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21 *Attorneys for Plaintiffs*

22 UNITED STATES DISTRICT COURT
 23 NORTHERN DISTRICT
 24 SAN FRANCISCO DIVISION

25 BERNARD PAUL PARRISH, HERBERT
 26 ANTHONY ADDERLEY, and WALTER
 27 ROBERTS III, on behalf of themselves and
 28 all others similarly situated,

Plaintiffs,

29 NATIONAL FOOTBALL LEAGUE
 30 PLAYERS ASSOCIATION, a Virginia
 31 corporation, and NATIONAL FOOTBALL
 32 LEAGUE PLAYERS INCORPORATED
 33 d/b/a PLAYERS INC, a Virginia
 34 corporation,

Defendants.

CIVIL ACTION NO. C07 0943 WHA

**PLAINTIFFS' REPLY BRIEF IN SUPPORT
 OF THEIR MOTION TO STRIKE THE
 DECLARATIONS OF LINDA CASTILLON,
 ADAM SULLINS, JASON BRENNER,
 CHRISTINE FINCH, AND STEVE BYRD**

PLAINTIFFS' REPLY BRIEF
 CASE NO. C07 0943 WHA

1 Plaintiffs files this reply brief in response to Defendants’ July 10, 2008 Opposition to
2 Plaintiffs’ Motion to Strike. The content and timing of Defendants’ disclosures, in light of the
3 ten-deposition limit, prevented Plaintiffs from obtaining necessary discovery, and as such, the
4 Court should strike the declarations and Linda Castillon, Adam Sullins, Jason Brenner, Steve
5 Byrd, and Christine Finch from the summary judgment record.¹

6 **I. Plaintiffs Did Not Avoid, And, Indeed, Actively Pursued Discovery**

7
8 Defendants claim that Plaintiffs could have taken tens of additional depositions but
9 wanted to avoid discovery. This is untrue. Plaintiffs have diligently conducted discovery
10 throughout this case and pursued numerous depositions of key witnesses all across the country.
11 Defendants cite the resulting amended complaints as justifying the late disclosure of their
12 witnesses (even though they never informed the Court of this change in their approach to
13 depositions), while simultaneously refusing additional depositions for those same witnesses. The
14 current motion results from Defendants’ failure to allow sufficient discovery in light of the
15 changing circumstances surrounding this case.

16 Plaintiffs have used all ten of their allotted depositions. However, more than thirty of
17 Defendants’ disclosed witnesses have yet to be deposed. Plaintiffs diligently noticed and took
18 depositions throughout 2007 and 2008, but carefully chose a selection of those key witnesses to
19 depose, based on the information gleaned from Defendants’ disclosures. Plaintiffs have not
20 “adopted a strategy of not taking additional depositions as a cost savings,” as Defendants
21 contend.² Moreover, if there were any question as to Plaintiffs’ desire to depose these witnesses,
22 Plaintiffs sent Defendants a letter requesting that Defendants provide deposition dates for any and
23
24

25 ¹ Plaintiffs have simultaneously filed a request for oral argument with this Reply, designating a third-year attorney to
26 argue this motion.

27 ² See Defs.’ Resp. Br. at 11.

1 all remaining witnesses that Defendants wished to call at trial.³ Defendants refused to agree, and
2 instead identified two additional witnesses that day.⁴

3 Defendants also claim that Plaintiffs should have requested additional depositions from
4 the Court. This solution is unsatisfactory. Defendants identified over forty witnesses, even
5 though they successfully prevailed upon this Court to limit Plaintiffs to ten depositions. As a
6 practical matter, the Court would have needed to allow over thirty additional depositions in order
7 to depose each of Defendants' identified witnesses. Many of these witnesses could have been of
8 dubious value. And Plaintiffs still do not know which of these witnesses, if any, Defendants will
9 ultimately use in this case or call at trial. The better solution lay with the parties. Plaintiffs
10 asked Defendants to identify the witnesses it actually intended to call at trial, and to allow half-
11 day depositions of only these witnesses. To the extent Defendants did not know at this time who
12 they intended to call at trial, Plaintiffs even offered to conduct these additional depositions at a
13 time closer to trial. Defendants could have avoided this impasse by reaching a compromise with
14 Plaintiffs -- Court intervention was not required.

15
16 **II. Striking the Declarations Is an Appropriate Remedy; However, In the Alternative,
17 Plaintiffs are Amenable to the Possibility of the Court Ordering Late Depositions**

18 Rule 37(c)(1) states in unambiguous terms the appropriate remedy for failure to properly
19 disclose a witness: "the party is not allowed to use that information or witness to supply evidence
20 on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."
21 Defendants rely on two cases from the Southern District of New York to support their argument
22 that preclusion is not an appropriate remedy except in extraordinary circumstances.⁵ However, in

23 _____
24 ³ May 7, 2008 Letter from Laura Franco to David Greenspan (Charhon Decl. Ex. G, attached to Pls.' Motion to Strike).

25 ⁴ May 9, 2008 Letter from David Greenspan to Laura Franco (Charhon Decl. Ex. H, attached to Pls.' Motion to Strike); see Defendants' (May 9, 2008) Supplemental Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1) (identifying Richard Berthelsen and Steve Saxson) (Charhon Decl. Ex. I, attached to Pls.' Motion to Strike).

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27 ⁵ See Defs.' Opp'n to Pls.' Motion to Strike Declarations p. 11 (citing *Atkins v. County of Orange*, 372 F. Supp 2d
28 377, 396 (S.D.N.Y. 2005); *Lesser v. Camp Wildwood*, No. 01 Civ. 4209 (RWS), 2003 U.S. Dist. LEXIS 16921 (S.D.N.Y. Sept. 30, 2003)).

1 the Ninth Circuit, “even absent a showing in the record of bad faith or willfulness, exclusion is an
2 appropriate remedy for failing to fulfill the required disclosure requirements.” *Yeti by Molly, Ltd.*
3 *v. Deckers Outdoors Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (calling this a “self-executing,”
4 “automatic” sanction.) If precluding the witness from testifying at trial is an appropriate remedy,
5 then clearly, precluding a declaration at summary judgment is appropriate.

6 Plaintiffs, however, are amenable to other remedies, and have suggested such remedies to
7 Defendants. Rule 37(c)(1) states, “instead of [exclusion], the court . . . (C) may impose other
8 appropriate sanctions.” To the extent the Court is inclined to allow Defendants to rely on the
9 untested and self-interested declarations they have submitted, Plaintiffs respectfully request that
10 they be allowed to depose these witnesses for no less than a half-day before the Court decides
11 Defendants’ Motion for Summary Judgment. Plaintiffs also request that Defendants specifically
12 identify which of these witnesses, if any, they intend to call at trial so that Plaintiffs can depose
13 these witnesses accordingly.

14 **III. Plaintiffs Did Not Intend to Misrepresent Defendants’ Disclosures.**

15 In their brief, Defendants argue that Plaintiffs misrepresent Defendants’ disclosures.
16 Plaintiffs wrote that Defendants never disclosed Jason Brenner. However, as Defendants note, a
17 Jason *Brinner* was disclosed on June 29, 2007.⁶ Plaintiffs were unaware of Defendants’ mistake
18 at the time of their opening brief. Additionally, Plaintiffs correctly stated that Steve Byrd was
19 disclosed as a witness early in the brief.⁷ However, later in the brief, Plaintiffs mistakenly state
20 that Steve Byrd was never disclosed.⁸ This was an inadvertent mistake, for which Plaintiffs
21 apologize to the Court and to Defendants. Importantly, Plaintiffs cited to Defendants’ disclosures
22 throughout the statement of facts, attached the relevant disclosures, and in no way attempted to
23 hide the contents of any disclosures. These mistakes were wholly unintentional.
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26 ⁶ Defs.’ Br. at 8.

27 ⁷ See Pls.’ Br. at 4.

28 ⁸ See Pls.’ Br. at 7.

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IV. Conclusion

Plaintiffs respectfully request that the Court (1) strike the declarations of Linda Castillon, Adam Sullins, Jason Brenner, Steve Byrd, and Christine Finch from the summary judgment record, and/or (2) order that Plaintiffs be allowed to depose these witnesses for no less than a half-day before the Court decides Defendants' Motion for Summary Judgment.

Respectfully submitted,
MANATT, PHELPS & PHILLIPS, LLP

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