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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 0943 WHA

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Thursday, July 24, 2008 at 8:00 a.m., or as soon thereafter as the matter may be heard in the above-referenced Court, Defendants National Football League Players Association ("NFLPA") and National Football League Players Incorporated d/b/a Players Inc ("Players Inc") (collectively, "Defendants"), will and hereby do move, pursuant to Fed. R. Civ. P. 56, for summary judgment as to all causes of action alleged against them by Plaintiff Herbert Anthony Adderley and the class he represents, which was certified by this Court in its Order dated April 29, 2008.

This Motion is based on the accompanying Memorandum of Points and Authorities, the accompanying declarations, the pleadings in this matter, and on such further evidence and argument as may be presented at the hearing on this Motion.

Date: June 13, 2008

DEWEY & LEBOEUF LLP

BY: /s/Jeffrey L. Kessler
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Pursuant to Fed. R. Civ. P. 56, Defendants National Football League Players Association ("NFLPA") and National Football League Players Incorporated ("Players Inc") (collectively, "Defendants") hereby submit this Motion for Summary Judgment against Plaintiff Herbert Adderley and the GLA Class.

PRELIMINARY STATEMENT

Summary judgment should be granted against both claims of the GLA Class – breach of contract and breach of fiduciary duty – because there is not a shred of evidence in the record to support Plaintiffs' claim that the GLA Class members have not been properly compensated for the licensing of their rights. From the beginning of this case, class counsel has repeatedly misled the Court by making brazen claims that Defendants have licensed the rights of retired player GLA Class members to third party licensees, such as Electronic Arts, Inc. ("EA"), without compensating those class members. Indeed, this is the sine qua non of all the GLA class claims, and the basis upon which the Court permitted the Third Amended Complaint to be filed.[1] Now that discovery has been completed, however, the record establishes that there is no evidence to raise even a genuine issue of material fact in support of the GLA Class claims.

To the contrary, the undisputed evidence establishes that all GLA Class members were paid when their rights were licensed, and that the third party license agreements whose revenues are sought by Plaintiffs were not intended to, and did not, license the rights of any retired players. Rather, the EA and other license agreements at issue, and all of the licensing revenues generated under those agreements, were 100% attributable to licensing the rights of active players. [redacted]

[1] See Third Amended Compl. ("TAC") ¶¶ 20-28, 51-55 (attached as Exhibit 1 to the Declaration of David Greenspan filed concurrently herewith); see Order Granting in Part and Denying in Part Pls.' Mot. for Leave to File an Am. Compl. at 4-7 (Nov. 14, 2007) (Rec. Doc. 176).

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[redacted]

This is fatal to Plaintiffs' claims because it cannot be seriously disputed that the GLA Class has no contractual or other legal entitlement to revenues generated by active player licensing.

Indeed, Adderley admitted at his deposition that the retired player GLA – though not, as this Court has noted, a model of clarity – provides that the only moneys to be "divided" between retired players are "moneys generated by such licensing of retired player group rights," and that he understood that he would only get paid when his rights were used.[4] It is also undisputed that the GLA says nothing about retired players participating in any "equal share" pool.[5] Most significantly, Plaintiffs do not dispute that when Defendants licensed the rights of retired players, primarily through "ad hoc" deals (which included group licensing [redacted]

[2] [redacted]

[3] [redacted]

[4] Herbert Adderley Depo. Tr. ("Adderley Depo.") 89:13-90:1, 92:8-17, 101:3-9, 96:13-18 (Greenspan Decl. Ex. 4); Adderley GLAs (Greenspan Decl., Ex. 5) (emphasis added).

[5] See Adderley Depo. 255:4-257:11 ("'Equally' is not in here.") (Greenspan Decl. Ex. 4).

In contrast to this undisputed record evidence (which conclusively resolves, by undisputed extrinsic evidence, any ambiguity in the language of the GLAs or the license agreements), all that Plaintiffs offer to "support" the GLA Class's claims are the fanciful arguments of class counsel. There is simply no record evidence to raise any genuine issue of material fact in support of Plaintiffs' claims that there were any retired player licensing revenues that were not properly distributed to the GLA Class. Rather, the undisputed evidence establishes that all of the additional licensing revenues sought by the GLA Class – including an "equal share" of revenues in the active player royalty pool – are revenues solely attributable to the licensing of active player rights. As a result, Plaintiffs' breach of contract and breach of fiduciary duty claims must be dismissed on summary judgment.

There are additional, independent defects requiring summary judgment against Plaintiffs' breach of fiduciary duty claim. First, now that the Court has ruled that the law of Virginia or Washington, D.C. will apply, it is clear that Defendants had no fiduciary duty to Plaintiffs. Second, as this Court knows, an essential element of any claim of breach of fiduciary duty is proof of injury to each GLA Class member. Yet, Plaintiffs have offered no evidence to raise a genuine issue of material fact that each GLA class member suffered any such injury. To the contrary, the undisputed facts establish that the market value of group licensing rights for most GLA class members was zero because they are virtually unknown to today's fans. As a result, these class members would not suffer any fact of injury even if their rights had been licensed without compensation. Plaintiffs have tried to overcome this failure of proof by directing their paid accounting expert to apply an "equal shares" formula as a purported means for proving injury and damages, and even to include revenues from contracts that make no mention of retired players. But there is no legal or factual basis for using such an arbitrary formula as a substitute for individual proof of injury, particularly where, as here, the GLA says nothing about "equal shares," and it is undisputed that the economic values of the rights of individual retired players are widely disparate, with most GLA Class members' licensing rights having no value at all.

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STATEMENT OF UNDISPUTED FACTS

A. The Parties

Defendant Players Inc, a Virginia corporation, is a for-profit licensing, sponsorship, marketing, and content development company that negotiates and facilitates licensing and marketing opportunities for active and some retired NFL players. TAC ¶¶ 10, 11. Defendant NFLPA is the union that represents all active NFL players. See id. The NFLPA also owns 79% of Players Inc. Id.

Plaintiff Adderley is a retired NFL player who signed two Group Licensing Authorizations ("GLAs") with the NFLPA that were effective, in relevant part, from February 14, 2003 to December 31, 2005. TAC ¶ 18; Adderley GLAs (Greenspan Decl. Ex. 4). The GLA Class consists of "[a]ll retired NFL players who signed GLAs with the NFLPA that were in effect between February 14, 2003 and February 14, 2007" and that contain the same operative paragraph as the Adderley GLA. Stipulation and Order Revising Class Definition and Class Notice (June 9, 2008) (Rec. Doc. 289).

B. Defendants' Retired Player Group Licensing Program

1. The Retired Player GLAs

Through GLAs signed by players in the GLA Class, retired players assigned to the NFLPA the "non-exclusive" right to use their names, images and other attributes in group licensing ("defined as programs in which a licensee utilizes a total of six (6) or more present or former NFL player images").[6] E.g., Adderley GLAs. [redacted] the NFLPA assigned the retired players' GLAs to Players Inc, and Players Inc tried to find group licensing opportunities for retired players with third party licensees. TAC ¶¶ 13, 14. [redacted]

[6] [redacted]

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2. [redacted]

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[redacted] Adderley himself testified to the undisputed fact that the rights of superstar retired players like Joe

[redacted]

Montana are highly valued, but the rights of journeymen retired players are not:

> 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.
> 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.[19]

Class counsel has also conceded this point:

> "Your Honor made a comment on it when the case was in a different posture earlier on. 'Well, isn't it true that Joe Montana's image is worth more than the third string center on that team?' And that's true. We acknowledge that."
>
> * * *
>
> "If you're Joe Montana you get one thing. A lesser player would get another thing. He probably wouldn't be used."[20]

[redacted]

[19] Adderley Depo. 83:3-84:1 (Greenspan Decl. Ex. 4).

[20] Tr. of Proceedings on Pls.' Mot. for Class Certification ("Class Hearing Tr.") 8:3-9, 11:20-22 (Apr. 24, 2008) (emphasis added) (Greenspan Decl. Ex. 13); May 31, 2007 Hearing Tr. 43:25-45:13 ("COURT: 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.") (Greenspan Decl. Ex. 14).

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Most of this retired player licensing income was generated through "ad hoc" agreements, which are licensing agreements between retired players and Players Inc whereby retired players license their rights to Players Inc for use in designated programs. Although class counsel told the Court at the recent class certification hearing that he did not know whether the [redacted] paid to retired players from ad hoc agreements was generated and paid by Players Inc, (Class Hearing Tr. 10:18-11:5) (Greenspan Decl. Ex. 13), the undisputed record evidence establishes that it was, in fact, Defendants who generated this substantial amount of money for retired players, including many GLA Class members. See [redacted]. Indeed, the GLA Class has disavowed any legal complaint with respect to the distribution of this money.[23]

There can also be no genuine dispute that – contrary to class counsel's unsupported representations, (Class Hearing Tr. 10:3-9) – much of this [redacted] in ad hoc licensing revenues constituted "group" licensing of retired player rights, not "individual" licensing. [redacted] The fact that ad hoc agreements, rather than GLAs, were used to license and compensate retired players for this program does not change the indisputable fact that the program involved six or more players and thus constituted group licensing. [redacted]

[23] See, e.g., Mot. for Leave to File TAC at 4 n.1 ("Plaintiffs are not claiming that Defendants failed to pay Mr. Adderley pursuant to an 'ad hoc' agreement, nor have they based any claims upon an 'ad hoc' agreement.") (Rec. Doc. 190).

[24] See Adderley "ad hoc" agreement (paying Adderley $6,800); Montana "ad hoc" agreement (paying Montana $40,000) (Greenspan Decl. Ex. 17) (also including the other 28 retired players' "ad hoc" agreements in connection with this Upper Deck program); see also Expert Report of Roger G. Noll at 49-50 (June 12, 2008) (Greenspan Decl. Ex. 18).

[25] Excerpts of Player Marketing Reports (Greenspan Decl. Ex. 19).

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[redacted]

[redacted]

[redacted]

C. The GLA Class Is Improperly Seeking to Recover Licensing Revenues That Are Exclusively Attributable to Active Player Licensing

Adderley concedes that the GLA he and other class members signed does not permit retired players to recover money that is generated by licensing active players' rights:

> Q: Sir, do you believe, as a retired player, you're entitled to any money that's generated by the licensing of active players?
> A: No.
>
> * * *
>
> Q: And what you thought you were agreeing to get [in the Adderley GLA] was that if your rights were licensed and used, you would get some money; correct?
> A: Correct.

Adderley Depo. 96:13-18, 92:7-17 (emphases added), 89:13-90:7 (same) (Greenspan Decl. Ex. 4); see also Adderley GLAs (stating that the revenues to "be divided between the player and an escrow account" are "the moneys generated by such licensing of retired player group rights.") (emphasis added) (Greenspan Decl. Ex. 5).

[redacted]

[redacted]

[redacted]

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Despite Adderley's admission, the undisputed evidence establishes that all of the revenues that the GLA Class are trying to recover are 100% attributable to the licensing of active players' rights. Specifically, the GLA Class is seeking an "equal share" of the licensing revenues distributed to active players as a result of 96 license agreements that Defendants entered into with third parties such as EA, Topps, and Upper Deck. TAC ¶¶ 20, 28. There can be no genuine dispute, however, that all of these agreements only conveyed active player rights.

1. The [redacted] Agreements Did Not Convey Retired Player Rights

Plaintiffs contend that Players Inc's [redacted] agreements with [redacted] constitute the "best" examples of Defendants licensing the rights of retired players in the GLA Class without compensating them. TAC ¶ 20. But the undisputed evidence establishes that the [redacted] Agreements did not license the rights of retired players, and that the revenues paid by [redacted] were only for active player rights. [redacted]

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[redacted]

2. The [redacted] Agreements Did Not Convey Retired Player Rights

The undisputed evidence relating to [redacted] agreements with [redacted] establishes that those agreements also were not intended to, and did not, license any retired player rights. [redacted]

[redacted]

[34] The NFLPA explained why video game companies are generally uninterested in retired players' rights in the Touchback retired player newsletter: "The NFLPA and Players Inc have worked hard to secure licensing agreements for games using retired players' names and images, but the video-game companies' response has been restrained. They are most interested in obtaining the rights of active players because they maintain that new rosters each year permit them to change the game annually, creating a new product." (Greenspan Decl. Ex. 25).

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[redacted]

3. Plaintiffs Have No Evidence That Any of the Other License Agreements at Issue Conveyed Retired Player Rights

Plaintiffs allege that the GLA Class members' rights were licensed in [redacted] license agreements containing the same language as that in the [redacted] Agreements.[39] But Plaintiffs once again have no evidence that the rights of any GLA Class members were licensed pursuant to any of these agreements. To the contrary, the undisputed evidence shows that these other agreements – [redacted] – licensed active players only.

[redacted]

[39] See TAC ¶¶ 20-28; Pls.' Mot. for Class Certification, at 6 n.3, 8-9 (Mar. 14, 2008) (Rec. Doc. 217); [redacted]

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[redacted]

D. The GLA Class Is Seeking "Equal Shares" of Active Player Money

It similarly cannot be disputed that the GLA Class's "equal shares" claim is an attempt to obtain "equal shares" of the active player licensing revenues generated [redacted], and all of the other active player license agreements at issue [redacted]

[redacted]

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[redacted] See TAC ¶¶ 32-34.[46] [redacted]

E. All of the Other Revenues That the GLA Class Is Trying To Recover Are Also Active Player Licensing Revenues

[redacted]

[redacted]

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[redacted]

ARGUMENT

"Summary judgment is appropriate if the nonmoving party bears the ultimate burden of proof at trial as to an element essential to its case, and fails to make a showing

[redacted]

[redacted] Each year, Defendants financial statements – including the distribution of the GLR pool – is submitted to and approved by the Board of Player Representatives, which is comprised of active players elected by their teammates. [redacted]

[redacted]

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sufficient to establish a genuine dispute of fact with respect to the existence of that element."[52] Thus, if the Court finds that Plaintiffs have not carried their burden on even a single element of their breach of contract, breach of fiduciary duty, or accounting causes of action, that cause of action must be dismissed in its entirety.

I. SUMMARY JUDGMENT SHOULD BE GRANTED AGAINST THE GLA CLASS'S BREACH OF CONTRACT CLAIM

The essential elements of a claim for breach of contract are (1) a legal obligation of a defendant to a plaintiff, (2) a violation or breach of that obligation, and (3) a consequential injury or damage to the plaintiff. Caudill v. Wise Rambler, 210 Va. 11, 13 (1969); see also Bembery v. District of Columbia, 758 A.2d 518, 520 (D.C. 2000).[53] Because Plaintiffs are seeking to recover money that the undisputed evidence establishes does not involve the use of retired player rights and is solely attributable to active player licensing, Plaintiffs' breach of contract claim fails as to all three elements.

A. The GLA Class Is Not Contractually Entitled to Active Player Licensing Revenues

The GLA Class's breach of contract claim is based upon Defendants' alleged breach of, and the GLA Class's alleged injuries arising out of, the following provision in the Adderley GLA:

> "It is further understood that the moneys generated by such licensing of retired player group rights will be divided between the player and an escrow account for all eligible NFLPA members who have signed a group licensing authorization form."

E.g., TAC ¶ 19, 29 (quoting Adderley GLA) (emphasis added).

Although, as the Court has recognized, the Adderley GLA is not a model of clarity, several points are undisputed. First, the GLA language provides that the only moneys to "be divided between the player and an escrow account" are "moneys generated by such licensing

[52] City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1365 (9th Cir. 1992).

[53] The Court ruled in its Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification ("Class Cert. Order") that the "certified claims will be governed by Virginia or District of Columbia law, which to be decided later." Class Cert. Order at 8 (Rec. Doc. 275). Accordingly, Defendants cite to both Virginia and D.C. law for the purposes of this Motion. As the EA and other license agreements have a New York choice of law clause, Defendants also cite to New York law where appropriate.

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of retired player group rights." Id. (emphasis added). Adderley himself has thus admitted that retired players are not "entitled to any money that's generated by the licensing of active players."[54] And, even the TAC characterizes the Adderley GLAs as "provid[ing] that moneys generated by licensing of retired player rights" should be divided among the GLA Class. TAC ¶ 29 (emphasis added). Second, Adderley and Defendants agree that the GLA only provides for retired players to be paid when their rights are used. See Adderley Depo. 89:13-90:1, 92:8-17 (testifying that he understood the GLA to mean "that if [his] rights were licensed and used, [he] would get some money" and that he "never thought that [he] should get something if nobody used [his] image") (Greenspan Decl. Ex. 4). This agreement between Adderley and Defendants about the intended meaning of the GLA conclusively resolves any ambiguity in the contractual language. Simply put, there is no basis in the GLA for a claim to be made against any active player licensing revenues.

B. The [redacted] Licensing Revenues Sought By Plaintiffs Do Not Involve Retired Player Rights and Thus Cannot Be the Basis of Any Claim of Breach

The GLA Class alleges that Defendants "breached the terms of the Adderley GLA(s) by failing to share the revenues they received from such licenses – [redacted] – with retirees." TAC ¶ 29. The undisputed evidence establishes, however, that all of the revenues generated by the license agreements put at issue by Plaintiffs are solely attributable to active (not retired) player licensing, to which the GLA Class has no contractual entitlement by the express terms of the GLA.

1. It Is Clear From the Face of the License Agreements at Issue That They Do Not License Retired Players' Rights

Plaintiffs' claim that Defendants licensed the GLA Class members' rights without compensating them rests entirely on a boilerplate "retired player" reference that appears in [redacted] license agreements Plaintiffs have identified. But, it is clear from the face of these agreements,

[54] Adderley Depo. 96:13-18 (Greenspan Decl. Ex. 4).

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as a matter of law, that retired player rights were not being licensed.[55] The boilerplate reference to retired players that Plaintiffs rely upon is the following:

[redacted]

[55] See, e.g., Ft. Lincoln Civic Ass'n, Inc. v. Ft. Lincoln New Town Corp., 944 A.2d 1055, 1064 (D.C. 2008) ("Where the language [of the contract] in question is unambiguous, its interpretation is a question of law for the court."); accord Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 324 (2007) (same); Waikoloa Ltd. P'ship v. Arkwright, 268 Va. 40, 46-47 (2004) (same).

[redacted]

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2. The Undisputed Extrinsic Evidence Further Establishes That the License Agreements at Issue Conveyed Only Active Players Rights

If the Court was to determine that the language of the [redacted] license

[57] The list of active players whose images licensees acquired pursuant to their license agreements with Defendants used to be provided as an "Attachment B" that was hundreds of pages long. For example, a 2001 Upper Deck license agreement has an Attachment B, which included only players who were active at the time that agreement was effective. See 2001 Upper Deck Agreement at Attachment B (Greenspan Decl. Ex. 41). The website is now used as a more convenient and efficient way of informing licensees which active players' images they have acquired, and what teams those active players currently play for. See Linzner 30(b)(6) Depo. 142:20-143:8; Nahra Depo. 272:22-274:9 (Greenspan Decl. Exs. 2, 6).

[58] See Nahra Depo. 279:8-14 ("[T]he report that they go to on the website which used to be Attachment B contains a list of active players. Just active players.") (Greenspan Decl. Ex. 6).

agreements at issue was ambiguous as to whether it licensed retired players' rights, then extrinsic evidence should be considered.[59] "[I]f that evidence demonstrates that only one view is reasonable – notwithstanding the facial ambiguity – the Court must decide the contract interpretation question as a matter of law."[60] Moreover, where, as here, all of the parties to the agreements (Defendants and their licensees) share the same contractual interpretation, a contrary interpretation advanced by strangers to that contract (Plaintiffs) is irrelevant as a matter of law.[61]

In this case, as set forth in detail at pp. 9-14, supra, the undisputed extrinsic evidence confirms that the license agreements at issue were not intended to, and did not, convey retired players' rights [redacted]

[59] See Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 569 (2002); Capital City Mortg. Corp. v. Habana Village Art & Folklore, Inc., 747 A.2d 564, 567 (D.C. 2000); Georgiades v. Biggs, 197 Va. 630, 633-34 (1956).

[60] Farmland Indus., Inc. v. Grain Bd. of Iraq, 904 F.2d 732, 736 (D.C. Cir. 1990) (applying D.C. law); accord Burns v. Eby & Walker, Inc., 226 Va. 218, 221-22 (1983); Wing Ming Props. (U.S.A.) Ltd. v. Mott Operating Corp., 148 Misc.2d 680, 684 (N.Y. Sup. Ct. 1990).

[61] See, e.g., Reliance Standard Life Ins. Co. v. Matula, No. 05-C-0788, 2007 U.S. Dist. LEXIS 24523, *25 (E.D. Wis. Mar. 30, 2007) ("[D]efendants are trying to tell a party to an agreement [plaintiff] that that party's interpretation of its own agreement is wrong. As strangers to the Agreement, the . . . defendants are not in an authoritative position regarding what the Agreement means and how the parties to the Agreement interpret it."); Waddy v. Sears, Roebuck & Co., No. C-92-2903-VRW, 1994 WL 392483, *11 (N.D. Cal. July 8, 1994) ("Tucker's employment contract is defined by the understanding and intent of Sears and Tucker, not third parties to the contract."); Williams Tile & Marble Co., Inc. v. Ra-Lin & Assocs., 426 S.E.2d 598, 600 (Ga. Ct. App. 1992) (the "interpretation of a contractual provision by a stranger to the contract obviously has no probative relevance whatsoever"); Combs v. Hunt, 140 Va. 627, 640 (1924) ("[W]e know of no principle of law or public policy which forbids [the] operation [of an agreement] exactly as stipulated by the parties, with which, as already stated, a stranger to the contract has absolutely no concern."); Matsushita Elec. Corp. v. Loral Corp., No. 93-1435, 1994 WL 497955, *2 (Fed. Cir. Sept. 23, 1994) (rejecting a third party's interpretation of a license agreement where the original contracting parties both understood the contract to have a different meaning) (unpublished opinion).

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[redacted]

In the face of this undisputed evidence about the mutual understanding of all of the parties to the license agreements, Plaintiffs offer only the unsupported interpretation of class counsel. The arguments of counsel, however, are insufficient to meet the plaintiffs' burden of proof in opposition to a summary judgment motion. Barcamerica Int'l USA Trust v. Tyfield Importers, Inc., 289 F.3d 589, 593 n.4 (9th Cir. 2002) ("The arguments and statements of counsel are not evidence and do not create issues of material fact capable of defeating an otherwise valid motion for summary judgment.") (quotation omitted).[66]

3. Plaintiffs' Contractual "Interpretation" Must Also Be Rejected Because It Is Commercially Unreasonable and Absurd

It is black letter law that courts should decline to interpret contracts in a manner that would lead to results that are absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties.[67] But that is exactly what would follow if Plaintiffs' "interpretation" of the [redacted] license agreements at issue was sustained. [redacted]

[66] In a recent Interrogatory response, and in their "expert's" damages report, Plaintiffs indicated that the GLA Class may also be seeking to recover revenues paid under the agreements that do not include even the boilerplate "retired player" reference, [redacted] Pls.' Resps. and Objs. to Defs.' Third Set of Interrogs. at Resp. No. 9 (May 19, 2008); Rowley Report § IV.C (Greenspan Decl. Exs. 42, 20). Since these agreements, such as the [redacted], do not even mention retired players, the Court should conclude, as a matter of law, that they too do not license retired players' rights.

[67] Miller & Long Co., Inc. v. John J. Kirlin, Inc., 908 A.2d 1158, 1160-61 (D.C. 2006); In re Lipper Holdings, LLC, 1 A.D.3d 170, 171 (N.Y. 1st Dep't 2003); Transit Cas. Co. v. Hartman's, Inc., 218 Va. 703, 708 (1978).

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[redacted] [69] [redacted]

[redacted]

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[68] [redacted]

[69] See also C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, 505 F.3d 818, 820-21 (8th Cir. 2007) ("[F]antasy baseball products incorporate the names along with performance and biographical data of actual major league baseball players…. A participant's success, and his or her team's success, depends on the actual performance of fantasy team's players on their respective actual teams during the course of the major league baseball season.") (emphases added).

[70] See 2004 and 2006 RC2 Brands Agreements ¶¶ 1(A), 2(A) & Rowley Report, Ex. 8 (identifying both RC2 Brands Agreements) (Greenspan Decl. Exs. 44, 20).

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[redacted] since the language of the GLA says nothing about such an equal share, see Adderley Depo. 255:4-257:11 ("'Equally' is not in here.") (Greenspan Decl. Ex. 4), and the undisputed evidence establishes that [redacted]

[redacted]

[75] Class Hearing Tr. 8:12-17 (Class Counsel: "We say [the escrow account] was created. We say it's an equal share fund.") (Greenspan Decl. Ex. 13).

[redacted]

* * *

[redacted]

Indeed, it is undisputed that the Adderley GLA does not mention anything about "equal shares" of any royalty pool. See Adderley Depo. 255:4-257:11 ("'Equally' is not in here.").[80]

Further, Plaintiffs have absolutely no basis to claim, as they have done in their expert reports, an equal share of revenues generated by license agreements for active player rights that make no mention at all of retired players. As noted above, the GLA is expressly limited to revenue generated by retired player licensing. Plaintiffs' claims for an equal share of all revenue from deals that have nothing to do with retired players and make no mention of retired players, shows that Plaintiffs' claims are unfounded and political.

[redacted]

[80] Defendants note that Plaintiffs' breach of contract claim is not based on the absence of any escrow account (to the contrary, Plaintiffs make the unsupported claim that the GLR pool is the escrow account). See, e.g., Class Hearing Tr. 8:10-17 [redacted]

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Finally, there is no legal basis for the GLA Class to claim a breach of the [redacted]. As non-parties to those agreements, it is black letter law that GLA Class members have no standing to sue for any purported breach.[81] The only situation in which non-parties have standing to sue over a contract is if they are third-party beneficiaries to that contract.[82] Plaintiffs, however, have not alleged, and cannot allege, that the GLA Class members are third-party beneficiaries to [redacted]. Third-party beneficiaries "must show that the parties to a contract 'clearly and definitely intended' to confer a benefit upon [them]."[83] There is not a shred of evidence to indicate that this was the case.

2. The GLA Class Is Not Contractually Entitled to Any Other Money from the GLR Pool

[redacted]

[81] See, e.g., Combs v. Hunt, 140 Va. 627, 640 (1924); Ford v. Sturgis, 14 F.2d 253, 255 (D.C. 1926) ("[I]f we hold that the plaintiff can sue in such case, there is no point at which such actions will stop. The only safe rule is to confine the right to recover to those who enter into the contract; for if we go one step beyond that, there is no reason why we should not go fifty.").

[82] See Ft. Lincoln Civic Assoc., 944 A.2d at 1064.

[83] Copenhaver v. Rogers, 238 Va. 361, 367 (1989) ("The essence of a third-party beneficiary's claim is that others have agreed between themselves to bestow a benefit upon a third party but one of the parties to the agreement fails to uphold his portion of the bargain.") (citation omitted); see also Ft. Lincoln Civic Assoc., 944 A.2d at 1064-65; Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 N.Y.2d 38, 44-45 (1985).

[redacted]

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[redacted] Summary judgment must thus be granted against all of Plaintiffs' breach of contract claims.

II. SUMMARY JUDGMENT SHOULD ALSO BE GRANTED AGAINST THE GLA CLASS'S BREACH OF FIDUCIARY DUTY CLAIM

The elements of a breach of fiduciary duty claim are (1) the existence of a fiduciary duty, (2) breach, and (3) damages.[87] Plaintiffs have failed to establish a genuine issue of material fact with respect to each of these elements.

A. The Adderley GLA Does Not Create a Fiduciary Duty

Last year, class counsel told the Court, in no uncertain terms, that "Plaintiffs have not alleged a relationship with PLAYERS INC based upon the GLA," and that "[t]he GLA … is not alleged to be the basis of the fiduciary relationship."[88] Now, however, such an "express agency" based upon the GLA is the only theory upon which Plaintiffs allege a fiduciary duty.[89]

[redacted]

[87] See Carstensen v. Chrisland Corp., 247 Va. 433, 444 (1994); Paul v. Judicial Watch, Inc., 543 F. Supp. 2d 1, 5-6 (D.D.C. 2008) (applying D.C. law).

[88] See Pls.' Opp'n to Defs.' Mot. for J. on the Pleadings at 1, 13 (May 10, 2007) (Rec. Doc. 55).

[89] Although the TAC also avers a fiduciary relationship based upon an "agency by estoppel" theory, TAC ¶46, since the Court determined that California law does not apply [redacted] Virginia and

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As to Plaintiffs' "express agency" theory, the TAC alleges that the GLAs create a fiduciary relationship between the GLA Class and Defendants because the class members [redacted] TAC ¶ 45. While these complaint allegations may have arguably stated a basis for a fiduciary duty under California law, they do not support the existence of a fiduciary duty under Virginia or D.C. law, and are, in any event, unsupported by the record evidence.[90]

Unlike [redacted] the alleged agency relationship claimed by Plaintiffs, under Virginia and D.C. law, "the critical test is the nature and extent of the control agreed upon." Murphy v. Holiday Inns, Inc., 216 Va. 490, 493 (1975).[91] "[T]he determinative [factor] is usually whether the [principal] has the right to control and direct the [agent] in the performance of his work and the manner in which the work is to be done." Judah v. Reiner, 744 A.2d 1037, 1040 (D.C. 2000) (internal quotation omitted) (emphasis added). See also Wells v. Whitaker, 207 Va. 616, 624 (1966). Specifically, the level of control necessary to establish an agency relationship under Virginia or D.C. law is "control over the day-to-day operations of the alleged [agent]" and the "right to control the methods or details of doing the work." Ames v. Yellow Cab of D.C., Inc., No. 00-3116 (RWR)(DAR), 2006 WL 2711546, *5 (D.D.C. Sept. 21, 2006) (applying D.C. law); Wells, 207 Va. at 624.

Plaintiffs cannot point to anything in the Adderley GLA or in the record evidence

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the District of Columbia only recognize agency by estoppel when it is used to estop the principal from denying the existence of an agency relationship to a third party, and not to estop a purported agent from denying the existence of the relationship to the purported principal. Sanchez v. Medicorp Health Sys., 270 Va. 299, 304 (2005); Wilson v. Good Humor Corp., 757 F.2d 1293, 1302 (D.C. Cir. 1985) (applying D.C. law).

[90] Plaintiffs argued the exact opposite of these complaint allegations when they were advancing their now-dismissed theory of fiduciary duty based upon a confidential relationship: "when they go to sell these rights to licensees, player video games being the single biggest money, biggest deal, it's all controlled by Players, Inc." May 31, 2007 Hearing Tr. 42:16-24 (emphasis added) (Greenspan Decl. Ex. 14).

[91] See also Jackson v. Loews Wash. Cinemas, Inc., 944 A.2d 1088, 1097 (D.C. 2008).

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that would establish their control over the "day-to-day operations" or "the methods or details" of Defendants' licensing business. Indeed, the TAC does not even allege such control. Moreover, Adderley testified that the only "control" he had over Players Inc was the ability "to ask" Players Inc to keep him out of a promotion:

> A: If there was some type of conflict … or if they use me in some type of promotion that I didn't agree to, that I would have the authority to ask them not to use it….
> Q: So, apart from that, did you have any ability to control Players, Inc['s] use of your GLA rights?
> A. No.

Adderley Depo. 97:18-99:2 (Greenspan Decl. Ex. 4).

The record evidence thus falls far short of raising a genuine issue that any class member had the ability to control the "day-to-day operations" of Players Inc. Further, the record is devoid of any evidence with respect to the purported ability of Plaintiffs to control, at any level of activity, the NFLPA. See Murphy, 216 Va. at 495 (hotel franchise agreement providing purported principal with control over use of its intellectual property insufficient to create agency relationship as it still had "no power to control daily maintenance of the premises ….[,] [purported agent's] current business expenditures, fix customer rates, […] demand a share of the profits ….[, and] was given no power to hire or fire [purported agent's] employees, determine employee wages or working conditions, set standards for employee skills or productivity, supervise employee work routine, or discipline employees"); Ames, 2006 U.S. WL 2711546, *5-7 (no agency relationship created by agreement licensing purported principal's "name, logo and optional services," even though the agreement stated it could be terminated by either party at any time, and purported principal retained the right to ban purported agent from using its dispatch system).[92] Because there is no evidence to raise a genuine issue of material fact in support of the

[92] See also DNM, Inc. v. S.H. Clark & Sons Roofing, Inc., No. 911233, 1992 Va. LEXIS 102, *5-6 (Va. April 17, 1992) (memorandum opinion) (holding that even a contract that "establishes an on-site representative of the owner who retains authority to approve the construction budget, and . . . reject trade contracts" does not provide enough control to establish agency); Bangkok Crafts Corp. v. Capitolo di San Pietro in Vaticano, No. 03 Civ. 0015 (RWS), 2004 U.S. Dist. LEXIS 25235, *19-20 (S.D.N.Y. Sept. 13, 2004) (License provisions allowing licensor "to protect the goodwill associated with its name and marks . . . are clearly insufficient to create an agency relationship") (citing Murphy, 216 Va. at 495).

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existence of a fiduciary duty, any claim of a breach of that purported duty cannot survive summary judgment.

B. There Is No Evidence to Raise a Genuine Issue That Defendants Breached Any Alleged Fiduciary Duty

Even if Defendants had any fiduciary obligations arising out of the GLA, the undisputed evidence establishes that there has been no breach of any such duty. The alleged breaches of Defendants' purported fiduciary duty are identical to Defendants' purported contractual breaches (e.g., failing to "distribute[] revenues to the members of the GLA Class that should have been distributed and were owed to them;" [redacted] TAC ¶ 54. But, as discussed above (pp. 9-16, supra), the undisputed evidence establishes that all of these monies were active player licensing revenues to which the GLA Class members have no legal entitlement.

There was thus no breach of any fiduciary duty, nor anything arbitrary or capricious, in not distributing to retired players revenues generated by active players.[93] Indeed, Adderley himself has admitted that retired players are not entitled to active player licensing money, and that he only expected to be paid when Players Inc utilized his rights. See Adderley Depo. 89:13-90:1, 96:13-18 (testifying that he believes that "as a retired player, [he is not] entitled to any money that's generated by the licensing of active players" and that he "never thought that [he] should get something if nobody used [his] image"). The purported premise of Plaintiffs' breach of fiduciary duty claim is that "Players Inc licensed the rights of retired players to licensees [redacted]" without compensation. TAC ¶¶ 51-54 (emphasis added). Since the undisputed evidence establishes that retired players rights were not included in such licenses (pp. 9-16, supra), it follows that the breach of fiduciary duty claim must fail.

[93] [redacted]

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Plaintiffs alternatively allege that Defendants breached their fiduciary duty by failing to represent the GLA Class members' best interests in pursuing licensing opportunities. See generally TAC ¶¶ 40-55. The undisputed evidence, however, shows that [redacted] Even so, the undisputed facts show that Defendants still managed to generate over [redacted] million for retired players by licensing designated groups of retired player rights, [redacted][95] This is not a record upon which to base a breach of fiduciary duty claim.

The final variation of Defendants' breach of fiduciary duty claim is an alleged failure to "accurately report … revenues to members of the GLA Class." TAC ¶ 54. The fundamental problem with this claim is that the "pertinent and critical information" about revenues that Defendants allegedly "kept secret from" Adderley and the GLA Class is information about active player licensing revenues to which GLA Class members have no legal entitlement. Id. ¶ 53. Nevertheless, the undisputed evidence shows that Defendants have not "kept secret" from retired players any of the information at issue. For example, a 2004 issue of the Touchback retired player newsletter explained:

> Players Inc also receives a royalty for the inclusion of active players based on the wholesale price of games. This royalty is split: 40% goes to the NFLPA to offset its operating expenses, 23% goes to Players Inc to offset its operating expenses and 37% is divided equally among more than 2000 eligible active players each year.

"Group Licensing Essential," Touchback (June 2004) (Greenspan Decl. Ex. 25) (emphasis added) (also explaining why video game companies are mostly interested in active – not retired – players, stating that the "select" retired players whose rights were licensed were "mostly Hall of

[redacted]

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Fame members or members of Super Bowl teams").[96]

C. There Is No Evidence to Raise Any Genuine Issue of Fact of Injury in Support of a Breach of Fiduciary Duty Claim

Even if Plaintiffs could demonstrate a genuine issue of material fact in support of Defendants' alleged breach of fiduciary duty (they cannot), the claim would still fail because Plaintiffs have not come forward with any evidence to raise a genuine issue of material fact to show individual injury or damages for each of the GLA Class members.[97] The undisputed evidence and admissions by Adderley and class counsel demonstrate that the licensing rights of most GLA Class members had no economic value because they are virtually unknown to the public.[98] Injury and damages could not result from licensing economically worthless rights and, in any event, Plaintiffs simply have no evidence to raise a genuine issue on the element of injury as to individual class members. [redacted]

Nor can Plaintiffs' "equal shares" formula provide a legally valid substitute for the requirement to establish individualized injury and damages as a result of a purported contractual breach.[99] As a threshold matter, the Adderley GLA says nothing about "equal shares," and as the Court correctly noted at the class certification hearing, "for retired players there is no such [equal share] regime." Class Hearing Tr. 8:22-23 (Greenspan Decl. Ex. 13). Moreover, given the undisputed evidence and concessions of class counsel that the economic value of the GLA Class members' rights are widely disparate, with most GLA Class members'

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[96] Adderley's allegations about a lack of information are especially disingenuous because he attached to his complaint a letter that he received in Fall 2003 which stated that "40% of Players Inc's operating revenues is paid to the NFLPA as a royalty for the active player name and image rights secured by the NFLPA and licensed to Players Inc." TAC ¶ 57, Ex. L (emphasis added).

[97] See, e.g., Hager v. Gibson, 109 F.3d 201, 212 (4th Cir. 1997) (affirming summary judgment because where supposed fiduciary "caused no injury to the corporate debtor nor personal gain to himself, [his actions] could not give rise to liability for breach of any fiduciary duty") (applying Virginia law); Day v. Avery, 548 F.2d 1018, 1029 n.56 (D.C. Cir. 1976) (affirming summary judgment because "the breach of fiduciary relationship is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby") (applying D.C. law).

[98] See pp. 5-7, supra.

[99] See, e.g., Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 306 (5th Cir. 2003) ("[P]laintiffs' 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").

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rights having no economic value, injury may not be economically presumed. See [redacted]. As this Court has previously noted, why should an unknown retired player whose licensing rights have no value have a claim to any payment at all?[100]

Further, there is no evidence to establish that even one penny of the [redacted] paid by [redacted] or, for that matter, any other licensee was attributable to the retired player rights of any GLA Class member. See pp. 9-16, supra. The total absence of evidence as to fact of injury for individual GLA Class members by itself requires summary judgment against the breach of fiduciary duty claim.[101]

CONCLUSION

For all of the foregoing reasons, summary judgment should be granted against all of the claims of the GLA Class.[102] For too long, class counsel has been misleading the Court with misrepresentations about the evidence. Now, however, fact discovery is closed, and actual evidence – not just class counsel's argument – is before the Court. That evidence leaves no doubt that the GLA Class cannot prevail as a matter of law, and thus summary judgment should be granted.

Date: June 13, 2008

DEWEY & LEBOEUF LLP

BY: /s/ Jeffrey Kessler
Jeffrey L. Kessler
Attorneys for Defendants

[100] May 31, 2007 Hearing Tr. 43:25-45:13 ("COURT: 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."); Class Hearing Tr. 8:6-9, 9:7-13, 11:20-22 (Class Counsel: "A lesser player would get another thing. He probably wouldn't be used."); Adderley Depo. 83:3-84:1 (Greenspan Decl. Exs. 14, 13, 4).

[101] This evidentiary failure also means that Plaintiffs cannot recover anything more than "nominal damages" on their breach of contract claim. See, e.g., Garcia v. Llerena, 599 A.2d 1138, 1142 (D.C. 1991); Orebaugh v. Antonious, 190 Va. 829, 834 (1950).

[102] Because the Court should grant summary judgment against the GLA Class's breach of contract and breach of fiduciary duty claims, Plaintiffs' derivative relief claim for an accounting must also be dismissed. See, e.g., May 31, 2007 Hearing Tr. 30:9-11 ("[T]here's no primary cause of action, there's no claim for an accounting.") (Greenspan Decl. Ex. 14).

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