Parrish et al v. National Football League Players Incorporated Doc. 264 Att. 1

EXHIBIT A

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Attorneys for Defendants National Football League Players Association
and National Football League Players Incorporated d/b/a Players Inc

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 0943 WHA

DEFENDANTS' SUPPLEMENTAL MEMORANDUM ON PLAINTIFFS' CLASS CERTIFICATION MOTION

Plaintiffs' Reply in Support of Their Motion for Class Certification ("Reply Br.") is replete with distortions that Defendants will address at the hearing on Plaintiffs' Motion. There is, however, one factual misstatement to the Court that Defendants believe requires immediate correction.

In discussing Defendants' argument that individual questions of law predominate because California law may not be universally applied in this putative "nationwide" class action, Plaintiffs state:

> Defendants' claim that Plaintiffs have not alleged how many putative class members reside in California is also misleading. In response to Plaintiffs' discovery requests for addresses of the putative class members, Defendants expressly and repeatedly refused to provide this information on the grounds that it would be unduly burdensome and that "[s]uch information is neither relevant nor discoverable under the [federal rules] before the certification of a class." According to paragraph 16 of this Court's rules, Defendants are therefore precluded from denying that putative class members reside in California.

Reply Br. at 11-12 (internal citation omitted).

Contrary to Plaintiffs' description, Defendants did not refuse to provide Plaintiffs with sufficient information to determine "how many putative class members reside in California." Id. During the meet and confer process regarding the relevant interrogatory requests, Defendants declined to provide the addresses of the thousands of putative class members (which Plaintiffs could try to use for political purposes), but expressly offered to provide the state of residence of each putative class member if Plaintiffs chose to make such a request:

> Plaintiffs have not provided any reasoning as to why the addresses of thousands of putative class members is relevant to the issue of commonality. If and when Plaintiffs provide any reasoning as to why address information is relevant to the issue of commonality, Defendants would be more than happy to revisit the issue. Indeed, we note that Plaintiffs are not seeking, for example, the state of residence of each class member – which may be relevant to choice of law issues – but the specific addresses of all of the thousands of putative class members.

Ltr. from David Greenspan to Ryan Hilbert at 3 (Jan. 17, 2008) (attached hereto as Exhibit A) (emphasis added). Plaintiffs, however, never took Defendants up on this offer and never asked for the state of residence of each putative class member, as Defendants invited Plaintiffs to do.

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Instead, Plaintiffs simply "reserve[d] [their] rights for the time being" on the issue of addresses. Ltr. from Ryan Hilbert to David Greenspan at 1 (Jan. 22, 2008) (attached hereto as Exhibit B).[1]

In short, Plaintiffs' representation to the Court that Defendants refused to provide information as to the states of residence of the putative class members is erroneous, and the exact opposite of what in fact occurred.

Date: April 8, 2008

DEWEY & LEBOEUF LLP

BY: /S/ David G. Feher

David G. Feher
Attorneys for Defendants

[1] In refusing to consent to the filing of Defendants' supplemental brief, Plaintiffs claim that their position is factually accurate because Defendants "should" have produced the state of residency information (even though Plaintiffs never requested it, after Defendants offered to produce the information if only Plaintiffs would ask for it rather than seeking irrelevant individual addresses). See Ltr. from Noel Cohen to David Feher (Apr. 7, 2008) (attached hereto as Exhibit C). Plaintiffs' response is totally illogical — finding Defendants at fault for not producing something that Defendants offered to produce, but which Plaintiffs never requested — and yet another example of their continuing "smoke and mirrors" approach to this litigation.

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January 17, 2008

BY E-MAIL

Ryan S. Hilbert
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Re: *Parrish, et al. v. NFLPA, et al.* (N.D. Cal. No. C07 0943 WHA)

Dear Ryan:

I write in response to your letter of January 8, 2008, concerning Defendants' Responses and Objections to Plaintiffs' First Set of Interrogatories, which were served approximately three weeks before then.

A. Interrogatory Requests Nos. 1 and 2

In these interrogatories, Plaintiffs requested information about putative class members as to time periods other than those in which Plaintiffs had the status on which they base their claims. Defendants objected to producing information as to time periods for which Plaintiffs cannot assert a claim. In your January 8 letter, you fail to offer any authority to support Plaintiffs' view that they are entitled to information about retired players who did not have GLAs in effect at any time between February 14, 2003 and December 31, 2005 – the only time period within the statute of limitations in which Adderley (the only Plaintiff who asserts a GLA-based claim) had a GLA in effect. Defendants therefore maintain their objection to the production of information about retired players who did not sign a GLA that was in effect during this period, on the ground that such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

That said, as you know, Defendants have not withheld any information on the basis of this objection. Specifically, in response to Interrogatories Nos. 1 and 2, Defendants identified a range of documents including *all* GLAs produced in this action. Since Defendants did not withhold the production of any GLA on the ground that its term did not overlap with the period of time in which Adderley had a GLA in effect, the range of documents identified by Defendants in response to Interrogatories Nos. 1 and 2 also includes those GLAs entered into after December 31, 2005. Thus, the bottom line is that, although the parties have adopted different legal positions regarding the relevance of post- December 31, 2005 GLAs, no information has been withheld on that ground, and any dispute on this issue is therefore moot for the time being. Should this dispute become ripe in the future, we would be

willing to meet and confer with Plaintiffs and consider any authority for your position that Plaintiffs are entitled to discovery regarding claims that Adderley or Parrish cannot assert.

On a related issue, to the extent that your letter takes issue with Defendants' identification of a range of documents from which the requested information may be located, we direct you to Federal Rule of Civil Procedure 33(d), which expressly permits a party to refer to documents to respond to an interrogatory. Rule 33(d) provides that such "[a] specification shall be in sufficient detail to permit the interrogating party [Plaintiffs] to locate and identify, *as readily as can the party served*, the records from which the answer may be ascertained." That is certainly the case here, where Plaintiffs, just "as readily" as Defendants, can identify the GLAs containing the same language as the GLAs signed by Adderley. In response to your specific question, we have identified all documents that we are aware of in Defendants' production that contain information responsive to Interrogatories Nos. 1 and 2. Accordingly, we believe that there is no dispute with respect to this issue.

There is, however, one subject raised in your letter as to these interrogatories over which the parties do appear to have a ripe dispute – the issue of pre-certification discovery of address information for each putative class member, which you candidly describe in your letter as "contact information." Frankly, the law is very clear that such contact information generally is not discoverable at the pre-certification stage. E.g., Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (holding that such information is not generally "within the scope of legitimate discovery"); Dziennik v. Sealift, Inc., 05-CV-4659 (DLI) (MDG), 2006 U.S. Dist. LEXIS 33011, *3 (E.D.N.Y. May 23, 2006) ("Courts have ordinarily *refused* to allow discovery of class members' identities at the pre-certification stage out of concern that plaintiffs' attorneys may be seeking such information to identify potential new clients, rather than to establish the appropriateness of certification.") (emphasis added).

We recognize these cases do not absolutely protect, in every case, the production of contact information of putative class members prior to certification. However, the case law makes clear that the protection of such information is the rule, and that the production of such information is the exception, with the putative class representatives bearing the burden of establishing the exceptional need for such information. See Mantolete v. Bolger, 767 F.2d 1416, 1424 (9th Cir. 1985) ("*[T]he plaintiff bears the burden of advancing a prima facie showing* that the class action requirements of Fed.R.Civ.P. 23 are satisfied or *that discovery [of the putative class] is likely to produce substantiation of the class allegations*.") (emphasis added). Your letter does not provide any basis or authority to support the production of contact information – i.e., the exception to the rule – in this case. Rather, you baldly assert that "Plaintiffs seek the disclosure of contact information from putative class members precisely because these individuals may have information relevant to Plaintiffs' underlying claims, and that also bears on class certification issues such as commonality and/or numerosity."

With respect to the issue of numerosity, Plaintiffs already have all of the information they could conceivably need with respect to numerosity as to the asserted GLA-based classes. The GLAs produced in this action enable Plaintiffs to count up the number of players who signed GLAs with the

same language as Adderley's GLAs.[1] This information is more than sufficient for Plaintiffs to identify the number of class members in the two putative GLA classes. On the other hand, the addresses of these retired players is simply irrelevant to the issue of numerosity. As to the number of putative class members in the non-GLA putative class, for which Mr. Parrish is the putative representative, Defendants are willing to provide such information, but Plaintiffs' first set of interrogatories did not include a proper request as to this information (see discussion below relating to Interrogatory No. 3).

Plaintiffs' contention that the addresses of the putative class members is relevant to the separate issue of commonality is a pure *ipse dixit*. Plaintiffs have not provided any reasoning as to why the addresses of thousands of putative class members is relevant to the issue of commonality. If and when Plaintiffs provide any reasoning as to why address information is relevant to the issue of commonality, Defendants would be more than happy to revisit the issue. Indeed, we note that Plaintiffs are not seeking, for example, the state of residence of each class member – which may be relevant to choice of law issues – but the specific addresses of all of the thousands of putative class members.

Indeed, Plaintiffs' assertion that they "seek the disclosure of contact information from putative class members precisely because these individuals may have information relevant to Plaintiffs' underlying claims" indicates that Plaintiffs intend to conduct a mass mailing to all of these thousands of retired NFL players. This is precisely the type of pre-certification conduct that courts have generally not permitted, and is of even greater concern here where Plaintiffs are repeatedly on record as engaging in a broad political campaign against the NFLPA on issues wholly unrelated to the remaining claims in this case.

Finally, the decisions relied on by Plaintiffs on this issue are not on point. For example, Hill v. Bauer, 242 F.R.D. 556, 560, 562 (C.D. Cal. 2007), did not even involve a specific request for putative class members' contact information, but rather requests for "documents pertaining to putative class members' hours, wages, business-related expenses, repayment of wages to employer, termination wages, meal breaks and rest breaks," which the court found to be relevant to the wage and hour dispute claims of the putative class members. Indeed, the only discussion of the addresses of the putative class members was in response to defendant's privacy arguments based on the incidental presence of identifying information in some of these documents. See id. at 563. Here,

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[1] The GLAs produced also provide the name of each such retired player who signed the GLA, the date the retired player signed the GLA, and the date the GLA expired. As indicated in Defendants' responses to Interrogatory Nos. 1 and 2, there are four additional retired players who signed GLAs during the statute of limitations but whose GLAs cannot be located. These GLA forms – out of thousands – were apparently misplaced in the ordinary course of business, prior to the commencement of this action. Defendants are willing to produce, for these persons, the same information that would be found on the GLA, to the extent such information is otherwise available in Defendants' records.

Plaintiffs have failed to offer *any* substantive rationale showing how address information of putative class members is purportedly relevant.

The remainder of Plaintiffs' cited cases are also distinguishable on the basis that they involved fact specific employment-related claims, where the scope of the defendants' conduct with respect to individual, putative class members was at issue prior to certification of any class. See Putnam v. Eli Lilly & Co., 508 F. Supp. 2d 812, 814 (C.D. Cal. 2007) (Abrams, M.J.) (contact information relevant to determining whether defendant had paid putative class members overtime pay and permitted putative class members to take meal breaks); Wiegele v. FedEx Ground Package Sys., No. 06-CV-01330-JM(POR), 2007 WL 628041, *2 (S.D. Cal. Feb. 8, 2007) (contact information relevant because putative class members were "percipient witnesses to Plaintiff's wage and hour claims"); Babbitt v. Albertson's, Inc., No. C-92-1883 SBA (PJH), 1992 WL 605652, *6 (N.D. Cal. Nov. 30, 1992) (Hamilton, M.J.) (contact information relevant to plaintiffs' claims of discriminatory employment practices against them and other Hispanic and female employees). Here, Plaintiffs have given no indication as to how contact information is purportedly relevant to their claims.

In sum, the address information is the only information that Plaintiffs are not receiving in response to these interrogatories. If a class is ever certified, we will reconsider your request for this information, but in the meantime we believe our position is the right one under the law.

B. Interrogatory Request No. 3

Interrogatory No. 3 sought identifying information as to retired NFL players "who paid dues to be a member of the NFLPA within the statute of limitations and within the period of time that the [NFLPA] Constitution attached hereto as Exhibit B was in effect, but who, according to your records, did not sign a GLA the same year that they were a member." Apart from the fact that Defendants asserted the same objections discussed above as to providing contact information – an important principle – Plaintiffs miss the point that Defendants did not withhold any information in response to Interrogatory No. 3 on this ground. In fact, Defendants did not withhold *any* information at all in response to Interrogatory No. 3. The answer to Interrogatory No. 3 is simply that there are no retired players who meet the criteria set forth in that requests, which requested information as to a version of the NFLPA Constitution that was in effect before the statute of limitations period in this case.[2]

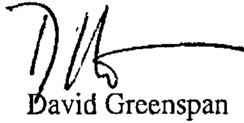
In Defendants' respective responses to Interrogatory No. 3, we offered to meet and confer with you about a reformulation of Interrogatory No. 3 that would assist Plaintiffs in drafting an interrogatory that would yield the information you may have been seeking, but that you did not in fact specify in your interrogatory (subject to our objection about producing contact information). For whatever reason, you have chosen not to take us up on our offer. Instead, your letter demands information and documents never previously requested by Plaintiffs in a proper discovery request. For example, your letter demands that we identify "the bates ranges for the March 1996 amendment ... and all other

[2] We are aware of (and took into account) your modification to Interrogatory No. 3, but that modification had no bearing on our response.

NFLPA Constitutions that were in effect during the relevant time period." You apparently recognize Plaintiffs had not previously made *any* request for those documents, because a few days ago you served us with a second set of document requests calling for such documents. We will timely respond to that request, but you cannot expect us to be mind readers or to rewrite discovery requests that are not properly drafted. In sum, there is no bona fide dispute as to Interrogatory No. 3 because Defendants have fully responded to that request as it was drafted by Plaintiffs.

If you have any further questions about these matters, we would be happy to meet and confer further about them.

Very truly yours,



David Greenspan

EXHIBIT B

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January 22, 2008

Client-Matter: 29749-060

VIA E-MAIL

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Re: Bernard Paul Parrish, et al. v. National Football League Players Association and Players Inc, Case No. C07-0943 WHA

Dear Dave:

This responds to your letter dated January 17, 2008, and is further to my letter dated January 8, 2008, regarding Defendants' Responses to Plaintiffs' First Set of Interrogatories.

Defendants' Responses to Interrogatory Nos. 1 and 2

We respectfully disagree with your assertions in connection with Interrogatory Nos. 1 and 2. For example, we do not understand how you can allege that information that falls squarely under Paragraphs 82-83 of Plaintiffs' Third Amended Complaint is "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence" *Compare* Interrogatory No. 1 (calling for Defendants to identify "each retired player who signed a GLA that contains identical printed text to the GLA attached hereto as Exhibit A and that was in effect during the statute of limitations period.") to Third Amended Complaint ¶¶ 82-83 (defining the "GLA Class" as "all those retired NFL Players who at any time have sent an executed GLA to the NFLPA containing language similar or identical to the [] GLA [attached as Exhibit A] that was in effect during the period beginning at the earliest point of the statute of limitations and continuing until the expiration of the last such GLA.").

We also disagree with your mischaracterization of your production, your misapplication of Rule 33(d), and your continued refusal to respond to Plaintiffs' Interrogatory Nos. 1 and 2 fully and completely, particularly with respect to the contact information of retired NFL players.

Nonetheless, in an effort to put this dispute behind us and in the spirit of compromise, we are willing to reserve our rights for the time being on those issues we raised in connection with Interrogatory Nos. 1 and 2 with one exception: as requested in my letter of January 8, and pursuant to your offer in footnote 1 of your letter of January 17, please let us know as soon as

possible the names and information of those four retired NFL players whom you claimed signed GLAs, but whose GLAs cannot be located.

Defendants' Responses to Interrogatory No. 3

As you know, Interrogatory No. 3 (which is the same for both Defendants) calls for each Defendant to identify "each retired NFL player who paid dues to be a member of the NFLPA within the statute of limitations and within the period of time that the Constitution attached hereto as Exhibit B was in effect, but who, according to your records, did not sign a GLA the same year that they were a member."

Putting aside Defendants' objections concerning relevancy (which you appear to have abandoned, though we can discuss that issue another time) and whether Plaintiffs are entitled to the retired players' contact information (which we are willing to reserve our rights on as above), you disingenuously refuse to provide *any* response to this Interrogatory on the ground that the NFLPA Constitution identified in Interrogatory No. 3 was no longer in existence during the relevant statute of limitations. At the same time, you refuse to provide Plaintiffs with the information they need in order to assess the merits of your position and reach a suitable compromise.[1]

More specifically, you refuse to identify the bates range of those documents that would allow Plaintiffs to accurately assess the merits of your position. Ironically, you state that such documents were "never previously requested by Plaintiffs in a proper discovery request." However, this argument is belied by the fact that Defendants have already produced the March 1994 Constitution (PI027327 to PI027346), thereby conceding that Defendants considered such documents responsive at least at one point in time. (The fact that Plaintiffs propounded additional document requests on this matter is not persuasive. As you know, we expressly informed you that Plaintiffs were reserving their rights on this issue at the time we sent you the additional requests.)

You also refuse to explain how the terms of the Constitution that allegedly succeeded the March 1994 Constitution (and presumably continued into the statute of limitations period) differed from the March 1994 Constitution. For all Plaintiffs know, the terms (at least as they relate to retired NFL players) of the various NFLPA Constitutions are the same. We trust that Defendants are not objecting to Interrogatory No. 3 on purely technical grounds when the substance of their response would not change.

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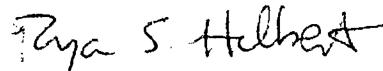
[1] You incorrectly state that "[f]or whatever reason, [we] have chosen not to take [you] up on [your] offer" to meet and confer about this issue. That is not true. As explained above, the reason Plaintiffs requested certain information was to properly assess the merits of Defendants' claims so that we could more efficiently and effectively reach a compromise.

Notwithstanding the foregoing, we are prepared to discuss this matter over the phone in the hope of resolving the dispute without the need for Court intervention. Please give me a call at your earliest convenience.

Very truly yours,



Ryan S. Hilbert
Manatt, Phelps & Phillips, LLP

cc: Ronald S. Katz, Esq.
David G. Feher, Esq.

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EXHIBIT C

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April 7, 2008

Client-Matter: 29749-060

VIA ELECTRONIC MAIL

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Re: Parrish, et al. v. NFLPA and Players Inc.

Dear David:

We have considered your request that Plaintiffs stipulate to allow Defendants to file a Supplemental Memorandum addressing what you believe to be a factual inaccuracy in Plaintiff's Reply in Support of Motion for Class Certification. Specifically, Defendants wish to address Plaintiffs' statement concerning Defendants' failure to provide information regarding the location of class members during the discovery process. [Reply at 11:27-12:5]. We respectfully decline your request.

Plaintiffs' position on this issue is entirely accurate: Plaintiffs requested information regarding the addresses of class members and Defendants refused to provide it. This fact is undisputed as no such documents or information were ever produced. That Defendants were potentially willing to "re-visit" their refusal to produce documents should Plaintiffs make an additional showing of relevancy with respect to commonality is immaterial and a far cry from Defendants actually producing documents. Moreover, Defendants could (and should) have produced this information if they intended to rely upon it, yet unilaterally chose not to. Indeed, Paragraph 16 of Judge Alsup's Supplemental Standing Order prevents Defendants from doing exactly what they seek to do here: object to a discovery request and then belatedly attempt to utilize the information they refused to produce.

Put simply, Plaintiffs do not believe Defendants have a good faith basis to seek leave to file a Supplemental Memorandum under these circumstances and would strongly oppose such a request. We ask that any request by Defendants to file another brief include this letter setting forth our objection.

Very truly yours,

Noel S. Cohen

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