDACTED] 2 [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 [REDACTED]

23
24 Third, Adderley alleges that Defendants breached Adderley’s GLA by failing to divide
25 this guaranteed minimum licensing revenue to retired players (*Id.*, ¶¶ 29-35).

26 2 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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Fourth,

[REDACTED]

Adderley made these allegations in good faith reliance on the plain language of the GLA, third party licenses and NFLPA-PLAYERS INC Agreements (*all* of which Defendants produced after the SAC was filed), and explicitly addressed the Court’s concerns with the breach of contract claim as previously alleged. Proposed TAC, ¶¶ 17-39, 94-99; *see also* Order, pp. 14-18. On this basis alone, the Court should grant Adderley’s motion for leave to amend.

B. Doug Allen’s Testimony Confirms Adderley’s Good Faith Amendment

Adderley also referenced deposition testimony from Doug Allen, not only to confirm the salient points alleged above, but to further support his good faith basis for filing the TAC. Proposed TAC, ¶¶ 22, 24, 33-34. Defendants attempt to explain away Allen’s testimony, but their efforts in no way demonstrate that Adderley filed his amended claim in “bad faith”. In fact, as detailed below, Defendants’ arguments largely mischaracterize Allen’s testimony.

1. Allen confirmed

[REDACTED]

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[REDACTED]

[REDACTED]

³ [REDACTED]

⁴ [REDACTED]

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[REDACTED]

[REDACTED]

2. **Allen Confirmed**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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3. **Allen Confirmed**

[REDACTED]

Adderley's incentive to enter into the GLA was Defendants' promise of a share of royalties. *See, e.g.*, Proposed TAC, Exs. B and C. Under the circumstances, Defendants cannot legitimately question Adderley's "good faith" basis for alleging a breach on the basis that royalties were not shared as promised.

[REDACTED]

Contrary to Defendants' arguments,

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[REDACTED]

Furthermore,

[REDACTED]

4. Ad Hoc Payments Are Separate from, And Irrelevant To, Whether Adderley Is Entitled To A Share of Guaranteed Minimum Revenue

Adderley's receipt of additional payments for specific deals is irrelevant to whether retired players who signed GLAs are entitled to a portion of the guaranteed minimum revenue.

[REDACTED]

Defendants also ignore that additional payments made to Adderley were, at least in part, for specific services such as signing cards.

[REDACTED]

1 Defendants argue it would be nonsensical to require retirees to enter into *ad hoc*
2 agreements if they had already acquired their rights via the GLAs. Opposition, pp. 8-9.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

7 These additional payments in
6 no way undercut (nor are they even relevant to) Adderley's claim to a share of the guaranteed
7 minimum revenue. They are clearly *ad hoc* agreements for being singled out⁸

8 At any rate, these *ad hoc* payments for the individual use of a player are independent from
9 – *i.e.*, in “addition to” – the granting of rights in Defendants’ third party licenses, [REDACTED]
10 [REDACTED]. The guaranteed minimum payments under such licenses are paid *without regard to*
11 *whether any individual's images or rights are used*. Proposed TAC, Ex. G, ¶ 6(C).

12 **V. THE COURT SHOULD ALLOW ADDERLEY LEAVE TO FILE HIS AMENDED**
13 **FIDUCIARY DUTY CLAIM**

14 Adderley's fiduciary duty theory does not “defy logic” simply because it contradicts
15 Defendants' self-serving declarations and arguments. Opposition, pp. 15-16. By the same token,
16 even if it were true that Defendants' ad hoc programs had generated *some* revenue for *some*
17 retired players that fact would not, as a matter of law, immunize Defendants from Adderley's
18 fiduciary duty claims based on the GLAs. *Id.*

19 **A. Adderley alleges relationships giving rise to a fiduciary duty**

20 Defendants cannot dispute that Adderley has addressed all of the Court's concerns
21 regarding damages and detrimental reliance in connection with his agency by estoppel theory,

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 ⁷ PLAYERS INC website clearly provides for both GLA's *and* ad hoc agreements if a player is “singled out”
26 in a particular game: “Any players who are singled out to promote licensed products are paid *additional fees* for
27 being highlighted on product packaging, point of sale, print ads or other collateral material, for autographs,
28 appearances, product endorsements and commercials.” TAC, Ex. E (emphasis added). Even a cursory review of EA
webpage for the NFL Street 2 program (a copy of which is attached as Ex. B to the LeClair Decl.) confirms that both
[REDACTED] have been “singled out”, and thus according to Defendants own policies, Defendants were
required to procure *ad hoc* agreements with them, in addition to the GLAs they had already signed.

1 and, for reasons detailed above, their “bad faith” challenges to this theory are ineffective.

2 Proposed TAC, ¶¶ 20-28, 40-56; *see also* Order, pp. 21-22.

3 Defendants attack Adderley’s direct agency theory on the grounds that he cannot, in good
4 faith, allege that “he controlled Defendants’ licensing activities all along, but didn’t know it”.
5 Opposition, p. 17. Defendants offer no authority for resolving the question of control at this
6 pleading stage. *See, e.g., id.*, n. 17. Two of their three cases do not concern California law, and
7 none of them denied plaintiff leave to file an amended agency claim. *See, e.g., Liimatta v. V & H*
8 *Truck, Inc.*, 2005 WL 2105497, *2 (D. Minn. 2005); *Abromowitz v. Pipher*, 2006 WL 4722437,
9 *220 (Pa. Comm. Pl. 2006); *Bowoto v. Chevron Corp.*, Slip. Op. 2007 WL 2349336, *16-17
10 (N.D. Cal. 2007) (unlike here, court addressed plaintiff’s agency claim in the context of a
11 summary judgment motion; in any event, court concluded that disputed issues of fact precluded
12 summary judgment). Defendants also ignore that this question will ultimately turn on Adderley’s
13 *right* to control – *i.e.*, his ability to withdraw his GLA or opt out of signing another – not his
14 *actual exercise* of control or supervision over Defendants. *See, e.g., Michelson v. Hamada*, 29
15 Cal. App. 4th 1566, 1580 (Cal. App. 1994) (the power to terminate the services of the agent gives
16 principle the means of control); *see also Malloy v. Fong*, 37 Cal. 2d 356, 370 (Cal. 1951) (“[it] is
17 not essential that the right of control be exercised or that there be actual supervision . . .”).

18 Only *after* filing his SAC, Adderley discovered Defendants’ concession that they
19 represented all retired NFLPA players (including those who had signed GLAs), and that
20 Defendants had licensed retired players’ rights pursuant to the GLAs. In light of these new facts,
21 Adderley has a good faith basis for alleging their legal significance.

22 Finally, Defendants’ opposition to Adderley’s “bad faith” confidential relationship theory
23 ignores that his physical disability is merely one factor giving rise to that relationship in this case.
24 *See, e.g.,* Opposition, p. 18; *see also* Order, p. 19 (citing *Richelle L. v. Roman Catholic*
25 *Archbishop*, 106 Cal. App. 4th 257, 272 (Cal. App. 2003)). Consistent with the factors in
26 *Richelle L.*, Adderley has alleged a confidential relationship based on: physical disability;
27 economic disparity; Defendants’ complete monopoly over information relevant to retired
28 players’ licensing revenues; Defendants’ solicited execution of GLAs from retired players;

1 Defendants' ability to bar retired players who had signed GLAs from pursuing individual deals
2 (the effective "exclusivity" of the GLAs); and Defendants' ability to exploit the vulnerability of
3 retired players by failing to provide them with relevant information about the operation of the
4 GLAs or receipt of licensing revenue. Proposed TAC, ¶¶ 40-44, 50-51, 53-55.

5 Defendants' trivialization of these Adderley's allegations of exclusivity is also misguided.
6 See, e.g., Opposition, pp. 16, 18-20. Defendants argue that *certain* retired players have licensed
7 their rights to Take Two Interactive, an entity that has no licensing relationship with Defendants.

8 *Id.*, p. 16. [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 [REDACTED] Defendants' opposition to the exclusivity
13 argument would not justify summary judgment, let alone denial of Adderley's leave to amend.

14 **VI. THE COURT SHOULD ALLOW PARRISH LEAVE TO FILE HIS AMENDED**
15 **FIDUCIARY DUTY CLAIM**

16 Absent any authority, Defendants also ask the Court to deny Parrish leave to file his
17 amended fiduciary duty claim based on his purported "bad faith" in bringing it. Opposition,
18 pp. 20-25. As detailed above, whether Defendants' self-serving declarations contradict Parrish's
19 claims, or whether Parrish can prevail, is irrelevant to whether he is entitled to amend.

20 Defendants argue that Parrish has no "good faith" basis for alleging that he was entitled to
21 any information relating to retired player licensing, has not identified information withheld from
22 him, and has not identified a relationship giving rise to a fiduciary duty. Opposition, pp. 21-25.
23 To the contrary, Parrish has identified the information allegedly withheld; namely, accurate and
24 complete information relevant to retirement benefits, or any other benefits to which he might be
25 entitled, including information regarding retired player licensing rights. Proposed TAC, ¶¶ 79-80.
26 Indeed, Defendants concede as much, arguing instead that Parrish was not entitled to receive that
27 information. Opposition, p. 21. Whether Parrish was entitled to this identified information is a
28 disputed issue of fact not properly resolved on this motion.

1 Defendants also dispute the impact of Upshaw's admission that he "does not work for"
 2 retired players. Opposition, pp. 22-23. That, however, is a question of fact irrelevant to this
 3 motion. Proposed TAC, ¶¶ 74-77.

4 Finally, Parrish has properly alleged a fiduciary relationship. On their face, Parrish's
 5 allegations support an implied agency theory by virtue of Defendants' recent concession that they
 6 represented all retired NFLPA players, as well as Parrish's alleged reliance on Defendants'
 7 solicitation of retirees and the terms and provisions of the NFLPA Constitution. Proposed TAC,
 8 ¶¶ 66-77. Defendants ignore Parrish's allegations regarding the Constitution, and their post-hoc
 9 revision of Allen's admissions is both improper and irrelevant. Opposition, p. 24, n. 25.

10 Parrish's allegations also support a confidential relationship. Proposed TAC, ¶¶ 57-65,
 11 71-77; *see also* Order, p. 19 (citing *Richelle L.*, 106 Cal. App. 4th at 272). Parrish has alleged not
 12 only that he suffers from physical disabilities and/or is vulnerable to the economic size of
 13 Defendants, but also that Defendants solicited his membership in the NFLPA, and that "because
 14 retired players enjoy no voting rights in the NFLPA pursuant to their retired status, nor do they
 15 receive information from PLAYERS INC regarding commercial or other opportunities pursued
 16 on their behalf, they are particularly vulnerable to the good faith dealings of the NFLPA and
 17 PLAYERS INC." *Id.* This vulnerability is exacerbated by Upshaw's admission that he does not
 18 work for these retired players. *Id.*, ¶¶ 74-75.

19 VII. CONCLUSION

20 For the reasons stated above, Plaintiffs respectfully request that the Court grant this
 21 motion.

22 Respectfully submitted,

23 Dated: October 18, 2007

24 /s/Ronald S. Katz

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