EXHIBIT 11

Case No. C 07 0943 WHA

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

In The Matter Of

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 REPLY REPORT OF DANIEL A. RASCHER**

I. INTRODUCTION/SUMMARY OF CONCLUSIONS

This is my second expert report in this matter; I submitted a previous report in this matter on May 23 ("Rascher Expert Report"). In addition to the materials on which I relied in preparing that report, I have considered additional materials provided by counsel, Professor Roger G. Noll, as well as other third party materials. A list of additional documents relied upon is provided in Appendix A.

I have been asked by counsel for Plaintiff Herbert Anthony Adderley to respond to the Expert Report of Roger G. Noll,[1] with a focus on Dr. Noll's critique of my first report. My general impression of Dr. Noll's report is that the bulk of his critique is aimed at straw-man arguments that have little or nothing to do with my opinion. For example, Dr. Noll has critiqued my report because, as he writes, "none of this information is relevant to an economic analysis of the proposition that *all* retired players *contribute equally* to the creation of brand equity and/or the licensing value of active players and league logos."[2] My understanding of this case is that there is a legal question as to whether certain retired players who signed GLA contracts have a right to a share of pooled GLA monies. I have no opinion on the legal question at hand, and I fail to see the relevance of Dr. Noll's critique either to that legal question or to my own opinions, which do not speak to the question of common economic impact, but rather address five specific questions put to me by counsel.[3]

Similarly, throughout his critique, Dr. Noll seeks to inject tangential issues of *ad hoc* (hereinafter "individually negotiated *ad hoc*") licenses into my analysis of shared group licensing/GLA monies.[4] In general, both in this report and my first report, I interpreted questions with respect to licensing/group licensing as relating to money eligible for the NFLPA/NFLPI's

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[1] Expert Report of Roger G. Noll, submitted on June 12, 2008 ("Noll Report").

[2] Noll Report, p. 7. Emphasis in original.

[3] I have been instructed by counsel that the sixth question I was asked, with respect to Mr. Upshaw's salary, has been ruled to be irrelevant to the issues in suit. Therefore, I will not be opining on the issue, and I have not addressed Dr. Noll's now-moot critique of my sixth opinion. See Section VII.

[4] I am aware that Defendants have sought to broadly define "group licensing" as any program with a licensee that uses six or more players, even if those players were licensed pursuant to "ad hoc" agreements. In my analysis, I have not applied the Defendants' broad definition of "group licensing." Because my reports have focused solely on the NFLPA/NFLPI's shared revenue pool, which, as I understand it, does not include monies received pursuant to "ad hoc" agreements, I have interpreted the term "group licensing" to exclude these "ad hoc" agreements.

shared revenue pool.[5] Dr. Noll's counterexamples focus on individually negotiated *ad hoc* deals, such as licensing deals signed by TMP.[6] While individually negotiated *ad hoc* deals are an important source of revenue to the NFLPA/NFLPI and to players' fortunes, they are not directly relevant to questions related to the shared revenue pool and GLAs.

Indeed, at certain points in his opinion, Dr. Noll has sought to dismiss my critique specifically because I did not deal with every source of NFLPA/NFLPI revenues, for example when he opines that "[t]he appropriate standard for evaluating the efficiency of the NFLPA/NFLPI is whether the total fraction of licensing revenues that was paid to players represents a reasonable fraction of total revenues."[7] My understanding is that the questions in this case relate to an alleged breach of contract with respect to one stream of revenues, i.e., revenues that are dedicated to the shared player pool, and my analyses were intended to answer the questions in the context of the revenues and splits of shared revenue only.[8] To address that question economically, there is no need to evaluate the efficiency of the entirety of NFLPA/NFLPI, nor do I have an opinion on that question. Therefore, I do not see any relevance to the repeated theme in Dr. Noll's critique that I have erred by focusing only on shared revenues.

My opinion is intended to focus solely on shared revenues. For example, I have not studied and I do not have an opinion on whether the portion of individually negotiated *ad hoc* revenues disbursed to players, retired or active, is within the customary range in sports. Dr. Noll's efforts to

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[5] In other words, I focused on GLA-related royalty revenues such as those captured in the NFLPA/NFLPI's spreadsheets under the terms "Licensing Royalties- NFLPA" and "Licensing Royalties- PLAYERS INC" as shown in "GLR FY06 Calaculation.xls." [sic]

[6] Noll Report, p. 49, footnote 18.

[7] Noll Report, pp. 46-47.

[8] I also understand there are allegations of breach of fiduciary duty.

portray my opinion with respect to shared group revenues as global statements about the NFLPA/NFLPI's finances, and then to dismiss my work for not having analyzed that universe of revenues, are misleading. My opinion is what I have presented, and not the unrelated straw-man that Dr. Noll presents and critiques.

To that end, I re-summarize my opinions on the five remaining questions put to me by counsel:

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 amount of shared group licensing revenues that have actually been received by the NFLPA/NFLPI or that have actually been paid to players. Moreover, the revenues presented in those public documents cannot be accurately disaggregated to allow an analysis of solely the shared portion.

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). Licensors also often designate some or all of those group licensing revenues as shared revenues. Specifically, unlike individually negotiated *ad hoc* licenses, those portions of group licensing revenues that are shared 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"), the National Baseball Hall of Fame ("BBHOF"), as well as the Pro Football Hall of Fame ("HOF"). And of course, for its shared licensing revenues, the NFLPA/NFLPI uses a "gross licensing equal share pool"[9] from which all eligible active players receive an equal share.

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. By having access to all players, the NFLPA/NFLPI is able to achieve efficiency savings, which can be an economic benefit to licensees and the union. By having exclusivity over distinct categories of players, the NFLPA/NFLPI is able to capture some portion of those benefits. 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. Economic research demonstrates that the mere fact that an organization has a representative structure is insufficient, by itself, to ensure that the principals (in this case union members) are not ill-served by their agents (the union leadership).

5) From 2003-2005, the NFLPA/NFLPI kept 64% of shared group licensing revenues. A change in how the NFLPA/NFLPI treated $8 million in shared group licensing revenues resulted in an increase in the percentage kept by the union. As a result, the NFLPA/NFLPI

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[9] See Deposition of Glenn M. Eyrich ("Eyrich Deposition"), p. 50.

kept 69% of shared group licensing revenues in 2006 and 68% in 2007. Figures for other sports associations' shared group licensing revenues, such as those of 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 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.

II. QUESTION 1: WHETHER A SPORT'S PAST INFLUENCES ITS CURRENT VALUE

1) Dr. Noll's focus on issues of common impact has no relevance to my opinion

Among the criticism Dr. Noll makes of my work is that I have not addressed issues of common impact or damages to the GLA Class that he deems relevant. For example, he says "Dr. Rascher provides no information about what market rates for these [retired] players would have been, whether other licenses for these and other retired players were at or below market rates, or whether the market values for licenses for all retired players have any positive market value,"[10] as if the answers to those questions were somehow related to my opinions. In particular, I was not retained to analyze questions related to class certification, nor have I been retained as a damages expert in this matter. And so in that regard, Dr. Noll is correct that I have not submitted an opinion as to the common impact to the class or the fact or amount of damages in this case. It is my understanding that the allegations in this case do not hinge on the question of whether there is a

[10] Noll Report, p. 19.

market for the individually negotiated *ad hoc* rights to all retirees, and so Dr. Noll's criticism of my failure to examine that individually negotiated *ad hoc* market is also inapt. At its core, it appears that the fundamental question of whether the GLA class has been harmed by the alleged breaches is a legal one, and of course I offer no legal opinions.

However, from this critique, Dr. Noll then opines that "[t]hus, Dr. Rascher's answer does not include any kind of economic analysis." In this, Dr. Noll is incorrect, and his opinion rests on two false premises. The first false premise is that my analysis has to speak to the various issues Dr. Noll has decided are important in order to be economic, such as whether "the market value of licenses is positive for all members of the GLA class."[11] On its face, it should be plain that the fact that I have not addressed the questions Dr. Noll finds important[12] says nothing about whether my analysis is economic or not.

For example, Dr. Noll criticizes my reference to correspondence written by NFLPA Chief Operating Officer Andy Feffer indicating that EA paid money for the rights to certain retired players. Whether this speaks to the value of each retired player is not relevant – the email provides evidence that a payment was made for the rights to retired players, and such a payment is strong empirical evidence of the value of those rights.[13] Indeed, Dr. Noll agrees that some retired players

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[11] Noll Report, p. 25.

[12] Dr. Noll's emphasis appears more suited to the certification of a class, which I understand has already been addressed by the Court.

[13] I do not understand Dr. Noll's claim that "plainly" this email was not estimating the value of the license to be $1 million. I see Mr. Feffer's words saying "you might have paid in excess of $1M for these rights." Why this is not an estimate of what EA might have paid is certainly not plain to me.

have licensing value, as he cites to Hall of Fame members[14] and has conducted an analysis and concluded that 379 retired players received individually negotiated *ad hoc* payments.[15] So Dr. Noll is wrong to conclude that I have no economic evidence of the value of retired players. He has merely chosen to dismiss any evidence that speaks to a subset of all retirees, but there is no reason why that evidence should be deemed non-economic or irrelevant to the specific question of whether retirees, in aggregate, have value. My evidence of marketplace transactions is indisputably economic.

There is also an element of circular logic to Dr. Noll's critique. My understanding of the allegations in this case are that Plaintiffs allege that the class of GLA signers are owed shared-revenue payments based on GLA contracts they have signed, and that, to date, they have received no such payments. Dr. Noll looks at the evidence of individually negotiated *ad hoc* payments and concludes that those who did not receive any such payment have no market value. But if Plaintiffs are correct that it is only because the alleged misconduct of the Defendants that most of the class members have not received a (shared) payment, then Dr. Noll's conclusion is only true because of Defendants' alleged misconduct. It hardly seems economic to point to the Defendants' failure to pay as evidence of the lack of value – that is merely evidence of the Defendants' failure to pay.[16] Whether that failure is a breach of contract or fiduciary duty is outside the realm of economics, but

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[14] Noll Report, p. 21.

[15] Noll Report, pp. 21-23.

[16] As an example, if Defendants withheld payment of Dr. Noll's expert fees in breach of his retention agreement, that would not be economic evidence that Dr. Noll's work in this matter had no economic value.

relying on that failure as evidence of lack of value is unsound economics.[17]

2) Dr. Noll's claim is false that my evidence is not empirical and thus not economic

The second false premise is that to be relevant, the literature to which I cite has to meet Dr. Noll's restrictive definition of "empirical" evidence. Dr. Noll says that no economic literature has quantified the effect of fan loyalty on the financial performance of sports leagues or teams.[18] This critique mischaracterizes the focus of my opinion and the literature on which it relies. My opinion does not require a precise quantification to support the notion that extensive research exists, showing that there is a strong conceptual support, grounded in empirical evidence, for the connection between the fan loyalty engendered by past players and the brand value of current teams. The literature is clear that there is compelling evidence that a sports team's past (its players, wins, championships, etc.) influences its present sales.

For instance, in a landmark conference held at the Brookings Institution in 1971 that eventually led to the publication of Government and the Sports Business (edited by Dr. Noll), Dr. Noll presented evidence that proves my point. Dr. Noll analyzed the important factors that affect demand for sports teams. He concludes that "[w]inning a pennant apparently has a strong effect on attendance in the winning season and also in several succeeding years."[19] This was not merely a

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[17] Similarly, Dr. Noll's statement that "there is no basis in economics to believe that retired players could expect to be compensated for this contribution unless such an arrangement was part of their original employment contract" (Noll Report, p. 40) seems to ignore that fact that this case is centered on the question of whether the retired players' contracts did make such an arrangement. If plaintiffs' legal argument is correct, then Dr. Noll's opinion is false.

[18] Noll Report, p. 27.

[19] See Noll, Roger (1974). Government and the Sports Business. Edited by Roger Noll. The Brookings Institution,

statement about the previous year's results; rather that attendance in a given year was significantly influenced by pennant wins as much as nine years prior.[20]

Dr. Noll is critical of my reliance on the academic literature, arguing that "[p]ublished research contains no evidence" of the link between fan loyalty (engendered *inter alia* by retired players) and financial performance.[21] In this assertion, Dr. Noll's opinion is easily shown to be incorrect.[22]

For example, Rhoads and Gerking found that the "long-standing athletic traditions" of college sports teams "established prior to the sample period" not only generated benefits to those sports program, but actually led to "increased charitable donations from all sources."[23] This showed that *current* donations to universities were significantly increased by *past* long-standing athletic success.

Washington D.C., p. 122.

[20] Noll, Government and the Sports Business, p. 121, Table 1, footnote g.

[21] Noll Report, p. 37.

[22] In addition, Dr. Noll criticizes my reliance on certain articles because those articles are not specifically focused on questions related to retired NFL players. But the articles to which I cited do speak to the relevant question of brand/fan loyalty related to past players, and Dr. Noll himself has cited to those relevant passages. See for example, Ross, James, and Vargas (2006), in which Team History (which includes retired-player related elements such as "game winning plays in the team's history" – such as Herb Adderley's scoring of the first ever defensive touchdown in a Super Bowl (see CLASS 004468-69)) – is found to be statistically significant. The study covered many sports, including football. As Dr. Noll acknowledges, "Team History is more important in explaining attachment than Social Interaction [measures of identity with other fans], Commitment [measures of duration of attachment], and Team Play [measures of the style of play] and equivalent to Stadium Community [measures of the area around the stadium]." (Noll Report, p. 30). Similarly, Dr. Noll points specifically to Underwood *et al.*'s focus on "a strong sense of history (e.g., appreciation/recognition of former teams/players, traditional uniforms)" including the Green Bay Packers. (Underwood *et al.*, p. 5). I disagree with Dr. Noll that my academic support is irrelevant to the question of retired football players.

[23] See Rhoads, T., and S. Gerking (2000), Educational Contributions, Athletic Quality, and Academic Success. *Contemporary Economic Policy*, 18(2), p. 248.

In an analysis of fan loyalty in the NFL, Craig Depken finds that "[t]he longer a team has resided in its host city (CITYAGE), the greater the attendance a team enjoys. This may reflect an accumulation of good will toward the team based on team history within the host city."[24]

Underwood, Bond, and Baer found that "history /tradition" is one of the four common themes contributing to fan loyalty.[25]

Ross, Russell, and Bang conclude that "[u]ltimately brand awareness will have an impact on brand choice, and in turn, help a sport organization generate revenue through ticket and merchandise sales."[26] Ross and his co-authors further show that team history (measured as 'the team has a history of winning', 'has a rich history', and 'has been successful in the past') is an important and statistically significant factor in determining brand association across various sports.[27]

Gladden and Funk state that "success is probably the most important creator of brand

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[24] See Depken, C. (2001). Fan Loyalty in Professional Sports: An Extension to the National Football League. *J. of Sports Economics*, Vol. 2(3), p. 277.

[25] Underwood, Robert, E. Bond, and R. Baer (2001), Building service brands via social identity: Lessons from the sports marketplace. J. of Marketing Theory and Practice, Vol. 9(1). Dr. Noll's critique of the Underwood *et al.* study as being focused on survey research is off-point. This qualitative research is empirical: i.e., "[r]elying on or derived from observation or experiment." (The American Heritage Dictionary of the English Language: Fourth Edition. 2000, (http://www.bartleby.com/61/71/E0117100.html, last visited on June 24, 2008). As to Dr. Noll's claim that the research is biased, this too is incorrect. Underwood, *et al.* accurately reflects factors that matter to *loyal* sports fans, and this is directly relevant to the questions at hand. That non-loyal fans may not care is irrelevant.

[26] Ross, S., K. Russell, and H. Bang (2008), An Empirical Assessment of Spectator-Based Brand Equity. *J. of Sport Management*, 22(3), p. 334.

[27] For basketball, see Ross, S., K. Russell, and H. Bang (2008), An Empirical Assessment of Spectator-Based Brand Equity. *J. of Sport Management*, 22(3), p. 330; for hockey, see Ross, S., H. Bang, and S. Lee (2007), Assessing Brand Associations for Intercollegiate Ice Hockey. *Sport Marketing Quarterly*, 16(2), p. 110; and for "favorite sport" of which the most common was football, see Ross, S., J. James, and P. Vargas (2006), Development of a Scale to Measure Team Brand Associations in Professional Sport. *J. of Sport Management*, 20(2), p. 272.

associations and brand equity over time."[28] Gladden and Milne (1999) further state that "[l]ogistic regression analyses revealed both brand equity and winning significantly contributed to the attainment of merchandise sales."[29]

These findings are supported by Gladden's work, where tradition ('my favorite team has a history of winning') and nostalgia ('I have fond memories of following my favorite team') are important factors in understanding brand associations, and by Wakefield *et al.*, who note that team loyalty may be derived from historical team performance.[30] Gladden, Irwin, and Sutton discuss teams focusing on "strategic management of the team brand as a means of realizing long-term appreciation in franchise value."[31]

Bauer, Sauer, and Schmitt build on Gladden and Funk's work to show that brand equity[32] of a team "positively influences the economic success of the team measured through attendance."[33]

Dr. Noll is wrong to label this literature as non-empirical. The literature to which I cited in

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[28] See Gladden, J., and D. Funk (2002). Developing an Understanding of Brand Associations in Team Sport: Empirical Evidence from Consumers of Professional Sport. *J. of Sport Management*, 16(1), p. 57.

[29] See Gladden, J., and G. Milne (1999). Examining the Importance of Brand Equity in Professional Sport. *Sport Marketing Quarterly*, 8(1), p. 21.

[30] See Gladden, J., and D. Funk (2002). Developing an Understanding of Brand Associations in Team Sport: Empirical Evidence from Consumers of Professional Sport. *J. of Sport Management*, 16(1), p. 68; and Wakefield, K., and H. Sloan (1995). The Effects of Team Loyalty and Selected Stadium Factors on Spectator Attendance. *J. of Sport Management*, 9(2), p. 159.

[31] Gladden, J., R. Irwin, and W. Sutton (2001). Managing North American Major Professional Sport Teams in the New Millennium: A Focus on Building Brand Equity. J. of Sport Management, 15(4), p. 298.

[32] The authors use the term brand equity to capture "brand awareness," "product-related brand attributes," "non-product-related brand attributes," and "brand benefits." This differs from Dr. Noll's use of the term.

[33] Bauer, Hans H., N.E. Sauer, and P. Schmitt (2005), Customer-based brand equity in the team sport industry. *European J. of Marketing*, 39(5/6), p. 507, 508: "Hypothesis H_1 is confirmed."

my first report and which I have added in this report is empirical and is from published and peer-reviewed analyses. Dr. Noll could not be more wrong in his accusation that my analysis "does not apply accepted methods of economic analysis."[34]

Dr. Noll seems to imply that articles that are not econometric are not economic or are without merit when it comes to understanding economic phenomena. But in an article on emissions published in a leading journal, Dr. Noll "[drew] some conclusions about the design of an efficient market for emissions permits," using the sort of analysis that Dr. Noll rejects in this litigation.[35]

Similarly, in an article published in a peer-reviewed journal, Dr. Noll draws conclusions about the regulation of risk comparing cognitive psychology and the standard decision-theoretic model of economics, without any of the sorts of quantitative analysis he appears to demand in this matter.[36] It is clear that for his own research, Dr. Noll accepts that there are many forms of research which can be valid science. That the disciplines of economics, marketing, or management draw from a variety of methodologies is not a controversial point. Dr. Noll's attempt to arbitrarily rule out large portions of the field is simply wrong.

3) Other empirical evidence

Dr. Noll says little to dispute the other evidence I present with respect to the value of past

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[34] Noll Report, p. 19.

[35] See Noll, Roger (1982). Implementing Marketable Emissions Permits. *The American Economic Review*, 72(2), Papers and Proceedings of the Ninety-Fourth Annual Meeting of the American Economic Association, p. 120.

[36] See Noll, Roger (1990). Some Implications of Cognitive Psychology for Risk Regulation. *The Journal of Legal Studies*, 19(2), The Law and Economics of Risk, pp. 747-779.

players.[37] But this sort of evidence, such as the popularity of retro jerseys, is important data. Along these same lines, it is clear that the history and traditions of the Cleveland Browns had value to the fans of that team, as the city of Cleveland settled its litigation to keep the team from relocating by accepting the legacy/brand/logos/team names, but without the current players.[38] A similar transaction occurred in the NBA in 1978, in which the Boston Celtics franchise effectively moved to San Diego and became the Clippers. The NBA ensured that the Celtics history and logos remained in Boston.[39]

Networks like ESPN Classic and the NFL Network feature what are essentially re-runs of old sports events, evidence that fans value the past. For example, the NFL Network re-runs old NFL games under the program title "NFL Classics."[40] NFL network also broadcast a whole week surrounding Hall of Fame week.[41] DVDs of early Super Bowl highlights are also sold to fans of the

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[37] Rascher Expert Report, p. 5; It is clear that EA puts in effort to include information about retired players whose name/number is not included in EA's video games. For example, I have played the PC version of EA's Madden 2007 and I see that un-named players with virtually the same height, weight, years of service, team, and position are included for, as examples, Brent Jones, Charlie Joiner, Dwight Clark, Ed Jones, Eric Wright, Forrest Gregg, Fred Dean, John Taylor, Keena Turner, L.C. Greenwood, Len Dawson, Michael Cofer, Ray Childress, Raymond Chester, Roger Craig, Steve Grogan, and Todd Christensen (See the screenshots in "Madden Captures.zip").

[38] Weisman, Larry (February 9, 1996). "NFL approves Browns move," *USA Today*.

[39] Bostrom, Don (January 7, 2007). "Flyers go from first to worst in one year," *Morning Call (Allentown, Pennsylvania)*.

[40] See http://www.nfl.com/nflnetwork/shows, last visited June 24, 2008. DVDs of early Super Bowl highlights, such as http://video.barnesandnoble.com/DVD/NFL-Films-Super-Bowl-I-X/e/85393795825/#TABS are also sold to fans of the sport's past. Another sign of the value derived from fan interest in retired players' past performances are firms like STATS LLC (http://www.stats.com/) and What If Sports (www.whatifsports.com), who provide access to historical statistics as far back as 1876 and, in some cases, allow fans to play hypothetical fantasy games pitting teams of the past.

[41] See http://www.nfl.com/nflnetwork/shows, last visited June 24, 2008. Fan interest in Hall of Fame week events (such as induction speeches like that of Herb Adderley, see CLASS 004468-49) also speak to the present marketability of past players' performances.

sport's past.[42] Another sign of the value derived from fan interest in retired players' past performances are firms like STATS LLC[43] and What If Sports[44] which provide access to historical statistics as far back as 1876 and, in some cases, allow fans to play hypothetical fantasy games pitting teams of the past against each other.

The NFLPA's statements and actions also provide empirical evidence that it treats retired players' value as positive. For example, in a letter to retirees, Doug Allen wrote that retired players "built the game and the union. We live everyday by the NFLPA's motto: 'Past, Present, and Future.'"[45] The NFLPA on its website writes: "Having a player at your event, whether the player is active or retired, provides you with instant credibility...."[46]

III. QUESTION 2: WHETHER THE NFLPA/NFLPI'S LM-2'S ACCURATELY REFLECT SHARED GROUP LICENSING REVENUE

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[42] See http://video.barnesandnoble.com/DVD/NFL-Films-Super-Bowl-I-X/e/85393795825, last visited June 26, 2008.

[43] See www.stats.com, last visited June 25, 2008.

[44] See www.whatifsports.com, last visited June 25, 2008.

[45] CLASS 000379.

[46] http://www.nflplayers.com/user/content.aspx?fmid=178&lmid=443&pid=1271, last visited June 23, 2008.

As discussed in the introduction, the focus of my answer with respect to the question put to me by counsel was on shared group licensing. My opinion is not, as Dr. Noll characterizes it, "that the form LM-2 submissions by the NFLPA are not accurate"[47] but rather that the LM-2's do not provide an accurate means of determining (a) the total licensing revenue received by NFLPA/NFLPI subject to sharing via the "equal share pool," or (b) (most importantly) the percentage of those shared revenues that are disbursed to players. Therefore, much of the critique by Dr. Noll (focusing on my supposed failure to consider individually negotiated *ad hoc* revenues) is irrelevant to my opinion.

For example, Dr. Noll criticizes my decision not to compare LM-2's to the audited financials, saying "standard practice among economists is to rely upon audited financial reports because they are the most reliable."[48] But whether the LM-2's in total can be reconciled to the union's consolidated audited financial statements is entirely irrelevant to the question as to whether those LM-2's can be disaggregated to reflect just the shared revenues. My opinion is the LM-2's cannot be so disaggregated. Certainly Dr. Noll's use of the NFLPA/NFLPI's audited financials does not provide any insight for disentangling the shared revenues from the individually negotiated *ad hoc* revenues.

Similarly, Dr. Noll criticizes my reliance on the NFLPA/NFLPI spreadsheets because:

> "the spreadsheets include only that portion of the licensing revenues that is subject to the three-way split among NFLPI, NFLPA and the

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[47] Noll Report, p. 40.

[48] Noll Report, p. 9.

> pool for disbursement to the active players by NFLPI. The spreadsheets represent that the internal accounting by the NFLPI and NFLPA of the revenue streams that they share, but not the total revenues collected from licensing or the total payments to the players from these revenues."[49]

For my purposes, "that portion of the licensing revenues that is subject to the three-way split among NFLPI, NFLPA and the pool for disbursement to the active players"[50] is exactly the revenue that I hold to be relevant to the questions before me. Noll's critique that I did not include other revenues (for example that I "exclude[] Premium Royalties and Promotions and Appearance"[51]) is misguided. I disagree with Dr. Noll that the individually negotiated *ad hoc* revenues received by NFL players are relevant to the questions put to me; non-shared revenues are irrelevant to the question of whether the LM-2's accurately reflect the shared revenues that Dr. Noll agrees are reflected in the NFLPA/NFLPI's spreadsheets.[52] Analysis of individually negotiated *ad hoc* or premium revenues is simply not informative to the questions I am analyzing.

From the testimony of the NFL's 30(b)(6) witness, Glenn Eyrich, it is my understanding that "premium royalties are amounts received on a per player basis for certain licenses."[53] Mr. Eyrich distinguished these premium or individually negotiated *ad hoc* royalty payments[54] from "Licensing"

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[49] Noll Report, p. 42.

[50] Noll Report, p. 42.

[51] Noll Report, p. 42.

[52] Noll Report, p. 42.

[53] Eyrich Deposition, p. 69.

[54] For some years, these funds are grouped together with "player appearances" when they are disbursed in a single line

revenues. When asked whether for this latter category "they [active players] get an equal share; is that correct?" Mr. Eyrich answered: "Correct."[55]

I took as my goal, then, to determine whether I could match the data contained in the spreadsheets produced in discovery (which tally and divide those shared group licensing revenues) with the publicly available LM-2's. My opinion was, and remains, that the LM-2's do not allow one to determine the amount of group licensing revenues paid into the "equal share pool" nor to determine the portion of that money disbursed to players.

Dr. Noll's proposed methodology, reconciling the cash-based accounting of the LM-2's with the accrual-based accounting of the audited financials, is tangential to my aim, as neither of these two documents provide a definitive breakdown of the shared licensing revenues, nor of the division among the NFLPA, the NFLPI, and the players.

Much of the rest of Dr. Noll's response to my second opinion is then spent on demonstrating how much other revenue is contained on the LM-2's and audited financials, purporting to demonstrate that I "massively underestimate both revenues and disbursements"[56] and to show that when the NFLPA/NFLPI's individually negotiated *ad hoc* payments are included in the tally, the player's share of NFLPA/NFLPI revenues is comparable to those of the NBPA or MLBPA.[57] This critique strikes at the essence of what is wrong with Dr. Noll's analysis, namely that he insists on

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item called "player royalty and appearances." See, for example, the NFLPA LM-2 for year 2005, Schedule 14.

[55] Eyrich Deposition, p. 69.

[56] Noll Report, pp. 43.

[57] Noll Report, pp. 42-47.

including football's individually negotiated *ad hoc* payments in his analysis. For the question of shared revenues, including such individually negotiated *ad hoc* revenues is incorrect.[58]

Specifically, Dr. Noll's analysis, as laid out in Table 3, proves my point; Dr. Noll's numbers from the consolidated audited financials also do not map to the spreadsheets. Both the LM-2's aggregate figures and those Dr. Noll presents in Table 3 from the consolidated audited financials far overstate the shared portion of revenues (and the percentage paid to players on those shared revenues). Dr. Noll is exactly right that for individually negotiated *ad hoc* revenues, "NFLPI keeps a much smaller share of the revenues...than its share of revenues that enter the player pool and that are divided equally among players, NFLPA, and NFLPI,"[59] but for this very reason, including those individually negotiated *ad hoc* revenues in my analysis would distort the answers to the questions related solely to shared revenues.

My work with the LM-2's in my first report was an effort to disaggregate those reports and determine what could be said about the shared revenues collected and disbursed by the NFLPA/NFLPI. Based on Dr. Noll's criticisms, I have reviewed my efforts and I see in certain

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[58] As I laid out in my first report, both the NBPA and MLBPA share virtually all of their licensing revenues equally. Thus, those sports' LM-2's provide a cleaner view of shared revenues than do the NFLPA/NFLPI's LM-2's or audited financials. By comparing those documents incorrectly, Dr. Noll is presenting an apples-to-oranges view of *shared* revenues across the sports.

[59] Noll Report, p. 45. Noll agrees with this assessment elsewhere, such as at page 41 of his report: "Dr. Rascher claims that the spreadsheets he used report lower distributions from licensing revenues and a lower share of payments to players from total revenues than is reported on Form LM-2. This statement is correct, but the reason is not that either document is incorrect." This is my point exactly. The reason is that the LM-2 contains *ad hoc* revenues that are not relevant to my analysis.

cases I included LM-2 revenues that were not shared revenue in my calculations,[60] and for one category of revenues,[61] I excluded revenues that should have been included. For this current report, I first attempted to revise those calculations using only shared revenues, but based on this review, I am now of the opinion that the LM-2's simply do not provide sufficiently disaggregated data to perform accurately the exercise I undertook. Dr. Noll also concedes that the NFLPA/NFLPI keeps its records in such a way that disaggregation of certain individual vs. group revenues is impossible.[62] In other words, using only the LM-2's, it is not possible to isolate the revenues paid into, or out of, the shared revenue.

For example, in 2006, it is clear from the NFLPA/NFLPI spreadsheets that approximately $44.2 million in shared revenues were received (as well as $22.8 million in NFL Sponsorship & Internet revenues, net of individually negotiated *ad hoc* payments to players).[63] However, my tally of all LM-2 figures labeled "Royalties" shows over $60 million in revenue (as well as the same Sponsorship and Internet revenues found in the spreadsheets).[64] The point is not that the $60 million is incorrect, but rather that even for those years where the LM-2's provide detail on

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[60] For example, I inadvertently included Premium Royalties for 2003-2005 when I did not intend to.

[61] For 2006 and 2007, I neglected to include 75% of Sponsorship and Internet revenues.

[62] Noll Report, p. 50.

[63] See "GLR FY06 Calaculation.xls," which lists $44,187,720.63 in "Total Licensing Revenues," and $22,884,528 in "NFL Sponsorship and Internet" revenues, from which $5,265,632 in ad hoc payments to players were deducted as "25% NFL Fund."

[64] See "NFL LM_2 2006 Analysis.xlsx," Sch_14.

individual payments, they do not accurately reflect the value of *just* those revenues that are shared.[65] This appears to occur because in some cases the NFLPA/NFLPI labels individually negotiated *ad hoc* revenues by the same labels as it uses for shared revenues. For example, in 2006 TMP made a total of seven payments for $616,854, according to the LM-2. From the spreadsheets, I can see that five of those payments went into the shared pool, but that one of the two individually negotiated *ad hoc* payments that did not go into the pool, is labeled in such a way that without the internal sheets, it would appear to be shared revenue (rather than an individually negotiated *ad hoc* payment).

My opinion that the LM-2's do not accurately mirror the internal NFL spreadsheets remains true.[66] Indeed, I would now say that the LM-2's not only do not disaggregate but cannot be disaggregated to reconcile with the internal spreadsheets. Therefore on my first exhibit, I have removed any attempt to derive those figures from the LM-2's, as they simply do not correspond to the shared revenues or division thereof.

1) Dr. Noll's Treatment of Dues

Dr. Noll specifically criticizes my decision not to include NFLPA rebated dues in my calculation of shared licensing revenues.[67] Elsewhere, Dr. Noll contrasts my treatment of dues

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[65] In my original report, I wrote "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." (Rascher Expert Report, FN7), I have now determined that this assumption failed to adequately distinguish *ad hoc* revenues from shared group licensing, resulting in an incomplete disaggregation.

[66] The fact that the LM-2's are not always "a fair portrayal" of the NFLPA/NFLPI's business was echoed by Andy Feffer in a *SportsBusiness Journal* article from June 9, 2008.

[67] Noll Report, p. 43.

refunds for the NFLPA with the treatment of "special dues" by MLBPA.[68] His criticism is incorrect and my decision was appropriate. Put most simply, NFL players pay dues out of their salaries. These dues are not licensing revenues paid by licensees that are then assigned in lieu of dues.[69] For the purpose of determining total shared licensing revenues (or *any* kind of licensing revenue), including these payroll deductions would be incorrect, just as it would be incorrect to include the rest of the NFL players' salaries in any calculation of licensing revenues. Because the NFLPA dues to which Dr. Noll refers are not payments made by licensees, the refund of those dues cannot be relevant to the split of shared licensing revenues.[70]

Similarly, Dr. Noll's analysis of the growth of the NFL's Fund B[71] seeks to re-label as licensing revenues monies that are clearly not derived from any license agreement. The NFLPA/NFLPI's consolidated audited financials state that the money flowing into, and out of, Fund B are the dues that are deducted from players' football salaries, not licensing revenues that have

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[68] Noll Report, pp. 52-54.

[69] As the collective bargaining agreement (CBA) between the NFL and the NFLPA states, NFLPA dues are collected from active players directly from their football paychecks, and not via a deduction of their licensing revenues. (See Article V, Section 2 of CBA).

[70] A simple thought exercise makes this clear. Imagine that instead of the pattern of the NFLPA collecting $10,000 per player and then, five years later, refunding $5,000, the NFLPA were simply to collect $5,000 upfront and refund nothing. The players would not have gotten any more or any less money, and the total receipt of licensing revenue would be unchanged as well. Similarly, if the NFLPA deducted $1 million per player from players' paychecks, and then refunded all but $5,000 of that deduction, it would not mean that each player was suddenly receiving nearly $1 million in shared licensing revenues. To say that somehow by taking an amount from each player's check and then refunding it, that the NFLPA has created additional licensing revenues for players is incorrect and misleading.

[71] Noll Report, pp. 52-54.

been relabeled and diverted into a strike fund.[72]

Baseball is different. MLBPA players pay regular dues (which ranged from $25 per day in 2000 to $50 per day in 2008).[73] Just as with the NFLPA, these regular dues are not related to licensing revenues, and I have not included them in my calculations of shared MLBPA revenues.[74] However, the MLBPA has also chosen to use the proceeds of shared group licensing for a variety of purposes and has labeled these licensing revenues as "special dues."[75] Some are used for administrative purposes.[76] Others were dedicated to a fund in the event of a strike or lockout and were later refunded to players.[77] For the purpose of determining total shared licensing revenues received, had these "special dues" been excluded, I would have understated the MLBPA's shared licensing revenues. And for the purpose of determining how much of that shared revenues the players received, if I had not included that portion of the "special dues" that were eventually

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[72] See PI095979. It is simply inappropriate to include dues in these calculations, but even if it were appropriate for some other analysis, Dr. Noll has erred in his tallies by not including the receipt of those dues in the denominator of his tallies.

[73] MLBPA LM-2 for year 2000, p. 2; MLBPA web site (http://www.mlb.com/pa/info/faq.jsp, last retrieved on June 24, 2008).

[74] In the MLBPA 2004 audited financials, regular dues are referred to in Note 7 in the Notes to Financial Statements, on p. 8.

[75] In the MLBPA 2004 audited financials, these special dues are discussed in Note 6 in the Notes to Financial Statements, on p. 7.

[76] MLBPA 2004 audited financials, Note 6B in the Notes to Financial Statements, p. 7. In my calculations, I include these revenues in the calculation of total shared licensing revenues, but not in the calculation of revenues disbursed to players.

[77] MLBPA 2004 audited financials, Note 6B in the Notes to Financial Statements, p. 7; Fisher, Eric and Mullen, Liz (May 5, 2008); "MLB players receive labor peace dividend," *Street & Smith's SportsBusiness Journal*.; MLBPA LM-2 for year 2007; The MLBPA is explicit about assigning licensing money in anticipation of "extraordinary legal and other expenses" (See MLBPA 2004 audited financials, p. 7).

rebated, that too would have been in error.[78]

When the MLBPA chooses to refund "special dues," they are disbursing to players the proceeds of specific licensing deals. When the NFLPA chooses to refund its dues, they are disbursing a portion of the NFL players' football paychecks that had been previously withheld as a payroll deduction. Dr. Noll's efforts to conflate the two types of dues should not obscure the fact that the NFL player's regular dues are akin to the MLB player's regular dues (neither of which I include in my licensing revenues analysis) and unrelated to MLB's player "*special* dues" (which I correctly include in my analysis).

2) The $8 million transfer

Dr. Noll appears to misunderstand my analysis of the $8 million transfer, discussed in my first report.[79] My opinion is that the NBA's one-time increase of its payment to the NBPA from $5 million to $8 million in 2006 seems to provide no relevant economic basis for the NFLPA/NFLPI's decision, from 2006 onward, to keep 100% of a tranche of shared revenues.

Although Dr. Noll says he is criticizing my opinion, his explanation of the incomparability of the payments received by NBPA with the NFLPA/NFLPI's treatment of logo rights[80] is entirely consistent with my own opinion on this $8 million reclassification. It appears that Dr. Noll agrees with me that there is no relevance to the NFLPA/NFLPI of the fact that the NBPA received $8

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[78] Based on my review, I have adjusted the value of licensing revenues refunded in 2003, to exclude revenues earned prior to the period of my analysis. See Revised Exhibit 3.

[79] Rascher Expert Report, pp. 7-8

[80] Noll Report, pp. 8, 46.

million in 2006 for its logo rights,[81] even though this was the justification given by the NFLPA/NFLPI though its 30(b)(6) witness Glenn Eyrich.[82]

The rest of Dr. Noll's discussion, that the NFLPA grew its total gross revenues and that the $8 million is a small fraction of the union's total receipts and cannot be examined in isolation, are both irrelevant to my opinion. I did not claim that the NFLPA/NFLPI had not increased its revenues, but rather that unlike the NBA/NBPA deal, which was tied to a specific payment for logo rights, I saw no evidence of a specific payment from the NFL to the NFLPA/NFLPI for logo rights.[83] Dr. Noll provides no evidence of such a payment; he merely points to total gross revenues having grown. This is irrelevant.

Secondly, my opinion regarding the $8 million has nothing to do with "evaluating the efficiency of the NFLPA/NFLPI."[84] The total share of all revenues paid to players is not relevant[85] to the question of whether the NFLPA/NFLPI's reliance on the NBPA's deal was solid. I did not suggest the comparison; rather it was the NFLPA/NFLPI, through its documents and its 30(b)(6)

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[81] Noll, at page 8, writes that the comparison of the NFLPA/NFLPI's "allocation of this $8 million with the disposition of the rights to its logo by the National Basketball Players Association" is "meaningless because the NBA markets the logo of the NBPA, whereas Players Inc. markets the logos of the NFLPA and NFLPI." I wrote, "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." It appears we both agree that the NFLPA/NFLPI's use of the NBPA's deal as the basis for its own $8 million transaction is non-economic.

[82] See Exhibit 91 to Eyrich Deposition (PI000145-6) and Exhibit 97 to Eyrich Deposition (particularly note 10 on PI095983), as well as Eyrich Deposition, p. 92.

[83] Rascher Expert Report, pp. 7-8.

[84] Noll Report, p. 46

[85] Noll Report, pp. 46-47.

witness,[85] who have argued that the NBA/NBPA deal was the basis for this change. My opinion remains that the NBPA's logo rights deal has little or no economic relevance to the NFLPA/NFLPI change in its treatment of an $8 million tranche of the shared revenue pool. Dr. Noll's critique of my work nevertheless appears to agree that the two unions' logo transactions are incomparable.

IV. QUESTION 3: WHETHER IT IS CUSTOMARY TO SHARE REVENUES EQUALLY

My third opinion (as to what the custom has been in various sports associations with respect to the division of shared licensing revenues) is focused on how sports associations generally, including but not limited to the NFLPA, share their pooled licensing revenues. Dr. Noll is silent with respect to my demonstration that the MLBPA, NBPA, and BBHOF all share their pooled revenue equally.[87]

Instead, in his critique of my opinion, Dr. Noll seeks to inject the tangential issue of NFLPA/NFLPI individually negotiated *ad hoc* licensing deals[88] into the discussion. For example, he points to several individually negotiated *ad hoc* licensing deals for retired players like Fran

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[86] See Exhibit 91 to Eyrich Deposition (PI000145-6) and Exhibit 97 to Eyrich Deposition (particularly note 10 on PI095983), as well as Eyrich Deposition, p. 92.

[87] Rascher Expert Report p. 9; In addition, see Lombardo, John (2006). "NBPA trades control of rights for guaranteed $25M a year," *SportsBusiness Journal*.

[88] In my first report I wrote that "Importantly, the NFLPA allows so-called "ad hoc" or "premium" licensing, which are for licensing deals of five of fewer players." This statement is correct, but incomplete. The NFLPA/NFLPI's accounting also allows for *ad hoc* deals for more than five players, but this additional category does not change my opinions.

Tarkenton and Warren Moon.[89] The fact that these deals appear to (1) give different amounts to different players and (2) give 100% of the individually negotiated *ad hoc* revenues to the players in question, is irrelevant to the question of the custom with respect to the division of pooled revenues.

Dr. Noll's other two examples actually provide additional evidence in support of my point. First, Dr. Noll points to the contract with EA for the rights to Hall of Fame players and coaches.[90] According to Dr. Noll, every member of the Hall of Fame, whether player or coach, received an equal share of the revenues, consistent with the custom I identified in my first report.[91]

Dr. Noll also points to a contract with TMP for the sale of action figures.[92] The contract calls for a shared payment as well as individually negotiated *ad hoc* payments based on individual sales. I have looked at TMP's payments to the NFLPA/NFLPI in the 2006 LM-2, as well as in "GLR FY06 Calaculation.xls," [sic] in which the union tallied and divided its shared revenues. In that year, TMP made over $560,000 in payments that went into the shared revenue pool[93] (which represented over 90% of TMP's licensing payments in that year, according to the LM-2) and was shared equally among eligible active players. That two individually negotiated *ad hoc* payments were also made is irrelevant to the question of how the shared revenues were distributed.

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[89] Noll Report p. 49; PI032952, PI032953, PI032957, PI032959, PI032962, PI032967, PI032971-2, PI032974-5, PI032977-8. PI032980-1, PI032983-4, and PI032986-7.

[90] Noll Report, p. 48.

[91] Moreover, the players received 84% of all proceeds (consistent with the customary range I discuss in my fourth opinion).

[92] Noll Report p. 49 and PI006932-46.

[93] "GLR FY06 Calaculation.xls" lists five payments totaling $564,684.99 from TMP, all of which are added to "Licensing Royalties- PLAYERS INC," which are then shared among the NFLPA, the NFLPI, and the players.

Finally, of course the NFLPA/NFLPI, through its 30(b)(6) witness, testified that all active players share equally in the GLA distributions.[94]

Based on the work I completed for my original report, as well as my review of Dr. Noll's critique, my opinion remains that the custom, across several sports, is that shared licensing revenue pools are generally shared equally among eligible recipients. Dr. Noll's efforts to interject individually negotiated *ad hoc* deals are not relevant and do not change my opinion.

V. QUESTION 4: THE CUSTOMARY RANGE OF LICENSING COMMISSIONS

Dr. Noll opens his criticism of my analysis of the portion of shared licensing revenue kept by the NFLPA/NFLPI by opining that my focus on shared licensing revenues was incorrect. He is wrong. My focus was appropriately on these revenues alone. My understanding is that the alleged misconduct relates only to these shared revenues. To Dr. Noll's point that I should look at all sources of licensing revenues (as well as the refunding of dues), I disagree. My analysis was, and is, intended to focus on what percentage of the shared revenue pool goes to players. To that end, injecting individually negotiated *ad hoc* payments or other sources of revenues to players is incorrect.[95]

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[94] Eyrich Deposition, pp. 68-69. Although on page 50 of his report, Dr. Noll asserts that practice squad players receive "a smaller share" (which I understand from Eyrich Exhibits 96, 96A, 96B, 96C, 96D is supposed to be $1,000 per practice squad member), in my review of the 2007 and 2008 LM-2, Schedule 18 (which list individual disbursements to players), I see no evidence that any player received a $1,000 "Royalty" payment.

[95] Noll Report, pp. 47-50; In addition, Dr. Noll's opinion that when those other sources of revenue are added to the shared licensing revenues, the NFLPA/NFLPI's average falls within my customary range is irrelevant to the question I am addressing, which focuses on the shared revenues to which the GLA class is asserting a claim.

Dr. Noll also provides the opinion that among the set of examples I provided of licensing arrangements, none are comparable to the NFLPA/NFLPI.[96] For example, he dismisses "colleges and smaller leagues" because "these entities do not share revenues with players, and they are not unions."[97] But Dr. Noll presents no evidence as to why a licensing agency would charge more (or less) to an entity because they share revenues with players or because they are a union, and I see no reason why the distinctions between the NFL players' deals and those made on behalf of colleges, smaller leagues, or even individual athletes would result in substantially higher fees for the NFL players because of how, or to whom, the NFLPA/NFLPI chooses to divide the receipts.

Dr. Noll has provided an additional example of a sports organization that provides its members with a percentage of revenues in line with the customary range. According to Dr. Noll's report, EA paid the Pro Football Hall of Fame $400,000 for its group licensing rights and the members of the Hall of Fame received 84% of the licensing revenues.[98]

Dr. Noll criticizes my conclusion that there are economies of scale in the negotiations of group licenses. His criticism is incorrect.[99] Specifically, the source for my opinion was the standard definition of economies of scale[100] and my focus was, again, on shared group licenses, not individually negotiated *ad hoc* deals. The conclusion is clear that the marginal cost of adding an

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[96] Noll Report, pp. 51-52.

[97] Noll Report, p. 51.

[98] Noll Report, p. 48.

[99] My opinion also has nothing to do with the Dr. Noll's false assertion that I have a "belief that all group licenses convey the same rights at the same price for all players." (Noll Report, p. 52.)

[100] I cited to Jean Tirole, *The Theory of Industrial Organization*. MIT Press, 1989, p. 16.

additional player to the NFLPA, and thus conveying the rights to that player in negotiating EA's Madden game license, would not increase the cost of that negotiation by as much as the average cost per player (if it increased the cost at all).

Dr. Noll also criticizes my reference to the share of revenues kept by the MLBPA from their shared licensing programs. I disagree with Dr. Noll's opinion that the MLBPA is not comparable, or that a correction for NFLPA dues must be made before such a comparison is possible. Both the NFLPA/NFLPI and the MLBPA run their own group licensing.[101] Both received group licensing revenues that were then shared equally among members.[102] As I discuss above,[103] the focus of my analysis is to look at shared group licensing received and the portion of that shared group revenue disbursed to players. To that end, a comparison of the NFLPA/NFLPI's shared revenues with those of MLBPA's shared revenues is entirely appropriate, and based on my analysis, I conclude that while MLBPA kept approximately 38% of all shared licensing revenue over the period 2003-2007,

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[101] Dr. Noll argues (Noll Report, p. 52) that because the NBPA has delegated its group licensing to the NBA, there is insufficient information to determine the full share of those licensing revenues kept by the NBA/NBPA, and thus to determine the share of total shared licensing revenues kept by players. Although I think the NBPA is a valid comparable for other aspects of this case (for example, for the fact that it shares its group licensing revenues equally among all participants), I agree with Dr. Noll that the NBPA is not well suited for analysis of the specific question of the portion of shared licensing revenue shared with players.

[102] See http://www.mlb.com/pa/info/faq.jsp, retrieved on June 22, 2008.
Q: How is licensing revenue distributed? A: Players receive a pro rata share of licensing revenue regardless of popularity or stature. Each player share is determined by his actual days of Major League service in a given season. **Q: What is group licensing?** A: Any company seeking to use the names or likenesses of more than two Major League Baseball players in connection with a commercial product, product line or promotion must sign a licensing agreement with the MLBPA. The license grants the use of the players' names and/or likenesses only and not the use of any MLB team logos or marks. Examples of products licensed by the MLBPA include trading cards, video games, T-shirts, caps, a wide variety of other products such as pennants, posters, pins, action figures and advertising campaigns for a wide variety of products and services.

[103] See my response to Dr. Noll's critique of my second opinion.

NFLPA/NFLPI kept between 64% and 69% of all shared licensing revenue.[104]

As discussed above (see Section III), Dr. Noll's treatment of NFLPA dues is inappropriate. He has arbitrarily assigned revenues, unrelated to any form of licensing, and has treated them as shared licensing revenues. There is no validity to such a designation. In contrast, there is a strong basis for including the specific "special dues" associated with MLBPA's group licensing in my analysis.

VI. Q5: The Economics of Representing Both Retired and Current Players

Dr. Noll makes three arguments to counter my answers to the fifth question. He argues that (a) exclusivity is not necessary to achieve one-stop shopping, (b) that the NFLPA/NFLPI does not have exclusivity over retired players, and (c) that it is "facetious" to argue that the NFLPA/NFLPI can extract rents from football players, whether active or retired.

1) One-Stop Shopping

Dr. Noll's first criticism of my opinion is that "[t]he benefits of one-stop shopping do not depend on whether the NFLPA has exclusive rights to players."[105] While Dr. Noll's statement is correct, it misses my point. The question I was asked focused on two issues, exclusivity as well as collectivity. In my response, I focused first on the benefits the NFLPA/NFLPI received from

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[104] See Revised Exhibit 3.

[105] Noll Report, p. 54.

having claimed that it represents "more than 1,800 active players and over 3,000 retired players,"[106] not from whether it is the sole representative. Clearly, Dr. Noll is right that if two groups had rights to all players, each could offer one-stop shopping. However, this critique says nothing to my point, which is that by having collective rights (over active or retired players), the NFLPA is able to create efficiency rents.

2) Exclusivity

Dr. Noll disputes that the NFLPA/NFLPI has exclusivity over group licensing for retired players, pointing to the Take-Two contract.[107] My understanding of plaintiffs' claim is not that the NFLPA/NFLPI has exclusivity for every would-be group licensee of retired players' rights, but rather that (a) the NFLPA/NFLPI has represented in its communications that it did so,[108] and (b) the NFLPA/NFLPI insists that its licensees (whether for retired players' rights or not) agree that they will treat the NFLPA/NFLPI as if it were the sole source for active *and* retired players' group licensing rights.[109]

My opinion is not that the NFLPA/NFLPI has "market power" in a strict antitrust sense. I

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[106] See for example, CLASS 001728.

[107] Noll Report, p. 55. My understanding is that the Take-Two agreement itself is not in evidence in this matter, so that neither Dr. Noll nor I have the ability to determine the content of Take-Two's licenses with retired players.

[108] See CLASS 001728 as well as CLASS001709.

[109] "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." See PI000081.

have not studied that issue. Instead, my opinion is that for those set of licensees who sign the standard licensing agreement[110] with the NFLPA/NFLPI,[111] even if a particular license only grants active player rights, the NFLPA/NFLPI then has exclusivity, and the resulting leverage, over the retired players' rights with respect to that licensee. Gene Upshaw explained this form of exclusivity: "PLAYERS INC's licensees such as EA Sports are permitted to secure retired NFL player rights only from PLAYERS INC, not from any other source, contrary to what others may have told you."[112]

As one example, because the licensing deal with EA for the Madden game includes the non-interference language (which I cited to in my first report[113]), EA is prohibited from negotiating with any retired NFL player except through the NFLPA/NFLPI. My understanding is that active players all grant the NFLPA/NFLPI exclusivity for their group licensing deals as part of the Collective Bargaining Agreement and standard NFL Player Contract.[114] From the perspective of the retired players, licensees who seek active player group licensing deals grant the union exclusivity over

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[110] I reviewed a series of NFLPA/NFLPI license agreements -- Exhibits CC through UU of the Declaration of Jill Adler Naylor in Support of Plaintiffs' Motion for Class Certification, as well as the TMP license (PI006932-46). Each contains the same standard non-interference language as the EA deal to which I cited in my first report (See Rascher Expert Report, p. 15) that grants the NFLPA/NFLPI exclusivity (with respect to the licensee) to any player who "at any time was under contract to an NFL Club."

[111] In 2007, there were 65 such licensees, which made licensing payments (related to shared revenues) of $52.8 million.

[112] CLASS001709, emphasis in original.

[113] Rascher Expert Report, p. 15.

[114] See Article XIV, Section 7 of the CBA (http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=231&pid=533&type=c), last visited June 24, 2008. See also Appendix C, Section 4b (http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=231&pid=708&type=c), last visited June 24, 2008. Dr. Noll acknowledges this active player exclusivity at page 14 of his report.

those retirees. And from that, my analysis focused on how that granted exclusivity was of benefit to the NFLPA/NFLPI. Dr. Noll's reference to the Take-Two contract[115] does not speak to the licensees of the NFLPA/NFLPI who are bound by the non-interference clause, as he acknowledged in his report.[116]

3) Principal-Agent problems within Unions

Dr. Noll dismisses my opinion that the NFLPA/NFLPI could exert leverage over its own members (including retired players). He states that it is "facetious because the NFLPA is wholly owned by the active players."[117] Yet, Dr. Noll himself has published research showing that democratic institutions can suffer from the problem of not having the agents carry out the will of the principals. For instance, Noll states:

> "A central problem of representative democracy is how to ensure that policy decisions are responsive to the interests or preferences of citizens.... Inevitably, elected officials delegate considerable policymaking authority to unelected bureaucrats.... This gives rise to the question how – or, indeed, whether – elected political officials can reasonably effectively assure that their policy intentions will be carried out."[118]

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[115] My understanding is that Take-Two previously had a license through the NFLPA/NFLPI and was thus bound by the non-interference clause. When EA received exclusive video game rights from the NFLPA/NFLPI, this meant Take-Two was no longer a licensee and thus no longer bound by the non-interference clause.

[116] Noll report, p. 24: "...the exclusive license between NFLPI and EA for computer games created the opportunity for another entity to assemble licenses for retired players for a competing game."

[117] Noll Report, p. 55. However, I note that the idea of a body collectively owned by its customers exercising antitrust market power over those customers is not unheard of. See, for example, United States of America v. Visa USA, Inc. et al., in which the Courts found that "Visa U.S.A. and MasterCard, jointly and separately, have power within the market for network services." Those services were sold to the banks that, at the time of the case, were the owners of the credit card associations. (See http://www.usdoj.gov/atr/cases/f201200/201283.pdf, last visited June 26, 2008).

[118] McCubbins, M., Noll, R., and B. Weingast (1987). Administrative Procedures as Instruments of Political Control. p. 243.

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> "The crime of runaway bureaucracy requires opportunity as well as motive, and this is supplied by asymmetric information. A consequence of delegating authority to bureaucrats is that they may become more expert about their policy responsibilities than the elected representatives who created their bureau. Information about cause-effect relations, the details of existing policies and regulations, the pending decision agenda, and the distribution of benefits and costs of agency actions is costly and time consuming to acquire. As in all agency relationships, it may be possible for the agency to take advantage of its private information."[119]

Similarly, shareholders in publicly traded firms with representative forms of organization, where each shareholder has one vote per share, nevertheless often resort to litigation claiming abuse by management or even by the board members whom the shareholders elect. Lucian Bebchuk, in a *Harvard Law Review* article, writes: "How can management ignore the wishes of shareholders and still remain in power? To begin, as I discuss in detail elsewhere, under current arrangements, shareholders seeking to exercise their theoretical power to replace directors face substantial impediments."[120]

Union leaders can also misrepresent their members. Discussing unions' representative structure, Bramble writes: "The existence of many elements of representative democracy is, however, not necessarily the best indicator of political representativeness. It is entirely possible for political institutions to have formally very democratic constitutions but to be led by figures who are only marginally under the control of constituents or members."[121] Bramble concludes that a

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[119] McCubbins, *et al.*, p. 247.

[120] Bebchuk, L. (2005). The Case for Increasing Shareholder Power. Harvard Law Review, 118, p. 856.

[121] Bramble, T. (2000). Leadership representatives in the Australian union movement. Australian Bulletin of Labour,

majority of the unions he studied were "bureaucratic" meaning that the members were not very much involved.[122]

As Booth writes in The Economics of the Trade Union, "... there are likely to be principal-agent problems associated with the fact that union leaders (agents) have objectives conflicting with the membership (the principal). These problems may arise because the leadership may be better informed than its membership, or because it is interested in self-aggrandisement."[123]

Finally, as Dr. Noll states, "NFLPA is wholly owned by the active players."[124] Even if Dr. Noll were correct that the NFLPA's constitution ensures that its actions are entirely consistent with the goals of the active players (which is contrary to the literature cited above), this says nothing with respect to whether the union can extract rents from the retired players, whether they are members (non-voting) or not.

VII. Q6: SALARIES

Since I filed my original report, I understand that the Court has denied Plaintiffs' request for the employment contracts of Gene Upshaw. Even though Dr. Noll may have relied on materials the Court expressly refused to provide, I have been instructed by counsel that the sixth question I was

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26(4), p. 301. One of the abuses Bramble points to is the practice of "stacking" of executive committees.

[122] Bramble, p. 319.

[123] Booth, A. (1995). The Economics of the Trade Union, pp. 87-88. In "Administrative Procedures as Instruments of Political Control," p. 247, Dr. Noll and co-authors make similar arguments about information asymmetry.

[124] Noll Report, p. 55.

asked, with respect to Mr. Upshaw's salary, has been ruled to be irrelevant to the issues in suit, and the details of Mr. Upshaw's compensation will not be disclosed. Therefore, I will not be opining on the issue, and I have not addressed Dr. Noll's now-moot critique of my sixth opinion.

Respectfully submitted this 26th day of June, 2008,

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