

EXHIBIT K

to the Declaration of Ryan Hilbert
in Support of Plaintiffs' Opposition to
Defendants' Motion for Summary Judgment

IN THE DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT
(SAN FRANCISCO DIVISION)

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

Plaintiffs,

Civil Action

v.

C07 0943 WHA

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

Defendants

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CONFIDENTIAL VIDEOTAPED DEPOSITION OF  
GENE UPSHAW

Wednesday, February 13, 2008,  
9:05 a.m.

Manatt, Phelps & Phillips, LLP,  
One Metro Center, Suite 1100  
700 12th Street, N.W., Washington, D.C.

Reported By:

Susan E. Smith, RPR, Notary Public

1           A. I think I answered that.

2           Q. And the answer is?

3           A. I don't recall.

4           Q. Okay. Thank you. When you make  
5 these presentations, do you ever use notes or  
6 PowerPoint or some written documentation?

7           A. Sometimes.

8           Q. And have you saved those?

9           A. Not really. Most of them I make  
10 -- in most of my presentations I don't have  
11 any written materials at all. I just make  
12 them.

13           Q. Okay. Then it says, just  
14 referring again to page 7, it says the NFLPA  
15 Retired Players Department has obtained Group  
16 Licensing Assignment agreements (GLAs) for  
17 more than 2,900 retired players.

18           What is your understanding of a GLA,  
19 sir?

20           A. Well, a GLA is a licensing  
21 agreement or assignment that the retired  
22 players grant us the right to represent them  
23 in group licensing. But, yes, that's  
24 basically what it is.

25           Q. And what is your understanding of

1 group licensing?

2 A. Group licensing, my understanding  
3 is the use of our players in six or more.

4 Q. Six or more active or present  
5 players?

6 A. Six or more players.

7 Q. Active or present players?

8 A. Active, yes.

9 Q. Or present? Active or former  
10 players?

11 A. If they're designated, yes.

12 Q. Okay. Let's take a look at one of  
13 these GLAs.

14 (Whereupon, Upshaw Deposition Exhibit  
15 No. 110, marked.)

16 Q. Is Exhibit 110 such a GLA as you  
17 have just been discussing, sir?

18 A. Yes, it is.

19 Q. And does it -- can you just point  
20 out to me where it mentions designated  
21 programs, it's only for designated programs?

22 A. It doesn't say designated programs  
23 here. But as a means, the way we operated and  
24 our practice has been designated, and that is  
25 where it all comes from.

1 all eligible NFLPA members who have signed a  
2 group licensing authorization form.

3 Do you know whether such an escrow  
4 account was created, sir?

5 A. No, no escrow account was created.

6 Q. And when it says eligible NFLPA  
7 members, do you have an understanding of what  
8 that means?

9 A. Yes.

10 Q. What is your understanding?

11 A. It would be, in this sense here it  
12 would be as it relates to NFLPA members that  
13 had signed a group licensing authorization.

14 Q. And when you say NFLPA members who  
15 had signed a group licensing authorization, do  
16 you mean active? Does that include active  
17 players?

18 A. Yes.

19 Q. Do the active players actually  
20 sign a group licensing authorization?

21 A. Yes, they do.

22 Q. And is that part of the CBA or is  
23 that separate?

24 A. It's a separate agreement. We  
25 have it in two forms.

1           Q. Okay. And he refers to an  
2 organization, Mr. Nahra does in the first line  
3 of the letter, called Personalities &  
4 Promotions International. Were you aware of  
5 that organization in 2003?

6           A. Yes.

7           Q. And was that organization causing  
8 a problem, from your point of view?

9           A. I don't think it was causing a  
10 problem from our point of view, but I was  
11 aware that there was such an organization.

12          Q. Well, Mr. Nahra seems to be  
13 complaining about a propaganda campaign that  
14 Personalities & Promotions was engaging in.  
15 Were you aware of that?

16          A. I'm not familiar with the  
17 background on that.

18          Q. Okay. And then Mr. Nahra  
19 describes the retired player group licensing  
20 program in the second paragraph of the letter.  
21 Do you see that?

22          A. Yes.

23          Q. And he says that to participate in  
24 that program, the retired players -- I'm  
25 reading now the second sentence -- the retired

1 players sign the NFLPA Retired Player Group  
2 Licensing Form, GLA, attached. And that's the  
3 same GLA basically that Mr. Adderley signed.

4 Do you see that?

5 A. Yes.

6 Q. Okay. And he says, the next  
7 sentence, "In spite of your efforts to suggest  
8 otherwise, the GLA grants the NFLPA the  
9 nonexclusive right to license companies to use  
10 a player's name and likeness in programs  
11 involving six or more present and/or former  
12 NFL players. Is that consistent with your  
13 understanding, sir?

14 A. Yes.

15 Q. And then he says: Because the  
16 rights granted are nonexclusive -- and if you  
17 look at the attachment, it does say  
18 nonexclusive in writing in the second line.  
19 Do you see that?

20 A. Yes.

21 Q. And what is your -- I'm not going  
22 to ask you any legal things or anything like  
23 that, but what is your understanding as the  
24 executive director of the union and the  
25 chairman of PLAYERS INC as to what the

1 fees received for use of retired players'  
2 names and images to the retired players  
3 utilized and we will continue to do so.

4 So does that mean that -- there was  
5 no distribution, of course, to an escrow  
6 account because no escrow account existed; is  
7 that right?

8 A. That's correct. The money that  
9 was generated by a retired player went to the  
10 retired player.

11 Q. Do you know why the escrow account  
12 that is mentioned in the GLA was not created?

13 A. The reason it wasn't created,  
14 because we passed the money straight to the  
15 players. There was no money to set up an  
16 escrow account. I will be glad to take a  
17 loan. We can set one up today. But we don't  
18 have one, we never did.

19 Q. And did you ever inform any  
20 retired player that the escrow account was not  
21 being set up?

22 A. No.

23 Q. Now, when you say we have  
24 distributed all of the licensing fees received  
25 for use of retired players' names and images



1 he's a retired player. And we -- and what he  
2 is talking about is how does the computer  
3 recognize the difference between moving from  
4 one category to the other.

5 Q. And then he refers to payment pool  
6 eligibility. What is your understanding of  
7 that?

8 A. The payment pool eligibility would  
9 apply to the status of a Tiki Barber. If Tiki  
10 Barber was still involved in active player  
11 programs because he was an active player until  
12 he retired, he would still be entitled as an  
13 active player to eligibility from the pool  
14 that went to active players. There is no pool  
15 for retired players. That's what this is all  
16 about.

17 Q. And this payment pool, is that an  
18 equal share payment pool that you're referring  
19 to?

20 A. It's an equal share payment pool  
21 that applies to active players.

22 Q. Right. So whether you're a star  
23 or whether you're a third stringer, you get an  
24 equal share?

25 A. Yes.

1 of the question.

2 Q. You may answer.

3 A. I don't understand what that  
4 means.

5 Q. Okay. Have you ever, has the  
6 NFLPA or PI ever retained an independent  
7 third-party organization to evaluate a  
8 transaction between the NFLPA and PLAYERS INC  
9 in order to make sure that it was done in a  
10 proper fashion?

11 A. Yes.

12 Q. And when was that?

13 A. We did it initially when we formed  
14 the PLAYERS INC. We were trying to evaluate  
15 what the rights were that we're conveying from  
16 NFLPA to PLAYERS INC.

17 Q. And why did you consider it  
18 necessary to retain an independent third-party  
19 organization to help you out there?

20 A. Because we wanted to make sure we  
21 complied with what the law said at the time.  
22 And, as you pointed out, we wanted to make  
23 sure it was an arm's length transaction.

24 Q. And how many times did you, has  
25 NFLPA or PI retained an independent

1 third-party organization to play the role that  
2 you just described? You mentioned once, but  
3 has ever happened since?

4 A. I don't think it's ever happened  
5 since. I'm not sure.

6 Q. And that was back in, like, 1995,  
7 right?

8 A. '94, '95. I'm sure it was back  
9 then. But I can't recall, and I'm not going  
10 to speculate on what we might have done since  
11 then.

12 Q. Mr. Kessler and I agree, we both  
13 don't want you to speculate. That's a  
14 no-brainer. Okay, great.

15 So then it says, we're looking here,  
16 How is PLAYERS INC structured? And it says  
17 that Gene Upshaw, who serves as chairman of  
18 PLAYERS INC, as well as executive VP and Chief  
19 Operating Officer Andrew Feffer, Steve Saxon,  
20 attorney with the Groom Group in Washington,  
21 D.C., and who also serves as tax counsel to  
22 the NFLPA and PLAYERS INC, and Marvin  
23 Zimmerman, a Chicago businessman, has been  
24 involved with the NFLPA for over 30 years.

25 What has been Mr. Zimmerman's

1           A. This transaction and the value of  
2 this transaction was done on the advice of tax  
3 counsel, and that's how we valued. And that  
4 was advice that we used when we made this  
5 transaction.

6           Q. So when it says here in the last  
7 paragraph, last Whereas paragraph of the first  
8 page, it says whereas the NFLPA and PLAYERS  
9 INC agree that further judgment may be  
10 necessary after completion of an independent,  
11 third-party evaluation of the value conferred  
12 by the players, the NFLPA, and PLAYERS INC,  
13 what was that third-party valuation? Was that  
14 the tax counsel that you mentioned?

15          A. No. It says that NFLPA and  
16 PLAYERS INC agree that further adjustments may  
17 be necessary.

18          Q. Yeah, I agree it says that. It  
19 says after completion of an independent,  
20 third-party evaluation. I'm asking you, was  
21 that third-party independent evaluation ever  
22 completed?

23          A. No, not that I'm aware of. I  
24 mean, I'm not aware that there was a -- no,  
25 I'm not.

1           Q. Looking at the last paragraph on  
2 the second page, paragraph E, it says:  
3 Notwithstanding the other provisions of this  
4 Section 4, \$8,000,000 of the amount described  
5 in the Section 4(A) shall be paid out of the  
6 licensing revenue depository account.

7           Is that the active players equal  
8 share royalty pool?

9           A. Everything in this transaction  
10 deals with active players.

11          Q. I understand. I'm just asking --

12          A. But that's, yes, that's where it  
13 came from. It's the active players.

14          Q. So with respect -- you mentioned  
15 before, with respect to retired players, that  
16 you represented them when they were designated  
17 by a licensee. Was it the same with active  
18 players? Did they have to be designated by a  
19 licensee for you to represent them?

20          A. No.

21          Q. They got an equal share  
22 regardless; is that correct?

23          A. They are -- this pool of money was  
24 designated, and it was for active players, not  
25 retired players. And we represented and do

1 represent all of the active players.

2 Q. And the active players get an  
3 equal share out of this pool; is that correct?

4 A. Yes.

5 Q. And they get that equal share  
6 whether their images are used or not?

7 A. They get that equal share if they  
8 meet the eligibility rules that are  
9 established.

10 Q. Whether their -- and they get the  
11 equal share --

12 A. If that's part of their  
13 eligibility, yes.

14 Q. -- whether or not their image is  
15 used?

16 A. Yes.

17 Q. Okay, fine. And whether or not  
18 they're designated by the licensee?

19 A. Yes. As I said earlier, the  
20 designation is only one category in which we,  
21 we do represent the retired players. There  
22 are other categories that are not designated  
23 but we do still represent them, too.

24 Q. What categories are those?

25 A. Those are individual requests by

1 particular game, they designate who they want  
2 to use. There are other calls we get from  
3 people that will say we'd like to have an  
4 appearance, can you get this player to appear?  
5 Can you get this player to participate in this  
6 particular program? We facilitate that by  
7 going to the player and asking him would he  
8 like to participate. We tell him what the fee  
9 is and he decides.

10 Q. Okay. And do you make efforts to  
11 get the licensees to designate retired  
12 players?

13 A. It's up to the licensee. It's  
14 their business. They determine what's best  
15 for their business. We have no input  
16 whatsoever in telling them who they should use  
17 and who they should not use. They have their  
18 own company. We just facilitate as much as we  
19 possibly can to help.

20 Q. But you don't make any affirmative  
21 efforts to sell them the images of retired  
22 players as a group or individually?

23 A. I don't run any licensee's  
24 company. That's up to them.

25 Q. So you don't make those

1 affirmative sales efforts to sell retired  
2 players to licensees, images to licensees?

3 MR. KESSLER: Objection to the form  
4 of the question.

5 A. I've answered it. I can't answer  
6 any different.

7 Q. And do you make any efforts with  
8 respect to selling the images of retired  
9 players to companies that request, make  
10 requests for NFL player services?

11 A. If they're making a request, it's  
12 pretty much sold.

13 Q. Right. But do you make efforts to  
14 sell that prior to their making a request?

15 A. Not really.

16 MR. KATZ: Let me have the reporter  
17 mark as the next a document headed Agreement.

18 (Whereupon, Upshaw Deposition Exhibit  
19 No. 125, marked.)

20 Q. Do you recognize Exhibit 125, sir?

21 A. Yes.

22 Q. Can you tell us what it is,  
23 please?

24 A. This is an agreement establishing  
25 PLAYERS INC.



1 STATE OF MARYLAND ) ss  
2 COUNTY OF BALTIMORE)

3  
4 I, Susan Smith, RPR, a Notary Public  
5 of the State of Maryland, do hereby certify  
6 that the within named, GENE UPSHAW personally  
7 appeared before me at the time and place  
8 herein set out, and after having been duly  
9 sworn by me, was interrogated by counsel.

10 I further certify that the  
11 examination was recorded stenographically by  
12 me, and this transcript is a true record of  
13 the proceedings.

14 I further certify that the  
15 stipulations contained herein were entered  
16 into by counsel in my presence.

17 I further certify that I am not of  
18 counsel to any of the parties, nor an employee  
19 of counsel, nor related to any of the parties,  
20 nor in anyway interested in the outcome of  
21 this action.

22 As witness my hand and notarial seal  
23 this 14th day of February, 2008.

24 My commission expires  
25 November 1, 2010

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Susan E. Smith  
Notary Public