EXHIBIT 16

Case No. C 07 0943 WHA

Parrish v. National Football League Players Association, et al.

In The Matter Of

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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	**EXPERT REPORT OF DANIEL A. RASCHER**

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I. QUALIFICATIONS

I am Director of Academic Programs for the Sport Management Master's Program and Associate Professor at the University of San Francisco ("USF"). I teach courses in sport economics and finance to graduate students. I am also a Managing Partner of OSKR, LLC, an economic consulting firm specializing in applying economic analysis to complex legal issues as well as President of SportsEconomics, LLC, ("SportsEconomics") an economic, finance, and marketing research consulting firm focused on the sports industry. Formerly, I was an Assistant Professor at USF and an Assistant Professor at the University of Massachusetts, Amherst. I was also previously Principal at LECG, LLC, a provider of expert economic consulting and testimony.

I received a Ph.D. in Economics from the University of California at Berkeley. I have published numerous articles in the field of sports economics and finance and have worked on dozens of projects involving the sports industry and other industries. My curriculum vitae is attached to this report in Appendix B.

I am being compensated at my usual and customary hourly rate of $450 per hour, plus reimbursement of expenses. In my work on this matter, I have been assisted by OSKR staff, working under my supervision and control. I have no direct financial interest in the outcome of this matter.

In preparing this report, I have considered materials provided by counsel and third party materials. A list of documents relied upon is provided in Appendix C.

II. INTRODUCTION/OVERVIEW OF ASSIGNMENT

I have been asked by counsel for Plaintiff Herbert Anthony Adderley to answer the following six questions.

1) Did the retired National Football League ("NFL") players[1] help to make the game what it is today?
2) Do the NFLPA/NFLPI's LM-2 documents submitted annually to the United States Department of Labor accurately reflect the licensing revenues that have actually been paid to players?
3) Is there a difference between group licensing and individual (or "ad hoc") licensing? What has been the traditional way of distributing group licensing revenues? In group licensing agreements in sports, what is the customary method of dividing up revenues among members of the group whose rights are licensed?
4) What is the percentage of licensing monies kept by the NFLPA/NFLPI? Can you compare that percentage with other professional sports unions or other third-party licensing entities? If so, what conclusion(s), if any, can you reach about how the percentage kept by the NFLPA/NFLPI compares to what is customary in sports licensing?

[1] Throughout this report, when I refer to "NFL players" or simply "the players," I am referring to the individuals who play or played in the NFL and not to Players Inc. For the latter, I will use the acronym NFLPI to avoid any confusion. I also refer throughout to the NFL Players Association as NFLPA.

5) What effect, if any, does the fact that the NFLPA/NFLPI represents both the active and the retired players for group licensing have on the bargaining position of the NFLPA/NFLPI with respect to retired players and licensees?

6) Can you compare the salary of the Executive Director of NFLPA/NFLPI with the salaries of the Executive Directors of other professional sports unions? If so, what conclusion(s) do you reach about how the NFLPA/NFLPI compares to what is customary for other sports' players associations?

III. CONCLUSIONS

My opinions and conclusions can be summarized as follows:

1) The retired NFL players did help to make the game what it is today. The affinity of fans for today's players and teams is based, in part, on the shared history that fans have with past teams and, importantly, past players. As a result, the value that the NFLPA/NFLPI is able to develop with its licensing rights is built upon the contributions of past players.

2) The NFLPA/NFLPI's LM-2 documents submitted annually to the United States Department of Labor do not accurately reflect the licensing revenues that have actually been received by the NFLPA/NFLPI or that have actually been paid to players.

3) Licensors in sports commonly distinguish between individual licenses, which cover a small number of players (for example, five or fewer in this case), and group licenses, which cover a larger number of players (for example, six or more in this case). The license revenues a licensor receives from these agreements are typically handled differently. Specifically, unlike individual license revenues, group license revenues are commonly divided up on an equal share basis. For example, this method is followed by the National Basketball Players Association ("NBPA"), the Major League Baseball Players Association ("MLBPA"), and the National Baseball Hall of Fame ("BBHOF").

4) The fact that the NFLPA/NFLPI represents both the active and the retired players for group licensing provides the union with leverage, akin to "market power," in its negotiations with players and with licensees. Directionally, this will tend to result in higher licensing revenues and, if that leverage is used against players, in a lower percentage of that revenue being paid to the players.

5) From 2003-2005, the NFLPA/NFLPI kept 64% of group licensing revenues. A change in how the NFLPA/NFLPI treated $8 million in licensing revenues resulted in an increase in the percentage kept by the union. As a result, the NFLPA/NFLPI kept 69% of group licensing revenues in 2006 and 68% in 2007. Figures for other sports associations, such as the NBPA and MLBPA, as well as for third-party licensing entities, are typically between 10% and 40%, with levels around 25% the most common. It is my opinion that the NFL's 64% - 69% share is outside of the customary range, and I know of no reason why it should be outside this range.

6) I have compared the executive director compensation of NFLPA/NFLPI with that of other professional sports unions' executive directors. Based on that comparison, I have determined that the executive director compensation paid by NFLPA/NFLPI far exceeds what is customary in baseball and basketball. Gene Upshaw received 1.8 – 3.5 times more than his counterparts at NBPA and MLBPA over the period 2003-2007. For 2007 alone, Mr. Upshaw's compensation was between 2.9 and 6.7 times larger than what Mr. Hunter (NBPA) and Mr. Fehr (MLBPA) received, respectively. I know of no reason why Mr. Upshaw's total compensation should be so far in excess of that of the other unions' executive directors.

IV. <u>ANALYSIS</u>

1) Did the retired NFL players help to make the game what it is today?

As a matter of economics, the value to a would-be licensee to the rights to use the names and likenesses of NFL players, as well as the logos of the NFL and NFLPA/NFLPI is based, in part, on the brand value of those organizations and logos. Research shows, and common sense suggests, that the development of customer loyalty and brand value is partially based on historical teams and players.[2] Additionally, in the Madden football video game by Electronic Arts, Inc. ("EA"), it is possible to use retired players in the game,[3] which indicates that there is value to EA in having the retired players in the game. In fact, correspondence from Andy Feffer, COO of the NFLPA, indicates that the NFLPA/NFLPI received money for this value, albeit at below market rates.[4] As another example, retro-themed jerseys helped drive the sale of NFL merchandise in 2006, which demonstrates the continued popularity of the NFL's past.[5] Along these lines, Sports Illustrated recently featured a story on "How Johnny Unitas and Raymond Berry Invented the Modern NFL."[6]

2) *Do the NFLPA/NFLPI LM-2 documents reflect the licensing revenues that have actually been paid to players?*

From the detail in the LM-2's, I have been able to determine what the NFLPA reported as total gross licensing revenue received in each year, 2003-2007, and the amounts paid to players.[7] For example, in 2007, the total group licensing revenue received, as reported on the NFLPA's LM-2, was $49.8 million, and the total amount disbursed to players was reported as $26.9 million. I have summarized the five years from 2003 – 2007 in Exhibit 1 in Appendix A.

To understand the *actual* division of the NFL players' licensing revenue, I reviewed

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[2] See Ross, Stephen et al. (2006). Development of a Brand Scale to Measure Team Brand Associations in Professional Sport. *J. of Sport Management*, Vol. 20; Underwood, Robert et al. (2001). Building service brands via social identity: Lessons from the sports marketplace. *J. of Marketing Theory and Practice*, Vol. 9(1); and Beverland, Michael (2005). Brand management and the challenge of authenticity. *The J. of Product and Brand Management*, Vol. 14(7).

[3] See First wave of Madden invasion hits as EA ships Madden NFL 2001 for the PlayStation. *Market Wire*, August 2000. The 2007 version of the game was available as a "Hall of Fame" edition where gamers could play as their favorite historical team or player.

[4] Email from Andy Feffer to Paul Cairns, cc: Joe Nahra, November 1, 2007 (PI121593).

[5] See Yost, Mark (2006). *Tailgating, Sacks and Salary Caps : How the NFL Became the Most Successful Sports League in History*. Dearborn Trade.

[6] Sports Illustrated, April 28, 2008 (cover).

[7] In determining this figure, I have distinguished "Royalties," which I have assumed is Group Licensing revenue from "Player Marketing," which I have assumed is licensing revenue for five or fewer players. See Deposition of Glenn M. Eyrich, February 12, 2008 ("Eyrich Deposition"), pp. 64 – 69. See also notes to Exhibit 1 for more detail.

NFLPA/NFLPI spreadsheets received in discovery[8] that I understand are used by the NFLPA/NFLPI to determine the total licensing revenue received and the portion of such revenues owed to players, as well as the division between the NFLPA and the NFLPI. Although the details differ by year, underlying each of these spreadsheets is a simple schedule of tranches of revenues and splits among NFLPA, NFLPI, and the players themselves, as shown in Exhibit 2.

a) 2003-2005

As can be seen in Exhibit 2, the details of the divisions between NFLPA and NFLPI have changed from year to year, but prior to 2006, the players themselves received exactly 36% of each group licensing dollar.[9]

b) 2006-2007

I understand that for the 2006 season and beyond, the NFLPA and NFLPI agreed to a change in how group licensing revenues over and above $40 million would be divided. Specifically, they agreed that $8 million of such revenues would be set aside and shared between themselves without any of this $8 million going to the players. I represent this in Exhibit 2 by creating a tranche that covers $40 to $48 million, and increasing the NFLPA's share from 30% to 60% and increasing the NFLPI's share from 34% to 40%, thus leaving none of this $8 million tranche for the players themselves.[10] The result of this is that, in aggregate, the players received only 31% of the total group licensing revenue in 2006 and 32% of the total group licensing revenue

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[8] I analyzed spreadsheets entitled "GLR FY03 Calculation.xls," "GLR FY04 Calculation.xls," "GLR FY05 Calculation.xls," "GLR FY06 Calaculation.xls," and "GLR FY07 Calculation.xls."

[9] It is my understanding that the NFLPA/NFLPI have asserted that prior to 2006, each marginal dollar received over $40 million was divided 30% to the NFLPA, 33% to the NFLPI, and 37% to the NFL players themselves. (See Exhibit 91 to Eyrich Deposition, PI000145-6). My analysis shows that while this is correct with respect to the NFLPA, it understates by one percentage point the share received by the NFLPI and consequently overstates, also by one percentage point, the amount received by the players. That is, on the margin, the NFLPI received 34% (not 33%), and the players 36% (rather than 37%). This can be easily seen by adding $10 million to the total pool in "GLR FY05 Calculation.xls;" the resulting increase to the players' share is exactly $3.6 million, or 36%.

[10] See Exhibit 91 to Eyrich Deposition (PI000145-6).

in 2007.

c) Analysis of the $8 million transfer

Based on my review of Exhibit 91 to the Eyrich Deposition[11] and the deposition testimony of the NFLPA/NFLPI's 30(b)(6) witness on financial matters, Glenn M. Eyrich, as well as the NFLPA/NFLPI Financial Statements,[12] I understand that the NFLPA and NFLPI based their decision to change the division of this $8 million tranche from a 30/34/36 split (among NFLPA, NFLPI, and the players, respectively) to a 60/40/0 split on a "peer review of another sports organization's logo use revenue," and that the other sports organization in question was the NBPA.[13] It is my opinion, however, that the accounting by the NFLPA and NFLPI for this transaction has little correspondence to what occurred with the NBPA.

In 2006, the National Basketball Association ("NBA") and the NBPA agreed that the NBA would pay the NBPA an additional $3 million per year for the NBPA's logo rights, bringing the total to $8 million *for one year only*.[14] So it was not an increase of $8 million, just $3 million, it was a one-time change, and most importantly, the flow of money was from the league to the union, not from the players to the union.

In contrast, I see no evidence that the NFLPA/NFLPI received any additional monies from the NFL for logo rights in connection with the $8 million re-allocation. And, unlike the NBPA, which received additional outside money, the NFLPA/NFLPI has effectively zeroed out the players' share (36%) of that $8 million for 2006 and 2007. In effect, the NFLPA/NFLPI charged its players

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[11] See Exhibit 91 to Eyrich Deposition (PI000145-6).

[12] Exhibit 97 to Eyrich Deposition. See in particular, note 10 on PI095983, which states, contrary to the contract in Exhibit 91 (as well as NFLPA/NFLPI practice) that the NFLPA was to receive 40% and the NFLPI to receive 60%.

[13] Eyrich Deposition, p. 92.

[14] See Lombardo, John (2006). "NBPA trades control of rights for guaranteed $25M a year," *SportsBusiness Journal*. Also, see NBPA LM-2 Schedule 14 ("Other Receipts") for 2004, 2005, where "logo revenue" or "logo use revenue" is reported as $5 million, the LM-2 Schedule 14 for 2006, where it was reported as $8 million, and the LM-2 Schedule 14 for 2007, where it was reported back at the original $5 million.

$2.88 million per year for 2006-2007.[15]

d) The LM-2's do not correspond to the NFLPA/NFLPI's spreadsheets

Compared to the LM-2's disclosed revenues, the actual amount that players received was consistently *lower* than was reported on the LM-2's. At the same time, for 2006-2007, total gross licensing revenue was *higher* than was reported in the LM-2's (for the previous years, the LM-2's reported figures were higher). In all years, the percentage reported on the LM-2's as having gone to players exceeded the percentage that the players actually received according to the NFLPA/NFLPI's spreadsheets.

For example, in 2007, rather than receiving $49.8 million in revenues as identified in the LM-2's, the NFLPA/NFLPI received $75.4 million in Gross Licensing Revenue,[16] subject to division among the NFLPA, NFLPI, and the players. And rather than receiving $26.8 million, as per the LM-2's, the players received $24.3 million. So rather than the reported 54% going to players, my analysis shows that players received 32% of gross licensing revenues in 2007. See Exhibit 1.

Based on this analysis, I find the NFLPA/NFLPI's LM-2's to be a poor proxy for the detail contained in their actual spreadsheets.

3) *Is there a difference between group licensing and individual (or "ad hoc") licensing? What has been the traditional way of distributing group licensing revenues? In group licensing agreements in sports, what is the customary method of dividing up revenues among members of the group whose rights are licensed?*

The Retired Player Group Licensing Authorization Form defines group licensing programs

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[15] I also see no correspondence between the increase to the NFLPA/NFLPI's share and any increase in the costs of licensing. At the same time that the NFLPA/NFLPI increased its share of group licensing revenue from 64% to 68-69%, the vast majority of its group licensing revenue has come from an increasingly small number of long-term licensees. In fact, in 2006-2007, the top five licensees for the group licensing business constituted 87% of the group licensing revenue, with EA alone accounting for nearly 60% of group licensing revenue. All else equal, this process of concentration would tend to lower the NFLPA/NFLPI cost structure because the cost of monitoring important licensees is lower and typically the cost of negotiating with repeated customers is lower because of a history of contracting. See Exhibit 4.

[16] Prior to the deduction of the $8 million "Change in Market Adj."

as "… programs in which a licensee utilizes a total of six (6) or more present or former NFL player images in conjunction with or on products that are sold at retail or used in promotional or premium items."[17] The concept is also defined in the NFLPA/NFLPI's agreement with EA,[18] in correspondence from Joe Nahra to Personalities & Promotions International,[19] and in the testimony of Glenn Eyrich.[20] Mr. Eyrich further testified that all active players share equally in the GLA distributions.[21]

Importantly, the NFLPA allows so-called "ad hoc" or "premium" licensing, which are for licensing deals of five of fewer players. By making this distinction, the NFLPA (and other sports unions) are able to diffuse the potential tension between stars and other players, allowing stars to sign individual (or small-group) deals, while participating equally in larger group licensing.

I am aware that several other group licensing programs in sports use an equal share for dividing net royalties, e.g., NBPA,[22] MLBPA,[23] and the BBHOF.[24]

I understand that the retired player GLA calls "for the moneys generated by such licensing of retired player group rights [to be] divided between the player and an escrow account for all eligible NFLPA members who signed a group licensing authorization form."[25] I also understand from the deposition of Glenn Eyrich that no specific retiree escrow account was created,[26] and I am informed by counsel that the NFLPA/NFLPI in fact has just one escrow account, which it uses for the equal share pool. To the extent that the NFLPA/NFLPI were to give an equal share to retired contributors to this escrow fund, that would be consistent with the equal share concept I discuss

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[17] See Exhibit 87 to Eyrich Deposition.
[18] See, e.g., PI000072-86, PI000055-71.
[19] See PI095694-95.
[20] Eyrich Deposition, p. 46.
[21] Eyrich Deposition, pp. 68-69.
[22] Conrad, Mark (2006). *The Business of Sports: A Primer for Journalists*. Lawrence Erlbaum Associates. I do note that players are allowed to opt-out.
[23] Payments are divided up equally on the basis of actual days of major league service in a given season. See http://www.mlb.com/pa/info/faq.jsp.
[24] Conversation with Marvin Miller, May 22, 2008.
[25] See PI095696.
[26] Eyrich Deposition, pp. 60-61.

above.

4) *What is the percentage of licensing monies kept by the NFLPA/NFLPI? How does it compare with other professional sports unions or third-party licensing entities? How does the percentage kept by the NFLPA/NFLPI compare to what is customary in sports licensing?*

As discussed above, from 2003-2005, the NFLPA/NFLPI kept 64% of group licensing revenues. A change in how the NFLPA/NFLPI treated $8 million in licensing revenues resulted in an increase in the percentage kept by the union. As a result, the NFLPA/NFLPI kept 69% of group licensing revenues in 2006 and 68% in 2007.

The sports licensing industry is well developed, having been formalized nearly fifty years ago with the creation of NFL Properties in 1963.[27] Licensing offers many advantages to sports properties, namely, by providing promotion of the brand, protection of the brand, trademark and logo, and revenue streams that are mostly unencumbered with high expenses. Typical royalty rates range from 6-10%, sometimes up to 20%.[28]

Many licensors use an outside agency to sell their licensing rights to licensees. Looking at what licensors pay an outside agency as a commission for selling licensing rights to licensees provides relevant information. Based on my knowledge of the industry and a review of the literature, licensing commissions range between 10%-40% of licensing royalty revenues.

For example:

- Collegiate Licensing Company (CLC) handles licensing for hundreds of colleges and universities. CLC takes 15-20% out of a school's licensing royalties in exchange for selling licensing rights to licensees, some management duties, and enforcement.[29]
- The University of Kentucky, for instance, received 85% of the royalties on a licensing

[27] Earlier sports licensing agreements had taken place, but the NFL was the first sports league to form a separate properties component.
[28] See Irwin et al. (2008). *Sport Promotion and Sales Management*. Human Kinetics; Masteralexis, Lisa Pike et al. (2004) in *The Business of Sports* (eds.) Scott R. Rosner and Kenneth L. Shropshire. Jones and Bartlett Publishers, Inc.; Mullin, Bernie et al. (2007). *Sport Marketing*. Human Kinetics.
[29] Zimbalist, A. (1999). *Unpaid Professionals*. Princeton University Press.

deal cut by CLC for its logo to appear on local Wheaties boxes.[30]

- "Typically, licensing management firms provide their services for a fixed percentage of the royalty revenues, generally around 20% of the gross income."[31]
- Some smaller leagues outsource their licensing rights for "as high as 35%".[32]
- The United States Olympic Committee returns 82.7% of licensing proceeds back to athletes through the funding of training programs, grants, and other services.[33]

Similar to licensing deals, athletes also enter into endorsement contracts in which they use their fame to help a company sell its product or enhance its image. Typical endorsement commissions for agents range between 10-20%, with some only collecting that fee for the cash portion, not any benefits-in-kind (which are common with endorsements), thus further lowering the actual commission received.[34] Many agents charge the same rates for endorsements as they do for licensing work, while others charge slightly more for licensing deals.

There are inherent economies of scale in group licensing athletes' names and images. The cost of creating a licensing program and marketing the licensing rights of a single athlete has a certain expense that is not duplicated when adding additional athletes to the group licensing program. The incremental costs of adding an athlete are small (and smaller than the average cost).[35] In fact, grouping together all current NFL players and many retired NFL players lowers the cost per player of providing licensing services. Similarly, larger groups of licensors beget higher licensing revenues (see below). Thus, the cost of securing each dollar of licensing revenue is decreased for larger groups of licensors. Compared with what agencies charge individual athletes for licensing

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[30] Smith, Michael (February 26, 2007). "Banking on hoops," *Street & Smith's SportsBusiness Journal.*

[31] Masteralexis, Lisa Pike et al. (2005). *Principles and Practice of Sport Management.* Jones and Bartlett Publishers, Inc. p. 71.

[32] Masteralexis, Lisa Pike et al. (2004) in *The Business of Sports* (eds.) Scott R. Rosner and Kenneth L. Shropshire. Jones and Bartlett Publishers, Inc.

[33] Mullin, Bernie et al. (2007). *Sport Marketing.* Human Kinetics.

[34] Conrad, Mark (2006). *The Business of Sports: A Primer for Journalists.* Lawrence Erlbaum Associates.

[35] A definition of economies of scale is when the average cost of marketing a product exceeds the incremental cost of marketing it. See Tirole, Jean (1989). *The Theory of Industrial Organization.* MIT Press.

services, a group licensing business would have a lower cost structure on a per-athlete basis.

a) Other Sports Associations

As two points of comparison, I have examined the LM-2 documents submitted to the Department of Labor by the NBPA and the MLBPA. In any given year, the particular circumstances of the associations' payout schedules have resulted in variable percentages received. However, on average over the period 2003-2007, both associations have given their players approximately three-fourths of their licensing revenues, keeping one-fourth for themselves. This split is consistent with the 10% to 40% range that is typical in the industry.

i. Basketball

The NBPA has sold its licensing rights to the NBA for $25 million per year and the NBA negotiates licensing deals for both the league and the union's rights.[36] Thus, over the period 2003 – 2007, the average annual licensing receipts have been exactly $25 million per year. The NBA players' share of that licensing revenue has averaged $19.1 million, or 76.4%. Thus, over the same period, the NBPA's share has averaged 23.6%.[37] See Exhibit 3.

ii. Baseball

Like NFLPA/NFLPI, MLBPA does its own group licensing. During the period 2003-2007, the MLBPA put most licensing revenues into a special fund, in anticipation of a potential labor dispute.[38] However, in 2007 the union disbursed these accumulated licensing revenues and referred to it as "special dues refunds."[39] In my analysis, I have included these "dues refunds" and "special

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[36] See Lombardo, John (2006). "NBPA trades control of rights for guaranteed $25M a year," *SportsBusiness Journal*.

[37] As discussed in footnote 12, I understand that the NBPA also received additional payments from the NBA for logo uses. If this revenue were included in the total licensing pool, the NBPA share of licensing revenues would increase to 37.2%.

[38] The MLB called these deferred licensing revenues "special dues refunds." See "Major League Baseball Players Association Financial Statements (Cash Basis) Years Ended December 31, 2004 and 2003," ("MLBPA Financials") note 6B.

[39] See Fisher, Eric and Mullen, Liz (May 5, 2008). "MLB players receive labor peace dividend," *Street &*

dues refunds" in the licensing revenues.

Over the period 2003- 2007, the MLBPA's annual licensing revenue averaged $49.1 million, and players received $36.7 million, or 74.9%. Thus, over this period, the MLBPA's share has averaged 25.1%. See Exhibit 3.

Prior to doing its own licensing, it is my understanding, based on a discussion with Marvin Miller, the former Executive Director of MLBPA,[40] that the baseball players association used to have on outside licensing agency market its licensing rights. The commission paid to that licensing agency for its services was 25%, in line with MLBPA's current share.

Based on my analysis, it is my opinion that the customary range for a licensing entity, including other sports associations as well as third-party licensing entities, is typically between 10% and 40%, with levels around 25% the most common. It is my opinion that the NFLPA/NFLPI's 64% - 69% share is outside of the customary range, and I know of no reason why it should be outside this range.

5) *What effect does the fact that the NFLPA/NFLPI represents both the active and the retired players for group licensing have on the bargaining position of the NFLPA/NFLPI with respect to retired players and licensees?*

As a matter of economics, there is a benefit to a licensing entity of having some measure of exclusivity over the assets being licensed. In the specific case of the NFLPA/NFLPI, having the exclusive rights to any group licensing opportunity provides the union with several benefits.

First, by offering "one-stop shopping" for both active and retired players, the NFLPA/NFLPI is able to provide its licensees with cost savings. If a licensee like EA were forced to negotiate with every individual player included in the Madden video game products, that would be a costly and time consuming endeavor.[41] By packaging those rights into a single group license, the NFLPA/NFLPI in

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Smith's SportsBusiness Journal.

[40] Conversation with Marvin Miller, May 20, 2008.

[41] EA's Joel Linzner has acknowledged that in his negotiations with the NFLPA/NFLPI, he "knew, at that point in time, that PLAYERS INC. did represent retired players." (see Deposition of Joel Linzer, February 8, 2008, p. 126).

essence creates value, what economists would label as "efficiency rents."[42] These rents measure the cost savings that EA gains from engaging in just one negotiation. The NFLPA/NFLPI can capture some of these efficiency rents by charging EA a premium over what the individual licenses might be worth, which in turn provides the potential for the players to receive more revenue. The portion of the rents that the union captures relative to how much EA is able to keep depends on the bargaining power of each, but it certainly is a benefit to the NFLPA/NFLPI to be able to create those rents and capture some portion thereof.[43]

Secondly, by having no close substitutes, the NFLPA/NFLPI improves its bargaining position relative to licensees. For a firm like EA seeking to make an NFL video game there is truly no substitute for NFL players' names and likenesses.[44] This gives the NFLPA/NFLPI market power it would not enjoy if there were multiple sources of group licenses for active and retired NFL players. These two forces tend to work together. By lowering EA's costs, the NFLPA/NFLPI creates efficiency rents. Then, by having market power, the NFLPA/NFLPA is better able to capture those rents.

The same forces give a union potential leverage against its own members. To the extent that the union chooses to take advantage of this power, directionally this will result in a lower share of group licensing revenue being paid to the players. One example of the use of this sort of leverage is the letter sent by Gene Upshaw to retired players, stating:

> "PLAYERS INC's licensees such as EA Sports are permitted to secure retired NFL player rights <u>only</u> from PLAYERS INC, not from any other source, contrary to what others may have

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[42] See Shaanan, Joseph (2006). Ricardian or monopoly rents: The perspective of potential entrants. *Eastern Economic Journal*, Vol. 32(1).

[43] My understanding in this specific case was the NFLPA/NFLPI chose to give a substantial piece of the retired players' value to EA, accepting $400,000 for what EA "more than likely would have paid in excess of $1M for these rights…" See Email from Andy Feffer to Paul Cairns, cc: Joe Nahra, November 1, 2007 (PI121593). Clay Walker, senior VP of NFLPI also wrote that EA benefited from this deal because it led to Take Two's decision to exit the market. (See PI126892).

[44] Since Take Two has been unable to produce a football video game pursuant to a group license, it has been "not terribly pleased" with the results. Schiesel, Seth (September 17, 2007). "With Famed Players, Game Takes on Madden's Turf," *The New York Times*. See also Sinclair, Brendan (March 11, 2008). "Take-Two gets a lump of coal for holiday quarter," *Gamespot News*; and (March 11, 2008). "Take Two Conference Call Q&A Highlights," (http://www.firingsquad.com/news/newsarticle.asp?searchid=19943).

> told you. This offer will be your only opportunity to participate in NFL player video games and get paid."[45]

Another example is the Non-Interference clause the NFLPA/NFLPI includes standard in all of its agreements with licensees:

> In the event Licensee is interested in securing an individual player's personal endorsement, Licensee further agrees and acknowledges that such endorsement will require the personal approval of the individual player and approval of PLAYERS INC and a separate payment to PLAYERS INC. Unless the parties expressly agree otherwise, all contact with such player or player's agent shall be made by PLAYERS INC.
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> ...
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> NON-INTERFERENCE. Licensee agrees and acknowledges that it shall not secure or seek to secure, directly from any player who is under contract to an NFL club, is seeking to become under contract to an NFL club, or at any time in the past was under contract to an NFL club, or from such player's agent, permission or authorization for the use of such player's name, facsimile, signature, image, likeness (including, without limitation, number), photograph or biography in conjunction with the licensed product(s) herein unless expressly agreed otherwise by PLAYERS INC.[46]

By grouping current and former NFL players' rights under a single entity, the NFLPA/NFLPI is able to use the leverage created by this grouping to prevent licensees from seeking player rights from any other source.

6) *Can you compare the salary of the Executive Director of the NFLPA/NFLPI with that of the salaries of the Executive Directors of other professional sports unions? What conclusions do you reach about how the NFLPA/NFLPI compares with what is customary?*

According to the NFLPA/NFLPI's LM-2 filings, over the period 2003-2007, including payments to the grantor trust made on Mr. Upshaw's behalf,[47] Gene Upshaw's average annual

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[45] CLASS001709, emphasis in original. Although this letter appears to have been sent in the early 2000's, this same principal continues to apply.

[46] PI000073, PI000081.

[47] On October 1, 1997, Players Inc. entered into an employment contract with Gene Upshaw, employing him as Chairman of Players Inc. for a period of seven years. The employment contract provides for a salary of $500,000. The contract established a grantor trust that was funded on an annual basis with the Players Inc. salary amount. (See NFLPA LM-2 for year 2000). Players Inc. entered into a new seven year employment contract with the NFLPA Executive Director on February 28, 2002. The contract employs him as the Chairman of Players Inc. for the period from January 1, 2001 through December 31, 2007 and established a trust which was funded on an annual basis with unspecified salary and bonus amounts. (See NFLPA LM-2 for year 2003.) Because no salary and bonus amounts are given for the new contract, I am assuming zero dollars paid to the Grantor Trust for years 2003 and 2004. Thus, Upshaw's consolidated salary figures are

compensation was $3.5 million.[48] Billy Hunter, the executive director of the NBPA, received average annual compensation of $1.9 million.[49] Don Fehr, the executive director of the MLBPA, received average annual compensation of $1.0 million.[50] Based on this, I find that the NFL has paid, on average, 1.8 – 3.5 times more in total compensation to Gene Upshaw than the other US-based major sport players associations have paid to their executive directors, and that Mr. Upshaw's compensation is far outside the range set by baseball and basketball. In the most recently reported year, 2007, Mr. Upshaw's compensation was 2.9 times what Mr. Hunter was paid and 6.7 times what Mr. Fehr received. See Exhibits 5A and 5B.

Mr. Upshaw's compensation is substantially higher than that received by his counterparts in the other major sport player unions. I know of no reason why it should be so far in excess of the other unions' executive directors.

Respectfully submitted this 23th day of May, 2008,

Daniel A. Rascher, Ph.D.

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salary amount. (See NFLPA LM-2 for year 2000). Players Inc. entered into a new seven year employment contract with the NFLPA Executive Director on February 28, 2002. The contract employs him as the Chairman of Players Inc. for the period from January 1, 2001 through December 31, 2007 and established a trust which was funded on an annual basis with unspecified salary and bonus amounts. (See NFLPA LM-2 for year 2003.) Because no salary and bonus amounts are given for the new contract, I am assuming zero dollars paid to the Grantor Trust for years 2003 and 2004. Thus, Upshaw's consolidated salary figures are conservative. I will update my calculations to the extent that information becomes available to me.

[48] See Exhibit 5A.

[49] See Exhibit 5A.

[50] See Exhibit 5A.

PROOF OF SERVICE

I, Donna Wishon, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 1001 Page Mill Road, Building 2, Palo Alto, CA 94304. On May 23, 2008, I served the foregoing document by the method(s) indicated below.

☐ By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail, addressed as set forth below.

☐ By transmitting via facsimile the document listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ By placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.

☒ By electronic mail to the below email addresses:

Jeffrey L, Kessler, Esq. David G. Feher, Esq. Eamon O'Kelly, Esq. David Greenspan, Esq. Dewey & LeBoeuf LLP 1301 Avenue of the Americas New York, NY 10019-6092 Email: jkessler@dl.com; dfeher@dl.com; dgreenspan@dl.com; jclark@dl.com; rtaub@dl.com; MDonovan@dl.com; ipapendick@dl.com; lcaplan@dl.com	Kenneth L. Steinthal, Esq. Joseph Wetzel, Esq. Weil, Gotshal & Manges, LLP 201 Redwood Shores Parkway Redwood Shores, CA 94065 Email: bruce.meyer@weil.com; Joseph.Wetzel@weil.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 23, 2008, at Palo Alto, California.

Donna Wishon

Donna Wishon

Exhibit 4: NFLPA/NFLPI Largest Licensees, 2003-2007

2003	Amount	%	2004	Amount	%	2005	Amount	%
EA	$ 8,304,003	30.0%	EA	$ 11,805,073	39.3%	EA	$ 13,759,153	39.6%
UPPER DECK	$ 2,427,418	8.8%	REEBOK/ONFIELD	$ 3,047,101	10.1%	ON FIELD APPAREL	$ 3,491,569	10.0%
TOPPS	$ 2,028,814	7.3%	UPPER DECK	$ 1,996,703	6.6%	SEGA	$ 2,553,918	7.3%
PLAYOFF	$ 1,929,146	7.0%	PLAYOFF	$ 1,878,035	6.3%	PLAYOFF	$ 2,262,637	6.5%
ON FIELD APPAREL (REEBOK)	$ 1,792,191	6.5%	TOPPS	$ 1,753,938	5.8%	UPPER DECK	$ 2,217,688	6.4%
SEGA	$ 1,711,804	6.2%	FLEER	$ 1,571,665	5.2%	TOPPS	$ 1,936,490	5.6%
FLEER	$ 1,709,581	6.2%	TMP INT'L	$ 809,717	2.7%	FLEER	$ 1,630,763	4.7%
MIDWAY	$ 1,302,836	4.7%	SEGA	$ 686,189	2.3%			
PACIFIC	$ 845,782	3.1%	SONY	$ 683,530	2.3%			
MAJESTIC ATHLETIC	$ 812,002	2.9%						
Totals	**$ 22,863,576**	**82.5%**		**$ 24,231,950**	**80.7%**		**$ 27,852,218**	**80.1%**
All Other	**$ 4,841,484**	**17.5%**		**$ 5,798,327**	**19.3%**		**$ 6,931,217**	**19.9%**

2006	Amount	%	2007	Amount	%
ELECTRONIC ARTS INC	$ 24,737,063	56.0%	ELECTRONIC ARTS INC	$ 31,967,333	60.6%
ONFIELD APPAREL GROUP, LLC	$ 4,065,859	9.2%	DONRUSS PLAYOFF	$ 4,197,446	8.0%
TOPPS	$ 2,877,378	6.5%	THE TOPPS COMPANY INC	$ 4,150,532	7.9%
UPPER DECK	$ 2,781,024	6.3%	ONFIELD APPAREL GROUP, LLC	$ 4,122,225	7.8%
PLAYOFF	$ 2,676,112	6.1%	THE UPPER DECK COMPANY	$ 3,112,793	5.9%
Totals	**$ 37,137,437**	**84.1%**		**$ 47,550,329**	**90.1%**
All Other	**$ 7,026,284**	**15.9%**		**$ 5,199,696**	**10.9%**

Sources:
GLR FY03 Calculation.xls; GLR FY04 Calculation.xls; GLR FY05 Calculation.xls; GLR FY06 Calculation.xls; and GLR FY07 Calculation.xls