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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

BERNARD PAUL PARRISH, HERBERT ANTHONY ADDERLEY, WALTER ROBERTS III,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION and NATIONAL FOOTBALL LEAGUE PLAYERS INCORPORATED d/b/a/ PLAYERS INC.

Defendants.

Case No. C 07 00943 WHA

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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Defendants National Football League Players Association ("NFLPA") and National Football League Players Incorporated ("Players Inc") submit this Memorandum of Law in Opposition to Plaintiffs Herbert Adderley's and Bernard Parrish's Motion for Class Certification (the "Motion").

PRELIMINARY STATEMENT

This Court previously admonished Plaintiffs for their "smoke-and-mirrors approach to pleading."[1] It is now clear that the responsibility for this conduct lies squarely with the two named plaintiffs – who do not come close to meeting the standards to serve as the representatives of thousands of retired NFL players in this putative, "nationwide" class action.

Class representatives must be able to "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(a)(4). Parrish, however, is neither motivated by his asserted claim for $50 nor by any desire to represent or consider the best interests of the putative Retired Member class. Rather, he has admitted under oath that he is exploiting this litigation to advance his fanatical pursuit of issues that are irrelevant to the class and this action, to enhance his own marketability and notoriety, and to escalate his forty-year crusade against the NFLPA. The evidence of Parrish's disqualifying conflicts of interest, and his vindictive obsession with matters unrelated to and inconsistent with representing the putative class, is overwhelming. Parrish has, for example, admitted that "I'll never make a deal with [Defendants] and any offer they attempt will be on the front page of the NY Times . . . ."[2] Given Parrish's own words and conduct, the putative Retired Member class is left with no qualified class representative. See Point I.A.

As to Adderley, Plaintiffs' primary argument in support of his adequacy to serve as the lone representative of the putative GLA class is that the relevant standard is low. But, as set forth below, the bar is not so low that a class representative can be a plaintiff, such as Adderley, who does not understand (or even support) the claims of the class that he is supposed to represent, who has failed to exercise any independent judgment, and whose competence,

[1] Order Granting Motions to Dismiss at 4 (Sept. 6, 2007).

[2] Depo. Ex. 166 at CLASS 002716 (Exhibit 1 to the Declaration of David Greenspan ("Greenspan Decl."), filed concurrently herewith).

credibility, and even his capacity to testify under oath, has been damaged beyond repair. Accordingly, there is no adequate representative for the putative GLA class. See Point I.B.

Adderley's and Parrish's unfitness to serve as class representatives is underscored by their gross failure to adequately represent retired NFL players – including putative class members – as the Co-Presidents of Retired Professional Football Players for Justice ("RPFPJ"), an organization that they formed to "represent" retired players on issues such as benefits and filing class action suits. [redacted] See Point I.C.

The putative GLA and Retired Member classes also may not be certified because individual questions of fact and law predominate. For example, Plaintiffs have not come close to meeting their burden to demonstrate that it is possible to determine on a class-wide basis whether and by how much each individual putative GLA class member was damaged by Defendants' alleged breach of fiduciary duty and breach of contract. Such a class-wide showing is, in fact, impossible since the licensing rights of these retired players are highly individualized and widely variable, with most of the putative class members' rights having no value. Indeed, in a similar case brought ten years ago by Plaintiffs' counsel and a putative class of retired baseball players over their licensing rights, class certification was denied for precisely this reason. This time around, Plaintiffs try to paper over the problem by arguing that damages should be distributed in "equal shares." But there is no sound basis for an "equal" distribution of damages, which would, inter alia, create insurmountable conflicts between putative class members.[3] See Point II.

Plaintiffs likewise try to circumvent the individual questions of law that predominate by advocating the blanket application of California law for the two putative,

[3] The Court in the MLB case held that a retired player "who had a cup of coffee in the big leagues" would be entitled to very different damages than Hall of Fame retired players, just as this Court recognized that "if Joe Montana is the one who drives the marketing; why shouldn't he get the lion's share? Why should somebody who is not as famous get anything?" Coscarart v. MLB, No. 764737-4 at 10 (Cal. Super. Ct. April 24, 1997) (Greenspan Decl., Ex. 2); Hearing Tr., May 31, 2007, 43:25-45:13 (at p. 36-37 of exhibit) (Greenspan Decl., Ex. 3).

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"nationwide" classes. In doing so, Plaintiffs have ignored their burden to establish that the putative classes' claims have sufficient contacts with California (they do not) and that California law does not conflict with the law of other affected jurisdictions (it does). In 2005, Congress observed that "over the past ten years, the federal court system has not produced any final decisions – not even one – applying the law of a single state to all claims in a nationwide or multi-state class action."[4] This fact still holds true today. The putative "nationwide" classes would require that the laws of the fifty states be applied, yet another reason why the putative classes may not be certified. See Point III.

COUNTER-STATEMENT OF FACTS

The merits of the case are not at issue on this Motion, but Plaintiffs' purported "Background Facts" are so misleading and inaccurate that Defendants are compelled to respond.

A. Adderley's "GLA" Claim

The thrust of Adderley's claim, on behalf of the putative "GLA class," is that Defendants have failed to pay certain group licensing revenues allegedly due to him under his Group Licensing Authorization forms ("GLAs"). The fatal and fundamental flaw in this claim is that [redacted] (Third Amended Complaint ("TAC") (Rec. Doc. 189), Exs. B, C) (emphasis added), the money that Adderley and the putative GLA class are seeking to recover is 100% attributable to active player licensing.

[redacted]

In opposing Plaintiffs' Motion for Leave to File the TAC, Defendants submitted the declaration of [redacted]

[4] S. Rep. No. 109-14, at 64 (2005) (legislative history of the Class Action Fairness Act) (emphasis added).

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[redacted]

Plaintiffs' discovery fishing expedition has fared no better with respect to Defendants' other active player group licensing agreements. [redacted] Plaintiffs'

[5] [redacted]

[6] See Pls.' Reply Br. In Support of Mot. for Leave to File TAC at 4 (Oct. 18, 2007) (Rec. Doc. 174).

[7] See, e.g., Adderley Depo. Tr. 150:15-22 ("Q: "[I]f Upper Deck already had the rights to your image, in 2005, they would have no reason to pay you more money to get those rights again; right? A: Correct.") (objection omitted) (Greenspan Decl., Ex. 6); [redacted]

theory is so far-fetched that they are even seeking revenues paid to Players Inc by fantasy football licensees – companies whose products are solely based upon the real-time statistics of active players.[8]

Once it is recognized that the revenues at issue are 100% attributable to active player group licensing, all of Plaintiffs' derivative allegations similarly fail. [redacted][10] In sum, discovery has confirmed what Defendants have been stating all along: that this case is an effort by Plaintiffs to claim active player licensing money to which they have no contractual or other legal entitlement.

B. Parrish's "Retired Member" Claim

Parrish, on behalf of the putative Retired Member class, alleges that the payment of $50 in dues to the NFLPA Retired Players Association gave rise to a fiduciary duty on the part of Defendants. TAC ¶¶ 84-89. Parrish further alleges that his $50 should be returned because Defendants breached their purported fiduciary duties by withholding unspecified "information,"

[redacted]

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and by virtue of NFLPA Executive Director Gene Upshaw's statement that "I don't work for [retired players]" in collective bargaining. TAC ¶¶ 56-79. This claim – both the "agency by estoppel" theory purportedly giving rise to a fiduciary duty, and the alleged breach of that duty – is baseless. In fact, it has become obvious that Parrish is using his claim for $50 solely as a guise for pursuing information and complaints about retired player collective bargaining benefits that have nothing to do with this case. As shown below, in the words of Parrish himself, Parrish is misusing this class action to carry out his personal agenda of hatred and vindictiveness against the NFLPA.

ARGUMENT

The party seeking class certification bears the burden of demonstrating that they have met each of the requirements of Rule 23, and a failure to carry this burden as to any such requirement means that the class may not be certified. See Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001). The trial court must conduct a "rigorous analysis" to determine whether the requirements have been met, rejecting any "conclusory or generic allegations." Id.; Burkhalter Travel Agency v. Macfarms Int'l, Inc., 141 F.R.D. 144, 152 (N.D. Cal. 1991).

I. THE PUTATIVE CLASSES CANNOT BE CERTIFIED BECAUSE THEY DO NOT HAVE ADEQUATE CLASS REPRESENTATIVES

Federal Rule of Civil Procedure 23(a)(4) requires that the class representatives "fairly and adequately protect the interests of the class." This requirement is imposed because "[a] lead plaintiff in a class action owes a fiduciary duty to the class . . . [and] must demonstrate ability to discharge the fiduciary duty to the class." In re Quintus Sec. Litig., 148 F. Supp. 2d 967, 970 (N.D. Cal. 2001). A class representative must, among other things, possess interests that are not in conflict with the interest of the class, he must actively pursue the litigation, and he must seek to maximize the class's recovery. Id. at 970-971.

A. Parrish Is Inadequate To Represent The Putative "Retired Member Class"

Parrish's personal blood feud against the NFLPA and its leadership has gone on for over forty years, ever since the then-active NFL players rejected Parrish's attempt to organize

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a competing union with the Teamsters.[11] The evidence that Parrish is obsessed by this animosity, as opposed to any legitimate interest or ability to "adequately or fairly" represent the interests of the putative Retired Member class, is overwhelming, and provided by his own words:

- "I intend to give Upshaw and his cronies what they deserve for the pain and suffering they have inflicted on our brothers and their families. I have gotten calls warning me Upshaw has made remarks about 'getting me,' meaning they think he means he may put a contract out on me. I spent a few bloody years with the Teamsters Union; Upshaw is in over his head."[12]

- Q: Okay. Well, let me ask you this. It says in the next paragraph: "Many tyrants with the untouchable label like Caesar, Napoleon, Idi Amin, Hitler, Stalin, Milosevic, Saddam, have been touched and are gone." Do you remember writing something like that about Mr. Upshaw?
  A: I don't — I don't remember. But, I wish I had if I didn't.
  Q: Okay. Sir, you would agree, it is your view that Mr. Upshaw should be compared to people like Caesar, Napoleon, Idi Amin, Hitler, Stalin, Milosevic and Saddam, correct, that's your view?
  A: In my opinion, yes. Absolutely, yes.[13]

- Q: [I]s it true that you have – that you have advocated that Mr. Upshaw should be investigated in connection with the death of his previous wife Jimmy Lee Hill Upshaw?
  A: Yes.
  Q: And you've –
  A: I still advocate it….
  Q: [D]o you recall sending out e-mails to retired players stating that Mr. Upshaw should be subjected to a lie detector test concerning the death of his ex-wife?
  A: Yes. I've done that, yes.[14]

And, while Parrish seeks to represent a class of racially and ethnically diverse retired NFL players, the racially divisive undertones of his invectives against Upshaw and other African-American NFLPA officers is shocking and undeniable:

- Q: Take a look at Page 7, it says that, if you take a look, "Upshaw has signed a deal . . . to sell Super Bowl tickets in a partnership with the BET, Black Entertainment Network. It is part of the Upshaw/Vincent/Condon campaign to marry the NFLPA to the gangster rap and hip hop industry, a

[11] See Parrish Depo. Tr. 271:15-272:8, 275:1-276:15 (testifying that he has consistently opposed the NFLPA for the forty years since the players rejected his organizing efforts) (Greenspan Decl., Ex. 10).

[12] See Depo. Ex. 166 (Greenspan Decl., Ex. 1).

[13] Parrish Depo. Tr. 98:5-99:1 (Greenspan Decl., Ex. 10) (objections omitted).

[14] Parrish Depo. Tr. 157:18-162:22; see also Depo. Ex. 359 (Greenspan, Decl., Exs. 10, 11).

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marriage that sets up an unprecedented opportunity for money laundering from Washington, D.C./Baltimore drug rings, through gangster rap, hip hop industry contacts through the NFLPA and NFL players who are expected to throw around lots of cash." Did you write that, sir?

A: Yes.
Q: Okay. And –
A: Yes, I did.
Q: And are you accusing the NFLPA and Mr. Upshaw and the NFL players of engaging in money laundering with gangsters?
A: It says what it says and I don't back off it at all.[15]

- "[NFLPA President Troy] Vincent's comments smack of reverse discrimination. Baseball's white Donald Fehr Exec Director makes $1 mil a year and negotiated 5.5% of total salaries for employer contributions while Upshaw negotiated only 2.2%. The white President Bush makes $398,000 a year. Gene Upshaw has never had a real job in his life . . . . I'm white and Troy you can't do anything two or three times as well as I can . . . . The retired player retirement benefits issue is tainted with vindictive Upshaw and Vincent motives to get back at the white pioneer era players for how the white NFL management and owners treated blacks in the earlier days of the NFL…. Organized crime would be envious of Upshaw's operation, a RICO racketeer would kill for it."[16]
- "Condon and Upshaw have saved Upshaw's ass before playing the race card in the past in another desperate situation and an NFL players' rep from the Cowboys who was there said it was the black player reps who were the majority and voted Upshaw in when he unseated Caucasian Ed Garvey to become the executive director."[17]
- "I'm sure that Upshaw hip hop gangster rap fraternity will keep Parcells busy sorting though a quality pool of dog-fighting, gun toting, Dewey-driving strip club shooting ass-showing team that only gambles on dog fights . . . ."[18]

Plaintiffs' assertion that Parrish has "no conflict of interest or antagonism with other class members" rings hollow in the face of these statements that Parrish so proudly stands by.[19]

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[15] Parrish Depo. Tr. 380:18-383:15; see also Depo. Ex. 383 (Greenspan, Decl., Exs. 10, 12).

[16] Depo. Ex. 357 (Parrish submission to Dep't of Justice) (Greenspan Decl., Ex. 13).

[17] See Depo. Ex. 383 (Greenspan Decl., Ex. 12).

[18] See id.; see also Parrish Depo. Tr. 43:4-45:9 (referring to John Wooten, an African American, retired player in his 60s or 70s – and a putative Retired Member class member – as the NFL Commissioner's "errand boy") (Greenspan Decl., Ex. 10); [redacted]

[19] See Held v. Missouri Pacific Railroad Co., 64 F.R.D. 346, 350 (S.D. Tex. 1974) ("the Court also must take note of the personal antagonism evidenced between plaintiff and other members of the class whom she purports to represent, which creates an atmosphere peculiarly hostile to maintenance of a class action in this case").

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The case law is clear that a plaintiff who has such longstanding animus against the defendants should not serve as a class representative since "personal vendetta intrudes unavoidably upon the fiduciary duty of the class representative."[20] A class representative has the fiduciary duty to, among other things, maximize the class's recovery, which may require settlement of the class action. Here, Parrish's animus is so great that it will impede any possible settlement; his statements on this point are unequivocal:

- "They know I'll never make a deal with them and any offer they attempt will be on the front page of the NY Times too. I intend to give Upshaw and his cronies what they deserve for the pain and suffering they have inflicted on our brothers and their families."[21]
- "I am going to finish this fight no matter how dirty it gets or what it takes or where it goes I am not in it to make any deal. Upshaw is a rotten bastard and he is going down so is Condon and Vincent and Berthelson and those who took off and Goodell knows it and he will probably go to. This may not be a fight you want in. Think about it I do expect it to get real dirty down to my kind of fight."[22]
- "You bet they are worried. Their Pope called one of my best friends trying to pump him. I am not out to make any deal. Upshaw is dead meat."[23]

In addition to his personal animus, Parrish has testified to another reason that explains why he would never settle this lawsuit – the notoriety that it is giving him:

> Q: What have you done to try to market your image for yourself?
> A: What have I done, marketing my image, huh?
> Q: Yes.

[20] Norman v. Arcs Equities Corp., 72 F.R.D. 502, 506 (S.D.N.Y. 1976); Smith v. Ayres, 977 F.2d 946, 949 (5th Cir. 1992) (proposed class representative disqualified because of his "virulent antagonism" for defendant); Kamerman v. Ockap Corp., 112 F.R.D. 195, 197 (S.D.N.Y. 1986) ("an unduly antagonistic client, or a litigant who bears a grudge against the defendant is not an appropriate class representative" because "a plaintiff motivated by spite, or a grudge, will [not] 'fairly and adequately protect the interests of the class.'").

[21] Depo. Ex. 166 at CLASS002716 (emphasis added) (Greenspan Decl., Ex. 1).

[22] Id. (emphasis added); see also Parrish Depo. Tr. 82:5-82:15 ("Yes – I recall – I recall saying that.") (Greenspan Decl., Ex. 10).

[23] Depo. Ex. 356 (emphasis added) (Greenspan Decl., Ex, 14); see also Parrish Depo. Tr. 102:9-103:11 (Greenspan Decl., Ex. 10). At his deposition, Parrish tried to back off of his statement (in another document) that "I'm not inclined to compromise with these bastards," saying that he would "do what is right for the class." Parrish Depo. Tr. 38:21-41:5 (Greenspan Decl., Ex. 10). Notwithstanding this lone, futile attempt to disavow his own admissions, Parrish reaffirmed all of the statements about how he will "never make a deal" that are set forth in the text above.

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A: Well, I – one might say that I have a pretty high profile in this situation, don't I? Out of 180 articles across 440 pages of the media, the HBO programs, the New York Times, The Washington Post and so forth, I would say that my name and reputation have been marketed pretty well.

* * *

Q: Other than those interviews and filing this lawsuit, have you done anything else to market your image?
A: I think that's enough. Yes, I think that's –
Q: That's it, that's all you have done?
A: Yes. That's all I've done. Yes, right. Right.

Parrish Depo. Tr. 262:20-265:7 (Greenspan Decl., Ex. 10).[24]

Parrish's personal vendetta against Defendants has also manifested into wasteful and abusive discovery in contravention of the duty of a class representative to reduce costs to the class. See In re Quintus Secs. Litig., 148 F. Supp. 2d at 970-971. Prior to this case, Parrish wrote to Defendants that "I look forward to a suit in which, through discovery, all of what I have said will come out."[25] Parrish has urged that publicly filed court papers containing home addresses of Defendants' senior management should be circulated "to make the fight a little more personal for them."[26] Parrish also admitted that he hopes to use this litigation as a source of collecting more information to include in his blog postings and group e-mails.[27] In short, rather than try to conduct this case efficiently for the class, Parrish is misdirecting it to further his personal objectives.[28]

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[24] Parrish has also taken personal advantage of the "higher profile" this lawsuit has brought him, in the form of more paid appearances, which he had "mainly" done "for free" in the past. Parrish Depo. Tr. 132:13-135:4 ("I guess the publicity has helped because I'm talking about recent, recent. We've had lots of publicity, as you know. The people want to hear about what is going on with the retired players' issues. That's sort of changes things . . . . Today, I'd say yes. Then, yes – that – it has changed") (Greenspan Decl., Ex. 10).

[25] Depo. Ex. 353 at 32 (Greenspan Decl., Ex. 15) (emphasis added).

[26] Parrish Depo. Tr. 172:22-174:6 ("Q: [Y]ou were suggesting that the home addresses of these individuals, which were filed in court papers, be circulated so people can make the fight a little more personal for them, right? A: Right.") (Greenspan Decl., Ex. 10); see also Depo. Ex. 362 (Greenspan Decl., Ex. 16).

[27] See Parrish Depo. Tr. 412:20-413:21 (Greenspan Decl., Ex. 10).

[28] Parrish's judicial abuses have a long history. In a Texas state court action filed against Parrish, he failed to appear for trial resulting in a judgment against him. See Depo. Ex. 387 (Greenspan Decl., Ex. 17). In another Texas state court action, Parrish was sanctioned for skipping his deposition, and he was subject to another default judgment totaling nearly $1 million. See Depo. Exs. 389, 390 (Greenspan Decl., Exs. 18, 19). In a RICO suit against Parrish in the Southern District of Illinois, Parrish refused to cooperate with his own lawyer,

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Additional grounds for disqualifying Parrish as a class representative are the blatant conflicts that he has created between himself and the putative class members that he seeks to represent. For example, Parrish has publicly declared that he may seek election as Executive Director of the NFLPA, and he has even publicly issued his campaign platform. See Depo. Ex. 374 (Greenspan Decl., Ex. 21).[29] This ambition by itself disqualifies Parrish. The position of Executive Director is voted on solely by active NFL players, and Parrish would need to enlist the support of those players – whose licensing money Plaintiffs are seeking in this action – in order to gain their votes. As Parrish knows, his continuing, forty-year quest to become Executive Director of the NFLPA, which would personally enrich him, cannot be reconciled with the obligation of a class representative to prioritize the competing interests of the putative retired player class.[30]

Parrish has also antagonized and created conflicts with individual, putative class members. For example, Parrish has accused putative class member Mike Pyle (the NFLPA's President in 1967), of "accept[ing] a $270,000 bribe from [the NFL] negotiator."[31] Parrish Depo. Tr. 275:10-21 (Greenspan Decl., Ex. 10). Parrish refuses to speak to another putative class member, Toi Cook, who "was receiving checks from Upshaw for $7,014 a year out of the [Players Assistance Trust charitable] fund. So I blocked … Mr. Cook from my e-mail after I

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causing the lawyer to withdraw. See Depo. Ex. 386 (Greenspan Decl., Ex. 20). These episodes strongly suggest that Parrish cannot meet the standards of a fiduciary who will "fairly and adequately protect the interests" of the class.

[29] At his deposition, Parrish testified that he had not yet made up his mind as to whether he will run – "I don't care what that says…. I had not decided at that time and I still haven't" – but the fact of the matter is that he has taken affirmative steps in furtherance of his candidacy. Parrish Depo. Tr. 319:6-19 (Greenspan Decl., Ex. 10). Indeed, as noted above, Parrish drafted a campaign platform that appeared in the New York Times, see Depo. Exs. 374 & 376 (Greenspan Decl., Exs. 21, 22), and then distributed that article setting forth his campaign platform to the NFLPA Board of Player Representatives who vote for the Executive Director. See Depo. Ex. 377 (Greenspan Decl., Ex. 23). Under Parrish's campaign platform, he would be paid a salary of $700,000 per year. Id.

[30] See In re Merrill Lynch & Co., Inc. Research Reports Secs. Litig., 375 B.R. 719, 727 (S.D.N.Y. 2007).

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discovered that." Id. at 365:9-366:8.[32] Parrish's attacks on these two putative class members are illustrative; Parrish will attack any retired player whom he believes to be supportive of Upshaw.

Another reason for disqualifying Parrish from serving as a class representative are his incentives to misuse this litigation to advance the many other lawsuits Parrish is trying to bring against Defendants, including other suits that would personally benefit him. See Parrish Depo. Tr. 28:17-30:16 (threatened antitrust case against the NFLPA and NFL), 164:9-166:22 (threatened lawsuit against NFLPA Board of Player Representatives, NFLPA agents, and active NFL players), 80:6-81:18 (threatened lawsuits against the NFLPA retirement plan and Players Inc's vendors), 231:7-232:12 (threatened lawsuit against NFLPA disability plan) (Greenspan Decl., Ex. 10).[33] Courts have refused certification where putative class representatives have had similar ulterior motives. See, e.g., Love v. Wilson, No. CV 06-06148 ABC (PJWx), 2007 WL 4928035, at *7-8 (C.D. Cal. Nov. 15, 2007) (proposed class representative's "long history of antagonism" toward defendants made "clear that Plaintiff represents primarily his own interests" and the action could be "viewed as just one more skirmish in a larger war, instead of a legitimate attempt to represent the best interests of [the] shareholders.").[34]

Considering all of the foregoing, it is clear that Parrish cannot serve as an adequate and typical class representative. Parrish's behavior and personal obsessions have caused such extraordinary conflicts that it is impossible for him to adequately represent the putative class, and his role creates an insurmountable diversion from their claims and interests.[35]

[redacted]

[33] See also Depo. Exs. 350, 360, 166, 369 (Greenspan Decl., Exs. 24, 25, 1, 26).

[34] See also Smith, 977 F.2d at 949 (denying certification where plaintiff had initiated numerous lawsuits against defendant and stated "if he thinks this is even the tenth round, I mean we're-we're not even in the first round."); DuPont v. Wyly, 61 F.R.D. 615, 622 (D. Del. 1973) (finding putative class representative inadequate where "this suit may be an attempt to open still another front in a wide ranging battle having objectives unrelated to those shared by the class.").

[35] See Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (rejecting class representative because his "unique background and factual situation require him to prepare to meet defenses that are not typical of the defenses which may be raised against other members of the proposed class."); Koos v. First Nat'l Bank of Peoria, 496 F.2d 1162, 1165 (7th Cir. 1974) (plaintiffs' "effort would have necessarily been devoted to their own [credibility] problems" and

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B. Adderley Is Inadequate To Represent The Putative "GLA Class"

Adderley repeatedly testified that when this lawsuit was first filed, he "was thinking that [the complaint allegations] referred to the agreement that I signed with [Players Inc] with Reebok, that I didn't get paid for . . . ." Adderley Depo. Tr. 77:13-78:5, 318:20-319:4, 19:21-20:6 (Greenspan Decl., Ex. 6). In fact, Adderley believes that the only injury he has suffered is with respect to this Reebok agreement:

> Q: And the first time you ever believed any money was due to you, from Players Inc, that you didn't get, had to do with the Reebok jersey; correct?
> A: Yes.
> Q: Prior to that, you had no complaint with how Players Inc was utilizing your licensing, right?
> A: Correct.
>
> * * *
>
> Q: So, can you identify any other specific program that damaged you, other than the Reebok program?
> A: No.

Id. at 135:11-19, 136:22-137:1. Plaintiffs, however, have expressly disclaimed all causes of action relating to Adderley's Reebok or other "ad hoc" agreements.[36] In fact, Plaintiffs have not asserted any claim with respect to any breach of Adderley's Reebok agreement – even though that is Adderley's only complaint against Players Inc.

This is not surprising since, prior to being coached by his lawyer on re-direct examination (discussed below), Adderley did not even remember meeting or speaking to Plaintiffs' counsel before this case was filed. See Adderley Depo. Tr. 246:13-19 ("Q: So, did you speak or meet with them in any way before the case was started, the lawyers? A: No."), 21:24-22:8 (same) (Greenspan Decl., Ex. 6). Nor did Adderley's counsel ever explain to him what it means to serve as a class representative: "Q: Did anyone ever explain to you, before the case was started, what it meant to be a class representative? A: Very, very briefly explained that I would be representing a group of retired players…." Id. at 22:9-21, 246:1-12 (this "very, very brief[] explanation" came from Parrish, not counsel).

"[a] representative plaintiff should not be permitted to impose such a disadvantage on the class."); Dubin v. Miller, 132 F.R.D. 269, 272 (D. Colo. 1990).

[36] See Pls.' Mot. For Leave To File TAC at 4 n.1 (Sept. 27, 2007) (Rec. Doc. 141) ("Plaintiffs are not claiming that Defendants failed to pay Mr. Adderley pursuant to any 'ad hoc' agreement, nor have they alleged any claim based on an 'ad hoc' agreement").

Given the fact that Adderley's only complaint against Defendants – i.e., about his "ad hoc" Reebok deal – is very different from the claims of the putative GLA class that he seeks to represent, it is not surprising that Adderley has disavowed, under oath, many of the putative GLA class claims. For example, whereas the TAC alleges that "Adderley and other GLA Class members reasonably expected that the NFLPA and Players Inc … [redacted] Adderley testified to the exact opposite – that he understood that his GLA entitled him to licensing revenues only if his image was actually used:

> Q: And what you thought you were agreeing to get [in the 2001 GLA] was that if your rights were licensed and used, you would get some money; correct?
> A: Correct.

See Adderley Depo. Tr. 92:7-17, 89:13-90:1 (same) (Greenspan Decl., Ex. 6).

Similarly, whereas the TAC alleges that Adderley's GLAs "operate[] like 'exclusive' license[s]," and [redacted] (TAC ¶¶ 40, 16), Adderley testified to the opposite:

> Q: When you signed this [GLA], you understood it was a nonexclusive agreement; correct?
> A: Yes.
> Q: That was true of all the GLAs you signed; correct?
> A: Yes.
>
> * * *
>
> Q: Is it your understanding, sir, that there is anything that limits you today, from marketing your licensing rights on your own?
> A: No, there's nothing limiting me.
> Q: You've been free to market your rights on your own from 2002 up through today; correct?
> A: Yes.

Adderley Depo. Tr. 95:8-14, 96:20-97:1, 97:12-15 (objections omitted) (Greenspan Decl., Ex. 6).

Adderley also disavowed Plaintiffs' theory about the putative GLA class members being entitled to a so-called "equal share" royalty:

> Q: And in fact, it's true, isn't it, that every player in the NFL, retired player, would have a different value of rights for their name and image based on what their careers were like and how famous they were or not; right?
> A: Yes.

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Q: And do you agree that the values could be very, very different comparing, for example, Joe Montana to that guy who only played one year on special teams, it could be a huge difference in value, right?
A: Yes.

* * *

Q: Now, you testified when your counsel asked that the reason you thought that you were entitled to an equal royalty, or an equal share was because it said something in the GLA about dividing the money equally? Was that your testimony, sir?
A: Yes.
Q: Okay. Would you show me where the word equally or anything like that appears in this document?
A: Equally is not in here.
Q: Is there anything in there that says how it will be divided or what portions?
A: No.

Id. at Tr. 83:3-84:1, 255:7-256:1, 20-23 (objections omitted). The law simply does not permit such an uninvolved plaintiff, who is in conflict with the claims of the class that he is supposed to represent, to serve as a class representative.[37] But Adderley's unfitness to serve as a class representative is not merely the product of conflict, lack of information, or involvement.

Most profoundly, Adderley's confused, self-contradicting deposition testimony – in which he flip-flopped under oath on dozens of occasions – establishes that he is not competent to testify at trial on behalf of, or otherwise represent or protect the interests of, the thousands of retired NFL players who comprise the putative GLA class. In particular, Adderley changed his deposition testimony so often that one can only conclude that he is incapable of functioning in any court setting. For example, on direct examination, Adderley first testified, unequivocally and repeatedly, that he did not see or review any of the complaints before they were filed:

[37] See, e.g, Azoiani v. Love's Travel Stops and Country Stores, Inc., No. EDCV 07-90 ODW (OPx), 2007 WL 4811627, at *2 (S.D. Cal. Dec. 18, 2007) (denying certification where plaintiff had "very little knowledge of the case"); Simon v. Ashworth, Inc., No. CV 071324GHKAJWZ, 2007 WL 4811932, at *3 (C.D. Cal. Sept. 28, 2007) (denying certification where plaintiff did not know his role as a class representative, lacked knowledge regarding the complaint, and may not have "even decided to bring th[e] lawsuit"); In re Quarterdeck Office Sys., Inc. Sec. Litig., No. CV-92-3970-DWW(GHKx), 1993 WL 623310, at *5 (plaintiff with a "lack of familiarity with the suit, is an inadequate class representative."); Burkhalter, 141 F.R.D. at 153-54 (denying certification where plaintiff was not familiar with the "basic elements" of his claim and was "not entirely clear" about who he sought to represent); Lubin v. Sybedon Corp., 688 F. Supp. 1425, 1462 (S.D. Cal. 1988) (denying certification where plaintiff was unfamiliar with his suit); Greenspan v. Brassler, 78 F.R.D. 130, 133 (S.D.N.Y. 1978) (denying certification where plaintiff did not meet with his attorney "until the basic groundwork of the action had been laid.").

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Q: Did you review the complaints in this case before they were filed?
A: No.
Q: Did you review any of the complaints in this case before they were filed?
A: Where would the complaints come from?
Q: Your lawyers.
A: No.
Q: Do you know how many complaints were filed in this case?
A: No.

Adderley Depo. Tr. 20:7-20; see also 72:19-21 (testifying that he did not see the First Amended Complaint ("FAC") before it was filed), 78:21-24 (same), 81:4-82:10 (testifying that "nobody went over the facts [in the redacted TAC] before it was filed"), 129:23-130:16 (testifying that he did not see the redacted version of the TAC before it was filed) (Greenspan Decl., Ex. 6).

Following an hour long break in the deposition, however, Adderley made a series of stunning and repeated about-faces in this testimony. First, Adderley testified in response to leading questions from his counsel that he had seen several drafts of the FAC. See id. at 200:10-17 ("Q: And were there a number of drafts of the [the FAC]? A: Yes. Q: Were they all sent to you? A: Yes.").[38] But when Defendants questioned Adderley a second time on this issue, he reverted to his original testimony, testifying that he had not seen any draft complaints:

Q: [T]his morning, you told me you never saw the complaints before they were filed; right?
A: Yes.

* * *

Q: You never saw [the FAC] and you never saw the Second Amended Complaint before it was filed; correct?
A: That's correct.
Q: And you never saw the [TAC] before it was filed; correct?
A: I knew what was in there. It was discussed.
Q: You never saw it, sir; correct?
A: Correct.

Id. at 243:8-244:21. Adderley then changed his testimony again (the fourth version of his recollection) in response to more leading questions from Plaintiffs' counsel. Id. at 301:14-21 (Q: "Were drafts of the complaint sent to you? A: Yeah . . . just drafts, yeah."). Adderley thereafter

[38] The incredibility of this testimony is underscored by the fact that Adderley would, of course, have no way of knowing whether all drafts of the FAC were sent to him.

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changed his testimony a fifth time under renewed re-examination by Defendants, conceding that he did not see a draft complaint before the lawsuit was filed:

> Q: [D]o you recall specifically under oath that before the case was filed, you received a draft of the first complaint?
> A: Documents. I don't know whether the are draft or what.
> Q: You don't know whether it was a draft of the complaint or not?
> A: It was something to do with the lawsuit.
> Q: But you don't know if it was the complaint, right?
> A: Right.

Id. at 302:2-15.

Adderley's testimony is replete with such examples of wildly contradictory testimony. The following colloquy about whether he even authorized this case is illustrative:

> Q: Did you speak to the lawyers on the phone before this case was started?
> A: No.
> Q: Okay. So did you speak or meet with them in any way before the case was started, the lawyers?
> A: No.
> Q: Thank you. Now, you testified on [re-direct] examination here, that you authorized them to file the case, but you didn't speak to them; is that correct?
> A: I had to speak to them in order for them to be authorized.
> Q: So, when did you speak to them, sir?
> A: Well, this is before anything was filed.
> Q: You just told me –
> A: To say hello.
> Q: You just told me 30 seconds ago that you didn't speak to them; right? 30 seconds ago; right?
> A: How could I acknowledge or get the thing going without speaking to them.
> Q: Well, sir, it's your testimony 30 seconds ago, did you tell me you didn't speak to them before filing the lawsuit?
> A: If that's what the record says . . . .
> Q: As you're sitting here right now do you remember whether [or] not you had a conversation with these lawyers before you filed the lawsuit?
> A: Yes.
> Q: You did?
> A: Yes . . . .
> Q: Do you remember what they said to you in the conversation?
> A: No.
> Q: Do you remember what you said to them in the conversation?
> A: No . . . .
> Q: If you don't remember what you said, you don't know whether you authorized [the case] or not; right?
> A: Correct.

Id. at 246:13-249:19 (objections omitted).

After this exchange, Plaintiffs' counsel re-questioned Adderley, and he flip-flopped yet again, testifying that he had spoken "quite a few" times with counsel prior to filing

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the case, and that he recalled a specific "conference call." See id. at 285:21-286:11. But moments later, Adderley changed his testimony once more, testifying that this conference call "was between William Holden and another guy from the New York Times," and that prior to this call with the New York Times – which took place at the time the lawsuit was filed – he had "never" spoken to his lawyers about the case. See id. at 293:23-297:5.[39]

Plaintiffs' latest attempt to change Adderley's deposition testimony is through an Errata that rewrites the deposition transcript. The Errata sets forth twenty-four substantive changes for the purported purpose of "clarify[ing] recorded testimony." Adderley Errata (Greenspan Decl., Ex. 27). For example, whereas Adderley testified that he did not review the complaints in this case before they were filed, the Errata changes Adderley's testimony to say that he saw "draft" complaints. Compare id. with Adderley Depo. Tr. 20:10-20 (Greenspan Decl., Ex. 6). Similarly, whereas Adderley candidly conceded under oath that a player such as "Joe Montana … would be more damaged than somebody who just played one game, one year on special teams," the Errata now adds "but I rely on my lawyers for damage analysis." Compare Adderley Errata (Greenspan Decl., Ex. 27) with Adderley Depo. Tr. 137:4-23 (Greenspan Decl., Ex. 6).

Plaintiffs have adopted the desperate position that Defendants "confused" Adderley at his deposition, but there is nothing confusing about questions such as: "Did you review the complaints in this case before they were filed?" Adderley Depo. Tr. 20:7-9 (Greenspan Decl., Ex. 6). Nor, in any event, could Adderley's purported "confusion" rehabilitate his adequacy as a class representative.[40] Whether Adderley was hopelessly confused,

[39] Another example of Adderley repeatedly changing sworn responses is his testimony about a written discovery response in which Plaintiffs disavowed their own complaint allegation about a "solicitation" letter that Adderley supposedly received from Defendants. Whereas the TAC alleges that Adderley received a "Fall 2003 letter" from Defendants, Plaintiffs subsequently admitted in response to a Request for Admission ("RFA") that "Adderley … has no recollection of receiving the Fall 2003 Letter." Compare TAC ¶ 57 with Pls' RFA Responses No. 30 (Greenspan Decl., Ex. 28). When questioned about this contradiction, Adderley changed his testimony at least four times. Adderley Depo. Tr. 139:17-20, 212:8-10, 251:15-253:3 (Greenspan Decl., Ex. 6); see also id. at 288:20-289:4.

[40] See Kline v. Wolf, 702 F.2d 400, 403 (2d Cir. 1983) (plaintiff was inadequate class representative because "[e]ven if [his false] testimony was the product of an innocent mistake, it subjects [plaintiff's] credibility to serious question.").

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perjuring himself, or simply unable to remember even the most rudimentary facts (or some combination of the foregoing) is not controlling. No matter what the explanation, his ever-changing testimony under oath renders Adderley unfit to testify at trial or to otherwise act on behalf of the putative GLA class.[41]

C. Parrish's And Adderley's History Of Failing To Adequately Represent Retired Players

If there could be any remaining doubt about how unqualified Adderley and Parrish are to serve as class representatives, it would be eliminated by their egregious misrepresentation of retired players – including putative class members – as the Co-Presidents of Retired Professional Football Players for Justice ("RPFPJ"). According to RPFPJ's website, and the testimony of its Rule 30(b)(6) representative, RPFPJ was created to "represent" retired players, and to "engage in activities like bringing class action lawsuits," "testifying before Congress," "establish[ing] an alternative to the current marketing and licensing system," and "providing information" to RPFPJ's members regarding "royalties, pensions and disability payments."[42] Much like this lawsuit, however, Parrish used RPFPJ as a vehicle for pursuing his personal agenda and self-interests while Adderley idly sat by, exercising no independent judgment or oversight, in dereliction of their duties to represent RPFPJ's retired player members.

RPFPJ's Rule 30(b)(6) witness – Secretary and Treasurer Margaret Parrish (Parrish's sister) – testified that RPFPJ is "inactive." RPFPJ Depo. Tr. 33:9-21 ("Q: And so Mr. Parrish has no day-to-day involvement with this organization? A: There is no real day-to-day for

[41] See Savino v. Computer Credit, Inc., 164 F.3d 81, 87 (2d Cir. 1998) (affirming denial of class certification where plaintiff "repeatedly changed his position" since the inconsistencies would "create serious concerns as to his credibility at any trial."); Evans v. IAC/Interactive Corp., 244 F.R.D. 568, 578 (C.D. Cal. April 25, 2007) (rejecting a proposed class representative because questions relating to his credibility would "cause a fact finder to 'focus on [his] credibility to the detriment of the absent class members' claims."); In re Quarterdeck, 1993 WL 623310 at *5 (a plaintiff who is "subject to unique defenses, especially as to his credibility and his demonstrated lack of familiarity with the suit, is an inadequate class representative").

[42] E.g., Depo. Exs. 301, 302 (RPFPJ web pages) (Greenspan Decl., Exs. 30, 31); RPFPJ Depo. Tr. at 13:7-19 (testifying about the reasons for RPFPJ's formation), 55:13-57:5 (testifying that RPFPJ "represents" its retired player members) (Greenspan Decl., Ex. 29).

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this organization. It is inactive.") (Greenspan Decl., Ex. 29).[43] Despite RPFPJ's decision to become "inactive," Parrish and Adderley solicited donations for RPFPJ from retired players:

> Q: [RPFPJ] has accepted donations and contributions from members?
> A: Yes.
> Q: To support those activities?
> A: Yes.
> Q: Which haven't taken place?
> A: Yes.

RPFPJ Depo. Tr. 73:15-75:12 (Greenspan Decl., Ex. 29).[44] [redacted]. Significantly, RPFPJ's membership includes putative class members.[45] Notwithstanding the financial hardship that such donations imposed on these retired players, and the fact that RPFPJ decided to become "inactive," [redacted] Nor could she

[43] See also RPFPJ Depo. Tr. 52:3-11 ("The organization is inactive.") (Greenspan Decl., Ex. 29).

[44] See also Depo. Ex. 162 (Adderley seeking donations), JUSTICE 0182-0185 (Parrish seeking donations) (Greenspan, Decl., Exs. 32, 33).

[45] [redacted] Plaintiffs' counsel (which also represents RPFPJ) has refused to disclose the identities of RPFPJ's approximately 100 other members, so Defendants cannot ascertain how many more of them are putative class members. See RPFPJ Depo. Tr. 121:6-122:3 (Greenspan Decl., Ex. 29).

[46] The RPFPJ Rule 30(b)(6) Deposition Notice covered, among other things, "activities of PLAINTIFFS … on behalf of RPFPJ," "remuneration paid to or that may be paid to PLAINTIFFS … by RPFPJ," "any actual or potential role of any of PLAINTIFFS … in RPFPJ," and "[t]he business or other plans of RPFPJ, including but not limited to all of RPFPJ's sources of funding." Depo. Ex. 300 (Greenspan Decl., Ex. 34).

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provide any credible explanation for [redacted] given the fact that Parrish had "no real day-to-day" activities and the organization is "inactive." Id. at 33:9-21. [redacted] Parrish did not go to Washington, D.C. to testify before Congress, and whatever information he might have gathered on this trip (the Rule 30(b)(6) witness did not know), Parrish never shared it with RPFPJ's membership.[48] [redacted]

[47] [redacted]

[48] See id. at 90:2-91:15, 142:2-143:17 ("Q: Did Mr. Parrish put any of the information that he gathered from the June 2007 trip to Washington, D.C., onto the [RPFPJ] website? A: The organization considered that the website was basically frozen … and I know Bernie felt that he

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[redacted] See id. at [redacted], 143:18-146:3. Again, however, the Rule 30(b)(6) witness did not know the purpose of the trip (much less whether it was related to RPFPJ). See id. Even worse, Parrish cancelled the trip, [redacted][50] [redacted] despite the organization being "inactive." Id. at 33:9-21.[51]

While Parrish was using RPFPJ as his personal expense account, Adderley was also failing the retired players that RPFPJ was supposed to represent. Adderley solicited donations from these retired players, but then made no effort to ensure that their money was used to promote the objectives that he had promised to pursue. See id. at 39:18-40:17. It is clear that, just as with this lawsuit, Parrish involved Adderley in RPFPJ to take advantage of the notoriety that Adderley's name would bring, and then Adderley ceded absolute control to Parrish:

> Q: [D]id you know you were a director of [RPFPJ]?
> A: Not until after it was done . . . .
> Q: Did [Parrish] tell you what you'd have to do as a director?
> A: No.
> Q: Today, do you have any understanding of what you have to do as a director –
> A: No.
>
> * * *

---

was not to bother with the website anymore. Q: So the answer to my question is no? A: No, he didn't put the information up.").

[49] [redacted]

[50] During the lunch break at the deposition, the witness telephoned Parrish to refresh her recollection about the cancelled trip. Incredibly, even after speaking to Parrish, the Rule 30(b)(6) witness still could not identify the purpose of the trip, [redacted] See id. at 143:18-146:3.

[51] On re-direct examination by Plaintiffs' counsel, the 30(b)(6) witness testified that she had no reason to believe that Parrish's expenses were unrelated to RPFPJ because of her "long-term knowledge of [Parrish's] character and integrity." Id. at 138:7-139:1. [redacted]

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Q: Now, as co-president of [RPFPJ], what have you done?
A: Nothing. But lend my name to –
Q: Do you let Mr. Parrish basically run that organization?
A: He started it and he runs it.

Adderley Depo. Tr. 39:19-40:24, 261:5-20 (Greenspan Decl, Ex. 6) (objections omitted).[52]

Adderley further testified that Parrish signs his name to documents sent to retired players without Adderley's permission, see id. at 31:10-33:7, that he asked Parrish to "stop putting my name on documents without my permission" but that Parrish nevertheless continued to do so, id. at 63:17-64:4, 261:21-262:18 (objections omitted), that "Bernie Parrish put [the RPFPJ website] together without me knowing," id. at 37:12-38:1, and that Parrish does not share information with him about RPFPJ, see id. at 278:14-280:3, 41:16- 42:9. As Parrish told another candidate for the Board of Directors, "I sure want you on [RPFPJ's] Board, but I don't intend to lose control of this lawsuit." Depo. Ex. 166 (emphasis added) (Greenspan Decl., Ex. 1).

Parrish's malfeasance, and Adderley's nonfeasance, as purported representatives of RPFPJ's retired player members (including putative class members), is further evidence of how grossly unqualified these individuals are to represent thousands of retired players in a nationwide, putative class action lawsuit. Parrish has demonstrated time and time again that his only interests are his self-interests. Likewise, Adderley has demonstrated that he is unable to "protect the interests" of retired players, and is simply along for the ride with Parrish. Finally, Parrish's and Adderley's violations of their fiduciary duties as Co-Presidents of RPFPJ have created conflicts of interest with the RPFPJ/ putative class members who may now apparently have actionable legal claims against them for misappropriating RPFPJ's money.

II. THE PUTATIVE GLA CLASS CANNOT BE CERTIFIED BECAUSE INDIVIDUAL FACTUAL ISSUES PREDOMINATE, AND CONFLICTS OF INTEREST PERVADE THE CLASS

A. Individualized Questions Of Fact Of Injury And Damages Predominate

The party seeking class certification "bears the burden of showing that common questions of law or fact predominate." Zinser, 253 F.3d at 1188. The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by

[52] See also RPFPJ Depo. Tr. 39:18-40:17 (testifying to no knowledge of Adderley playing any role in RPFPJF) (Greenspan Decl., Ex. 29).

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representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997). This requirement "is far more demanding" than the commonality requirement of Rule 23(a)(2), id. at 624, and courts may consider substantive factual and legal issues, even if they implicate the merits, to determine whether the proponents of the class have satisfied their burden.[53] Individual issues predominate when the questions of fact of injury and/or the amount of any injury are not subject to common class-wide proof.[54]

Here, as the Court has previously recognized, the individual economic value of the licensing rights of the thousands of retired NFL players that make up the putative GLA class are extremely variable, and many of the putative class members have no licensing value at all:

> LECLAIR: Which is, why is it that there has never been a fair proposal made to these retired players saying, We're getting 34 million. We think the retired players on these teams should get X amount. That's the whole problem, which is that there isn't a fair allocation. The fact that these people aren't getting any money is, in fact, part of the problem….
> COURT: Well, what if Joe Montana is the one who drives the marketing; why shouldn't he get the lion's share? Why should somebody who is not as famous get anything?
> LECLAIR: That may be correct, Your Honor. But the problem is, who gets to decide? In this relationship the players never know, don't know who gets what, and have no ability to determine whether it is fair. And that's the very reason why we say the second –
> COURT: Well you're going to say a jury is going to decide that?
> LECLAIR: Sure.

[53] See Blackwell v. Skywest Airlines, Inc., 245 F.R.D. 453, 459 (S.D. Cal. 2007); Jimenez v. Domino's Pizza, Inc., 238 F.R.D. 241, 251 (C.D. Cal. 2006); see also Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982) ("class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action").

[54] See, e.g., Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 604 (5th Cir. 2006) (individual issues of causation, injury and damages predominated); Blades v. Monsanto Co., 400 F.3d 562, 571 (8th Cir. 2005) ("not every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy"); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 190 (3d Cir. 2001) ("ascertaining which class members have sustained injury means individual issues predominate over common ones"); Kline v. Coldwell, Banker & Co., 508 F.2d 226, 230 (9th Cir. 1974) ("individual questions concerning . . . liability ... and the injury of each individual plaintiff predominate"); Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P., 247 F.R.D. 156, 157 (C.D. Cal. 2007) ("Plaintiffs have not met their burden of showing they can prove 'fact of injury' or 'impact' on all class members though common evidence"); Gartin v. S&M Nutec LLC, 245 F.R.D. 429, 436 (C.D. Cal. 2007) ("no common injury is shared by the class members"); W. States Wholesale, Inc. v. Synthetic Indus., Inc., 206 F.R.D. 271, 277 (C.D. Cal. 2002) ("proving injury and causation will not be common to each class member").

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> COURT: A jury is going to sit there and decide who deserves more? I mean, that's what we normally have contracts for. People decide that in the marketplace. If they are famous, they get more money. If they are not famous, they don't get much. They get nothing.

Hearing Tr., May 31, 2007, 43:25-45:13 (at p. 36-37 of exhibit) (Greenspan Decl, Ex. 3) (emphases added). Adderley himself testified that the value of retired players' licensing rights varies significantly from player to player (see Point I.B, infra), [redacted][55] Given all of these indisputable facts, determining whether and by how much each of the thousands of individual retired players was damaged is simply not possible on a class-wide basis.[56]

For precisely this reason, the predominance of individual fact issues was held to be an insurmountable hurdle to class certification in a case brought by Plaintiffs' counsel on behalf of retired Major League Baseball ("MLB") players over the licensing of their rights. See Coscarart v. MLB, No. 764737-5 (Cal. Super. Ct. April 24, 1997) (Greenspan Decl., Ex. 2), aff'd sub nom Block v. MLB, 65 Cal. App. 4th 538 (1st Dist.1998). In Coscarart, four retired players sued MLB, MLB Properties, and others on behalf of a putative class of approximately 800 retired players asserting that the defendants had "used the retired players' names, voices, images, signatures, etc. for commercial gain without the players' permission and without their consent" thereby violating their right to publicity. Id. at 1-2. The court held that there were "individual issues relating to liability, affirmative defenses and damages which predominate, indeed overwhelm any issues common to the class." Id. at 8. The court stated that "[t]here does not seem to be a relatively uncomplicated way for calculating damages," because, inter alia, the value of each players' rights "would seem to depend on factors relating to each players

[55] [redacted]

[56] See Zinser, 253 F.3d at 1189 (to determine causation and damages "it is inescapable that many triable individualized issues may be presented"); Mateo v. M/S Kiso, 805 F. Supp. 761, 774 (N.D. Cal. 1991) (several individual issues, including "each individuals unique damages" predominated); Wilcox Dev. Co. v. First Interstate Bank, 97 F.R.D. 440, 447 (D. Or. 1983) (rejecting certification where "[i]t appears unlikely that plaintiffs will ever develop a damages formula").

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'celebrity'." Id. at 10.[57] The celebrity of the players ranged "from named plaintiff Cy Block, who had a cup of coffee in the big leagues, to putative class members such as Ted Williams, Joe DiMaggio and Stan Musial . . . whose celebrity eclipses that of all but a small handful of putative class members."[58] Id. The appellate court affirmed the denial of class certification, holding that "the value of each player's right of publicity would depend, at least in part, on the level of his celebrity" and "Plaintiffs failed to provide the court with any method to account for this variation . . . ." Block, 65 Cal. App. 4th at 543-544.

Plaintiffs try to cover up the predominance of individual questions of injury and damages identified in Coscarart by arguing that all putative GLA class members should simply receive an "equal share" of the revenues at issue.[59] Specifically, Plaintiffs propose to take the total pool of licensing money generated by Players Inc and divide it evenly among the active and retired players with effective GLAs.[60] But there is no factual or economic basis for such an "equal" allocation of the alleged damages. Indeed, unlike in most proposed class actions, Plaintiffs' "expert" Phillip Rowley (who is a "forensic accountant" – not an economist), see Rowley Decl., Ex. A, does not even try to offer any economic explanation as to why an "equal share" distribution would be a proper measure of class-wide damages. Instead, Mr. Rowley just assumes that "equal shares" is the proper measure without any explanation or support.

As Adderley testified, however, his GLA – the purportedly breached "contract" – says nothing about an "equal" division of group licensing revenues.[61] Rather, it merely states

[57] See also Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 825 n.11 (9th Cir. 1974) ("Generally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury").

[58] In Coscarart, the court rejected Plaintiffs' contention that the MLB Properties Former Player Pool Program compensation scheme could be used to calculate damages, finding that "[i]t is interesting to note that the formula plaintiffs refer to in the Former Player Pool Program recognizes itself that differences in "celebrity" are valued differently for purposes of royalties to be paid for uses of names, likeness, etc." Id. As discussed below, the GLA forms executed by Adderley and other putative class members in this case, unlike the MLB forms at issue in Coscarart, contain no such formula which can be applied here.

[59] See Mot. at 19-20 (addressing only the damages issue); Plaintiffs' Objections and Responses to Defendants' Second Set of Interrogatories No. 8 (Greenspan Decl. Ex. 48).

[60] Id.

[61] Adderley Depo. Tr. 255:4-257:11 (Greenspan Decl., Ex. 6).

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that [redacted][62] Plaintiffs are improperly asking the Court to insert the word "equally" into the GLA to avoid the need to prove class-wide injury and damages on an individual basis.[63] Likewise, plaintiffs ignore the undisputed fact that [redacted].[64] There is thus no contractual basis for distributing damages to GLA Class members in "equal shares."

Rather, the calculation of damages for a breach of contract claim under California law (assuming, arguendo, that California law applies) is "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result there from." Cal. Civ. Code § 3300. As set forth above, however, individual questions of fact would predominate in such an inquiry into the "detriment proximately caused" by Defendants' purported breach of each players' GLA.

Moreover, even if there was a principled reason for calculating class-wide damages on an "equal share" basis as to the putative GLA class's breach of contract claim (there is not), this would not justify calculating damages on an "equal share" basis as to the putative GLA class's breach of fiduciary duty claim. It is black letter law that a breach of contract, by itself, cannot establish a breach of fiduciary duty. In re Jerich, 238 F.3d 1202, 1206 (9th Cir. 2001). The proper measure of damages on a breach of fiduciary duty claim – again assuming,

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[62] [redacted]

[63] See Jaeger v. Canadian Bank of Commerce, 327 F.2d 743, 745 (9th Cir. 1964) ("Courts have no power to make new contracts or impose new terms"); Headlands Reserve, LLC v. Ctr. for Natural Lands Mgmt., 523 F. Supp. 2d 1113, 1123 (C.D. Cal. 2007) ("courts shall not create new contract terms"); see also Cal. Civ. Code § 3301 ("No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin").

[64] [redacted]. See Minutes of the NFLPA Board of Directors' Meeting March 18-20, 1991 (Greenspan Decl. Ex. 49).

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arguendo, that California law applies – is the "damage proximately caused by that breach,"[65] which results in the need for an individual determination of injury and damages for each class member that would predominate over any common issues for the GLA class.[66]

In sum, Plaintiffs cannot satisfy their class certification burden merely by having their "expert" advocate an "equal share" distribution on an ipse dixit basis. See Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 344 (4th Cir. 1998) ("[t]hat this shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible").[67]

B. There Are Irreconcilable Conflicts Of Interest Between The Putative GLA Class Members

An additional reason why the putative GLA class may not be certified – one that was not at issue in Coscarart (thus making the putative GLA class even less appropriate for class certification here) – is the pervasive conflicts of interest created by Plaintiffs' "equal share" proposal.[68] That is especially true where, as here, there is a fixed pool of damages claimed, and the proposed equal share allocation of those damages necessarily means that one class member's gain is another's loss.[69] Indeed, in these circumstances, a class member of great notoriety with real economic value in his licensing rights would be totally at odds with a class member of little

[65] Amtower v. Photon Dynamics, Inc., 158 Cal. App. 4th 1582, 1599 (6th Dist. 2008).

[66] Even the Retired Members Class damages of $50 each makes no economic sense as it ignores the fact that many class members would have received economic benefit for their $50, such as rental car discounts and other programs. See (Naylor Decl., Ex. F.)

[67] See also Bell Atlantic Corp. v. AT&T Corp., 339 F.3d 294, 306 (5th Cir. 2003) (rejecting class where "plaintiffs' proposed damages formula . . . attempts to project a measure of damages, for all the class members, that in no way accounts for the vast differences among those class members"); Corley v. Entergy Corp., 220 F.R.D 478, 485 (E.D. Tex. 2004) (rejecting average dollar-per-foot measure of trespass damages because "some parcels of land are more valuable than others"); Wilcox, 97 F.R.D. at 447 (rejecting certification where "[i]t appears unlikely that plaintiffs will ever develop a damages formula").

[68] See Amchem, 521 U.S. at 627 (conflict between those currently injured and those whose injuries may manifest in the future); Broussard, 155 F.3d at 338 (remedial interests of former and two types of current franchisees were not aligned); Gartin, 245 F.R.D. at 435 (conflicts between the injured and uninjured within class of all purchasers).

[69] See NCAA I-A Walk-On Football Players Litig., No. C04-1254C, 2006 WL 1207915, at *8-9 (W.D. Wash. May 3, 2006) (proving injury to each class member would pit them against each other); W. States, 206 F.R.D. at 277 (same).

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notoriety whose licensing rights are worth zero. There is no way for the putative class representatives in this case to reconcile this divergent conflict of interest.[70]

III. THE PUTATIVE CLASSES ALSO CANNOT BE CERTIFIED BECAUSE INDIVIDUAL LEGAL ISSUES PREDOMINATE

As stated in the legislative history of the Class Action Fairness Act of 2005, "over the past ten years, the federal court system has not produced any final decisions – not even one – applying the law of a single state to all claims in a nationwide or multi-state class action." S. Rep. No. 109-14 at 64 (2005). Indeed, it is a cornerstone of class action jurisprudence that absent class members have a due process right to have their claims governed by the state law applicable to their dispute. See Phillips Petroleum v. Shutts, 472 U.S. 797, 821-23 (1985).

Here, Plaintiffs have not satisfied their burden to "show how application of California law satisfies constitutional due process requirements in this case." Zinser, 253 F.3d at 1187.[71] Plaintiffs relegate to a mere footnote their discussion of the constitutionality of applying California law to a putative, "nationwide" class. See Mot. at 26-27 n.15. As this Court has held, however, "Shutts cannot be swept under the rug." In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1027 (N.D. Cal. 2007) (Alsup, J.) ("In re GPU").[72] Under Shutts:

> For a nationwide class to invoke the law of a particular state, the chosen state's law must both (1) not conflict with the law of another jurisdiction that has an interest in the case, and (2) have a significant contact or significant aggregation of

[70] Plaintiffs' "smoke and mirrors" tactics even extend to their identification of the members of the putative GLA Class. Whereas the TAC and the Motion expressly define the putative GLA Class as including only those retired players who executed the same form of GLA as Adderley (e.g., TAC ¶ 83, Mot. at 3), Plaintiffs' list of putative class members includes the names of many retired players who signed a different form of GLA. For example, Plaintiffs identify Doug Allen – a retired player and the former President of Players Inc – as a putative class member, even though Allen signed [redacted] – the exact form of GLA that this Court ruled could not be used to try to state a claim because no Plaintiff ever signed a GLA containing this or similar language. See Naylor Decl., Ex. Z at 1 (listing Doug Allen); Doug Allen GLA (Greenspan Decl., Ex. 50); (Sept. 6, 2007 Order at 15-16).

[71] See also Wash. Mut. Bank v. Superior Ct. of Orange County, 24 Cal. 4th 906, 921 (2001) (California law cannot be applied to nationwide class action unless "the requisite significant contacts to California exist, a showing that is properly borne by the class action proponent").

[72] The Court's decision in In re GPU dealt with a motion to dismiss allegations of a nationwide class. Even though that procedural posture is different from the instant motion for class certification, the Court's analysis of the constitutional requirements to apply California law to a putative nationwide class is instructive.

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> contacts to claims asserted by each member of the plaintiff class to insure that the choice of the forum state's law is not arbitrary or unfair.

Id. (emphases added). Here, neither criterion is satisfied. The consequence is that the laws of all interested jurisdictions of the "nationwide" putative class members must be applied, and individual questions of law predominate.

A. Application of California Law Would Be Unconstitutional Because The Two Putative Classes' Claims Have Insufficient Contacts To California

Plaintiffs' Motion fails to demonstrate that the claims asserted by all of the individual members of the proposed classes have sufficient contacts with California to ensure that the application of California law is not "arbitrary and unfair as to exceed constitutional limits." Shutts, 472 U.S. at 822. In In re GPU, a putative nationwide antitrust class action, the plaintiffs alleged that the two defendants, a California corporation and a Canadian corporation with operations in California, held meetings in California in furtherance of an alleged conspiracy. 527 F. Supp. 2d at 1029. This Court held that, as a matter of law, such allegations were insufficient to permit application of California law because, among other things, one of the defendants was organized and headquartered outside of California. Id.

Here, Plaintiffs allege – but do not establish[73] – even fewer California contacts than those held insufficient in In re GPU. First, neither Plaintiff alleges that he has any contact with California; nor is there any allegation about how many putative class members live in California. Parrish is a resident of Florida and Adderley is a resident of New Jersey. (TAC ¶¶ 4, 5). Second, both Defendants are Virginia corporations with principal places of business in Washington, D.C. (See Answer to TAC at ¶¶ 7, 10 (Apr. 2, 2007) (Rec. Doc. 28)). Players Inc has no office in California, and the NFLPA's California office is primarily used by a third party which sub-leases the space.[74] Plaintiffs baldly assert that "both Defendants conduct business" in California, but this conclusory allegation, even if Plaintiffs had offered any facts proving it true,

[73] Burkhalter, 141 F.R.D. at 152 (courts should not "accept conclusory or generic allegations regarding the suitability of the litigation for resolution through class action.").

[74] See Declaration of Richard Berthelsen ¶¶ 2-3 (Mar. 27, 2008) (filed concurrently herewith).

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falls far short of Plaintiffs' burden to demonstrate that sufficient contacts exist between all of the putative classes' claims and California to permit the class-wide application of California law.[75]

B. Conflicts Between California Law And Other Interested Jurisdictions

California's choice of law analysis "consider[s] whether there is a conflict between the law of California and the laws of other states . . . ." In re GPU, 527 F. Supp. 2d at 1028; see also Zinser, 253 F.3d at 1187.[76] Here, relevant California law conflicts with the law of other, more interested jurisdictions, thus creating a second barrier to class-wide application of California law.[77] It was Plaintiffs' – not Defendants' – burden under Shutts to show that California law does "not conflict with the law of another jurisdiction that has an interest in the case," In re GPU, 527 F. Supp. 2d at 1027, but Plaintiffs' Motion lacks any substantive analysis on this point. Indeed, as discussed next, Plaintiffs would not have been able to carry their burden even if they had tried to do so.

1. Agency by Estoppel

Plaintiffs allege that the GLAs signed by the putative GLA class members, and the dues paid by putative Retired Member class members, create an implied agency relationship that Defendants should be estopped from disavowing. (TAC ¶¶ 46, 66.) In a previous order, the Court stated that, under California law, "[a]n implied agency relationship can arise when one party holds itself out to be acting as the agent for another." (Sept. 6, 2007 Order at 20 (Rec. Doc. 133)) (citing Carpenter Foundation v. Oakes, 26 Cal. App. 3d 784, 791-92 (3d Dist. 1972)).

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[75] The mere fact that EA – a third party – is located in California cannot give rise to sufficient California contacts (indeed, in In re GPU, it was insufficient that one of the defendants was headquartered in California). Defendants note, in any event, that the exclusive EA agreement was executed in Washington, D.C. – not California. See (Greenspan Decl., Exs. 51, 52).

[76] Under the California governmental interest approach, "the Court must consider (1) whether the states' laws differ; (2) each state's interest in having its laws applied; and (3) whether there is a conflict between application of the laws." June 4, 2007 Order at 4 (Rec. Doc. 78) (citing Kearney v. Salomon Smith-Barney, Inc., 39 Cal. 4th 95, 107-08 (2006).

[77] Plaintiffs argue that "Defendants have not requested that this Court apply the law of another jurisdiction," but Defendants have, in fact, always taken the position that "in light of the fact that Plaintiffs purport to assert claims on behalf of a 50-state class of retired NFL players, the Court would have to apply the laws of each state to the claims of plaintiffs domiciled in that state." Defs.' Reply in Support of Mot. for Judgment on the Pleadings at 3 (May 17, 2007) (Rec. Doc. 68).

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Such an implied agency relationship is not, however, legally cognizable in most states. For example, a search of the law of Florida, New Jersey, and Virginia (the parties' home states), has revealed no law recognizing a similar cause of action. Although those states do recognize agency by estoppel, they do not provide a cause of action for a purported principal (i.e., Plaintiffs) against a purported agent (i.e., Defendants) for breach of fiduciary duty based on the existence of an implied agency relationship. Rather, these states only apply agency by estoppel to prevent the purported principal (i.e., Plaintiffs) from denying the existence of an implied agency relationship with regard to third-party claims based upon the acts of the agent. Indeed, one of the elements of agency by estoppel in these states is "a representation by the purported principal," but the only "representations" at issue in this case are those allegedly made by Defendants, the alleged agents. 2 Fla. Jur. 2d Agency & Employment § 11 (emphasis added).[78]

Moreover, California does not have any material interest in the extraterritorial application of its "agency by estoppel" principles as reflected in Carpenter. To the contrary, the California legislature has, in the over quarter of a century since Carpenter was decided, not codified its ruling as an agency by estoppel-based cause of action. Rather, the governing California Civil Code provision, similar to the law of many other states, excludes the type of claim Plaintiffs make here: "An agency is either actual or ostensible," and "[a]n agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Cal. Civ. Code §§ 2298, 2300 (emphases added). Unlike in Kearney, 39 Cal. 4th at 121-123, where the court found that a comprehensive statutory scheme indicated California's strong interest in having its law apply, here, the absence of a statutory provision indicates California's lesser degree of interest. See also Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 168 (1978) (finding California had no interest in extra-territorial application of the legal theory advanced by plaintiff where the cause of action "constitutes a law archaic and isolated in the context of the laws of the federal

[78] See Mobil Oil Corp. v. Bransford, 648 So.2d 119, 121 (Fla. 1995); Blaisdell Lumber Co. v. Horton, 575 A.2d 1386, 1388 (N.J. Sup. Ct. App. Div. 1990); Sanchez v. Medicorp Health Sys., 270 Va. 299, 304 (2005).

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union") (internal quotation omitted).[79]

2. Direct Agency

Plaintiffs also seek to apply California law on direct agency to the claims of the putative GLA class, but that law is very different from the law applied in other states. Plaintiffs argue that, under California law, it is Adderley's "right to control [Defendants] – i.e., his ability to withdraw his GLA or opt out of signing another" that gives rise to the agency relationship, as "the power to terminate the services of the agent gives principle [sic] the means of control." (Pls.' Reply in Support of Mot. for Leave to File TAC at 13 (Oct. 18, 2007) (Rec. Doc. 169).) But other states require a greater showing than the mere power to terminate an agreement before they will find that a principal had sufficient control over the purported agent to create an agency relationship. In Florida, for example, "[t]he level of control necessary to find a principal/agent relationship" exists only where the purported agent "is subject to the control of the [purported principal] as to the means to be used." Chase Manhattan Mortgage Co. v. Scott, 694 So.2d 827, 831 (Fla. Dist. Ct. App. 1997) (internal quotation omitted) (emphasis added).[80] Nor does California have any regulatory interest in the extraterritorial application of its direct agency law to agreements entered into by residents of other states. Cf. Bernhard v. Harrah's Club, 16 Cal. 3d 313, 322 (1976).

[79] There are also conflicts among the laws of the states with respect to numerous other legal issues in this case, none of which Plaintiffs considered in their Motion. For example, and as the Court has previously recognized, there is a conflict among the states with respect to the burden of proof for establishing a fiduciary relationship. See (June 4, 2007 Order at 4, 5) (noting that Virginia requires proof by clear and convincing evidence, while California requires proof by a preponderance of the evidence). There are also important differences in the law of fifty states on statutes of limitations and punitive damages. See id. at 5 (noting that Virginia law caps punitive damages whereas California does not); Schonfeld v. Toll Brothers, Inc., 51 Va. Cir. 134, 1999 WL 1499540, at *2 (Va. Cir. Ct. 1999) (Virginia has two-year statute of limitations for breach of fiduciary duty claims, whereas California has a four-year statute of limitations for such claims).

[80] Similarly, neither New Jersey nor Virginia law provides that the mere power to terminate a contract is control sufficient to give rise to a direct agency relationship. See Sodexho Operations, LLC v. Director, Div. of Taxation, 21 N.J. Tax 24, 39 (N.J. Tax Ct. 2003) ("The comment to [Restatement 2d of Agency § 11] notes that '[i]t is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements.'") (quoting Restatement 2d of Agency §1) (emphasis added); Murphy v. Holiday Inns, Inc., 219 S.E.2d 874, 876-78 (Va. 1975) ("in determining whether a contract establishes an agency relationship, the critical test is the nature and extent of the control agreed upon," finding that franchisee was not an agent because the franchisor did not have "control or right to control the methods or details of doing the work") (emphasis added).

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C. Individual Questions Of Law Predominate

Because California law may not be applied on a class-wide basis, Plaintiffs cannot meet their burden to show that common issues of law predominate. Here, the law of each member of the "nationwide" putative classes must be applied (up to fifty states). This fact alone dooms class certification because "the predominance requirement . . . will not be satisfied . . . if the claim must be decided on the basis of the laws of multiple states." Wright & Miller, Federal Practice and Procedure § 1780.1 at 204 (3d ed. 2005).[81] Thus, the putative GLA and Retired Member classes – which both include claims for breach of fiduciary duty – may not be certified.

IV. THE PUTATIVE RETIRED MEMBER CLASS IS ALSO VASTLY OVERBROAD

Finally, even if the putative Retired Member class could overcome the absence of an adequate representative (Point I), and the predominance of individual questions of fact and law (Points II and III), it still could not be certified as proposed. Parrish's claim is based upon allegations that, during the one-year period when he was an NFLPA Retired Players Association member (April 28, 2005 to April 30, 2006), he was denied unspecified "information" and Upshaw stated that "he does not work for retired players" in collective bargaining. (TAC ¶¶ 58, 59, 68, 72-75.) Parrish's claim is thus predicated upon specific conduct and specific representations that occurred during his one-year membership period. The putative Retired Member class, however, purports to include all retired players who paid NFLPA Retired Players Association dues (but did not sign GLAs) "within the statute of limitations." Mot. at 3 (emphasis added). Thus, the putative class includes retired players whose membership period did not

[81] Accord Zinser, 253 F.3d at 1189 (where "the applicable law derives from the law of the 50 states, as opposed to a unitary federal cause of action, differences in state law will 'compound the[] disparities' among class members from the different states"); Cole v. Gen. Motors Corp., 484 F.3d 717, 729 (5th Cir. 2007) ("Plaintiffs have failed to adequately address, much less extensively analyze, the variations in state law . . . and the obstacles they present to predominance") (internal quotation omitted); In re Am. Med. Sys., 75 F.3d 1069, 1085 (6th Cir. 1996) ("If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law"); E. Me. Baptist Church v. Union Planters Bank, 244 F.R.D. 538, 547-48 (E.D. Mo. 2007) (decertifying plaintiffs' nationwide class claim for breach of fiduciary duty); Drooger v. Carlisle Tire & Wheel Co., No. 05-cv-73, 2006 U.S. Dist. LEXIS 20823, at *31 (W.D. Mich. 2006) ("The great weight of authority observes that when class claims cannot be brought under a unifying law, predominating questions of law are absent, and certification is inappropriate").

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overlap with the period of time in which Parrish was allegedly denied information, or with the period of time in which Upshaw made his statement. In this respect, there are not common questions of fact between Parrish and many of the putative class members; nor are Parrish's claims typical of many members of the putative class that he seeks to represent. See Fed. R. Civ. P. 23(a)(2) & (b)(3).[82]

CONCLUSION

For all of the foregoing reasons, Plaintiffs' Motion must be DENIED.

Date: March 28, 2008

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[82] See also Poulos v. Caesars World, Inc., 379 F.3d 654, 665, 667-668 (9th Cir. 2004); Martin v. Dahlberg, Inc., 156 F.R.D. 207, 214-217 (N.D. Cal. 1994); Mateo v. M/S Kiso, 805 F. Supp. 761, 773-774 (N.D. Cal. 1991).