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19 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
20 **SAN FRANCISCO DIVISION**

21 BERNARD PAUL PARRISH, HERBERT
ANTHONY ADDERLEY, WALTER
22 ROBERTS III,

23 Plaintiffs,

24 v.

25 NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION and NATIONAL
26 FOOTBALL LEAGUE PLAYERS
INCORPORATED d/b/a/ PLAYERS INC,

27 Defendants.
28

Case No. C 07 0943 WHA

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

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TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

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

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

Date: June 13, 2008

DEWEY & LEBOEUF LLP

BY: /s/ Jeffrey L. Kessler

Jeffrey L. Kessler

Attorneys for Defendants

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1 Pursuant to Fed. R. Civ. P. 56, Defendants National Football League Players
2 Association (“NFLPA”) and National Football League Players Incorporated (“Players Inc”)
3 (collectively, “Defendants”) hereby submit this Motion for Summary Judgment against Plaintiff
4 Herbert Adderley and the GLA Class.

5 **PRELIMINARY STATEMENT**

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

16 To the contrary, the undisputed evidence establishes that all GLA Class members
17 were paid when their rights were licensed, and that the third party license agreements whose
18 revenues are sought by Plaintiffs were not intended to, and did not, license the rights of any
19 retired players. Rather, the EA and other license agreements at issue, and all of the licensing
20 revenues generated under those agreements, were 100% attributable to licensing the rights of
21 active players. As testified to by the EA executive who negotiated EA’s license agreements with
22 Players Inc:

23 “My understanding was that this license agreement and the fees that [EA] agreed
24 to pay in this license agreement were to secure the rights of active NFL players
25 and that Players Inc represented retired players, which, if we wanted to purchase

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

1 those rights separately, Players Inc would work on our behalf to do so.”²
2 Similarly, with respect to the NFLPA’s license agreement with the Topps Company (which class
3 counsel handed up to the Court at the class certification hearing), the undisputed facts, as attested
4 to by Topps’s Rule 30(b)(6) witness, establish that, contrary to what class counsel told the Court,
5 this Topps license agreement also only conveys the rights of active players:

6 Q: And is it your understanding today that under the 2007 license agreement
7 Topps still needs to enter into individually negotiated deals with retired
8 players or through Players, Inc. with respect to a particular retired player in
9 order to obtain the rights to such a retired player?
10 A: Yes. It’s my understanding that we did not get those rights from the license
11 agreement; that we had to do a separate agreement and make a separate
12 payment for these rights.³

13 The record evidence is thus consistent; every licensee that has provided testimony
14 or declarations has confirmed the testimony of Defendants’ witnesses that the license agreements
15 that are the basis for the GLA Class’s claims do not, in fact, convey any retired players’ rights.
16 This is fatal to Plaintiffs’ claims because it cannot be seriously disputed that the GLA Class has
17 no contractual or other legal entitlement to revenues generated by active player licensing.

18 Indeed, Adderley admitted at his deposition that the retired player GLA – though
19 not, as this Court has noted, a model of clarity – provides that the only moneys to be “divided”
20 between retired players are “moneys generated by such licensing of retired player group rights,”
21 and that he understood that he would only get paid when his rights were used.⁴ It is also
22 undisputed that the GLA says nothing about retired players participating in any “equal share”
23 pool.⁵ Most significantly, Plaintiffs do not dispute that when Defendants licensed the rights of
24 retired players, primarily through “ad hoc” deals (which included group licensing), Defendants
25 paid over 98% of that more than \$30 million in revenues to those retired players whose rights
26 had been licensed.

27 ² Joel Linzner 30(b)(6) Depo. Tr. (“Linzner 30(b)(6) Depo.”) 71:23-73:25 (Greenspan Decl. Ex. 2).
28 ³ Warren Friss 30(b)(6) Depo. Tr. (“Friss 30(b)(6) Depo.”) 74:8-21 (Greenspan Decl. Ex. 3) (emphasis added).
⁴ Herbert Adderley Depo. Tr. (“Adderley Depo.”) 89:13-90:1, 92:8-17, 101:3-9, 96:13-18 (Greenspan Decl. Ex. 4); Adderley GLAs (Greenspan Decl., Ex. 5) (emphasis added).
⁵ See Adderley Depo. 255:4-257:11 (“‘Equally’ is not in here.”) (Greenspan Decl. Ex. 4).

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

11 There are additional, independent defects requiring summary judgment against
12 Plaintiffs’ breach of fiduciary duty claim. First, now that the Court has ruled that the law of
13 Virginia or Washington, D.C. will apply, it is clear that Defendants had no fiduciary duty to
14 Plaintiffs. Second, as this Court knows, an essential element of any claim of breach of fiduciary
15 duty is proof of injury to each GLA Class member. Yet, Plaintiffs have offered no evidence to
16 raise a genuine issue of material fact that each GLA class member suffered any such injury. To
17 the contrary, the undisputed facts establish that the market value of group licensing rights for
18 most GLA class members was zero because they are virtually unknown to today’s fans. As a
19 result, these class members would not suffer any fact of injury even if their rights had been
20 licensed without compensation. Plaintiffs have tried to overcome this failure of proof by
21 directing their paid accounting expert to apply an “equal shares” formula as a purported means
22 for proving injury and damages, and even to include revenues from contracts that make no
23 mention of retired players. But there is no legal or factual basis for using such an arbitrary
24 formula as a substitute for individual proof of injury, particularly where, as here, the GLA says
25 nothing about “equal shares,” and it is undisputed that the economic values of the rights of
26 individual retired players are widely disparate, with most GLA Class members’ licensing rights
27 having no value at all.
28

1 **STATEMENT OF UNDISPUTED FACTS**

2 **A. The Parties**

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

8 Plaintiff Adderley is a retired NFL player who signed two Group Licensing
9 Authorizations (“GLAs”) with the NFLPA that were effective, in relevant part, from February
10 14, 2003 to December 31, 2005. TAC ¶ 18; Adderley GLAs (Greenspan Decl. Ex. 4). The GLA
11 Class consists of “[a]ll retired NFL players who signed GLAs with the NFLPA that were in
12 effect between February 14, 2003 and February 14, 2007” and that contain the same operative
13 paragraph as the Adderley GLA. Stipulation and Order Revising Class Definition and Class
14 Notice (June 9, 2008) (Rec. Doc. 289).

15 **B. Defendants’ Retired Player Group Licensing Program**

16 **1. The Retired Player GLAs**

17 Through GLAs signed by players in the GLA Class, retired players assigned to
18 the NFLPA the “non-exclusive” right to use their names, images and other attributes in group
19 licensing (“defined as programs in which a licensee utilizes a total of six (6) or more present or
20 former NFL player images”).⁶ E.g., Adderley GLAs. Pursuant to certain agreements between
21 the NFLPA and Players Inc, the NFLPA assigned the retired players’ GLAs to Players Inc, and
22 Players Inc tried to find group licensing opportunities for retired players with third party
23 licensees. TAC ¶¶ 13, 14. Defendants’ hope was that some licensees would want to acquire the
24 collective rights to most, if not all, retired players who had signed GLAs. See Nahra 30(b)(6)

25 _____
26 ⁶ Although the issue of “non-exclusivity” is not material to this Motion, Defendants note the
27 undisputed testimony of their Rule 30(b)(6) witness that the GLAs are both expressly and
28 operationally “non-exclusive,” i.e., retired players could assign both their individual and group
licensing rights to entities other than Defendants. See Deposition of NFLPA Staff Counsel Joe
Nahra (“Nahra 30(b)(6) Depo.” or “Nahra Depo.,” as context requires) 19:8-18, 156:11-14;
Adderley Depo. 95:1-14, 96:20-97:1, 97:12-15 (Greenspan Decl. Exs. 6, 4).

1 Depo. 122:9-123:24 (Greenspan Decl. Ex. 6).

2 **2. Despite the Efforts of Defendants, Licensees Were Not Interested in**
3 **Acquiring the Group License Rights of Most Retired Players Who Signed**
4 **GLAs**

5 There can be no genuine dispute that Defendants encouraged their licensees to
6 acquire the rights to retired players:

7 “[W]e’re constantly promoting using retired players. [The licensees] didn’t
8 always do it. But to the extent they were interested we work with them. Our staff
9 members worked with them to develop the retired player programs.”⁷

10 * * *

11 “[O]ne of the most important things I did was emphasize to the Players Inc staff
12 how important it was to promote retired players as an integral part of our
13 approach to the marketplace.”⁸

14 * * *

15 Q: Do you know if anyone at Players Inc ever went to a licensee and asked if
16 they wanted to license retired player rights?

17 A: Yeah. The staff did that all the time.”⁹

18 * * *

19 “Players Inc would work with any and all retired players that a company we do
20 business with wanted to use. Again, it was our interest to increase opportunities
21 for all players, including retired players.”¹⁰

22 * * *

23 “[W]henver I have contact with licensees or sponsors, or whatever, I always
24 remind them that we also have this group of players besides our active players,
25 and that applies to any of our players, both active and retired.”¹¹

26 It is also undisputed that it was the third party licensees – not Defendants – that
27 determined which, if any, retired players’ rights would be acquired:

28 “[W]e do not control, and we have no way of controlling who the licensee feels
they can include in a licensed product and generate revenue. We are not in the
trading card business. We are not in the video game business. We leave it to the
licensees who are the experts in those businesses to decide what players they want
to use. What we want to do is make it as easy as possible and to encourage them
to use as many players as possible, but we cannot control what they decide to

⁷ Deposition transcript of former Chief Operating Officer of Players Inc Pat Allen (“P. Allen Depo.”) 89:12-90:11 (Greenspan Decl. Ex. 7).

⁸ Deposition transcript of former President of Players Inc and Assistant Executive Director of the NFLPA Doug Allen (“D. Allen Depo.”) 181:16-183:22 (Greenspan Decl. Ex. 8).

⁹ P. Allen Depo. 49:3-6.

¹⁰ Deposition transcript of former Vice President, Player Marketing of Players Inc Howard Skall (“Skall Depo.”) 159:8-16 (Greenspan Decl. Ex. 9).

¹¹ Deposition transcript of Chairman of Players Inc and Executive Director of the NFLPA Gene Upshaw (“Upshaw Depo.”) 136:20-137:3 (Greenspan Decl. Ex. 10).

1 do.”¹²

* * *

2 “Players Inc made known to the marketplace that it had access to a large number
3 of retired NFL players that were available for use in licensing and of their name
4 and image and in opportunities to provide services like autographs or
5 appearances. The marketplace determined which players it wanted to make use
6 of, not Players Inc or the NFLPA.”¹³

7 Critically, the undisputed record evidence also establishes that most licensees
8 either had no interest in acquiring retired player group licensing rights, or had an interest only in
9 acquiring the rights of a small number of retired players for specific programs:

10 “I know there was a hope that licensees would be willing to pay money to get
11 retired player rights in general without regard to who those particular players were
12 but that never happened. Despite our efforts that never happened. There were no
13 licensees that were willing to pay either a guarantee or some sort of flat fee for
14 just getting whatever retired players they got. It was always where the licensees
15 were only interested in obtaining rights to particular retired players.”¹⁴

* * *

16 “[T]he companies that we discussed this with were only interested in particular
17 players at particular prices....”¹⁵

* * *

18 “I’ve had discussions with several licensees about the retired players and how
19 they would be helpful and beneficial in certain programs. Yes, I’ve done that...
20 [T]he most recent example would be the EA contract that we just executed not
21 long ago, and I offered retired players in that area. But there was, there was really
22 no interest.”¹⁶

* * *

23 “The only retired players whose rights Fathead has sought to acquire are
24 ‘superstar’ retired players such as Joe Montana, John Elway, and Dan Marino.”¹⁷

25 The reason that most licensees had little or no interest in large groups of retired
26 players was because of the undisputed fact that the rights of the vast majority of retired players
27 have no economic value. For example, 1,730 of the 2,109 of the members of the GLA Class
28 (approximately 82%) were never asked for or used by any Players Inc licensee.¹⁸ Adderley
himself testified to the undisputed fact that the rights of superstar retired players like Joe

¹² Nahra Depo. 268:18-269:13 (Greenspan Decl. Ex. 6).

¹³ D. Allen Depo. 156:2-8 (Greenspan Decl. Ex. 8).

¹⁴ Nahra 30(b)(6) Depo. 67:19-68:15 (Greenspan Decl. Ex. 6).

¹⁵ Nahra 30(b)(6) Depo. 208:21-209:19.

¹⁶ Upshaw Depo. 151:3-153:16 (Greenspan Decl. Ex. 10).

¹⁷ Decl. of Linda Castillon (“Castillon Decl.”) ¶ 4 (June 7, 2008) (Greenspan Decl. Ex. 11).

¹⁸ Decl. of Professor Roger Noll ¶ 7 (June 12, 2008) (Greenspan Decl. Ex. 12).

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

2 Q: And in fact, it's true, isn't it, that every player in the NFL, retired player,
3 would have a different value of rights for their name and image based on what
4 their careers were like and how famous they were or not; right?

4 A: Yes.

5 Q: And do you agree that the values could be very, very different comparing, for
6 example, Joe Montana to that guy who only played one year on special teams,
7 it could be a huge difference in value, right?

6 A: Yes.¹⁹

7 Class counsel has also conceded this point:

8 "Your Honor made a comment on it when the case was in a different posture
9 earlier on. 'Well, isn't it true that Joe Montana's image is worth more than the
10 third string center on that team?' And that's true. We acknowledge that."

* * *

11 "If you're Joe Montana you get one thing. A lesser player would get another
12 thing. He probably wouldn't be used."²⁰

12 **3. When Licensees Did Choose to License Retired Player Rights,
13 Players Inc Distributed Virtually 100% of the Money to the Retired
14 Players Whose Rights Were Licensed**

14 It is undisputed that, from February 2003 to August 2007, Defendants generated
15 at least \$30 million in revenues through retired player licensing, while keeping just over
16 \$400,000 in administrative fees before paying out the rest of the money to those retired players
17 whose rights were licensed.²¹ Thus, Defendants retained just 1.35% of the revenues they
18 generated from retired player licensing – a vastly lower percentage than the up to 40% that
19 Plaintiffs' own "expert" opines would have been within the typical range. See Expert Report of
20 Daniel A. Rascher ("Rascher Report") at 12-13 (May 23, 2008) (Greenspan Decl. Ex. 16).²²

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

22 ²⁰ Tr. of Proceedings on Pls.' Mot. for Class Certification ("Class Hearing Tr.") 8:3-9, 11:20-22
23 (Apr. 24, 2008) (emphasis added) (Greenspan Decl. Ex. 13); May 31, 2007 Hearing Tr. 43:25-
24 45:13 ("COURT: People decide that in the marketplace. If they are famous, they get more
25 money. If they are not famous, they don't get much. They get nothing.") (Greenspan Decl. Ex.
26 14).

25 ²¹ See Decl. of Executive Vice President and Chief Operating Officer of Players Inc Andrew
26 Feffer ("Feffer Decl.") ¶ 2 (Greenspan Decl. Ex. 15).

26 ²² It is also undisputed that the \$400,000 Defendants retained from retired player licensing over a
27 four year period did not come close to covering Defendants' costs for running the program. For
28 example, the ten-person staff in Players Inc's Player Marketing Department, the staff of Players
Inc's Trading Cards & Collectibles, Apparel, and Multimedia Departments, the NFLPA Retired
Players Department, and members of Defendants' executive staff all worked to promote the use
of retired players' rights. See Skall Depo. 21:11-22:9, 38:9-16. (Greenspan Decl. Ex. 9).

1 Most of this retired player licensing income was generated through “ad hoc”
2 agreements, which are licensing agreements between retired players and Players Inc whereby
3 retired players license their rights to Players Inc for use in designated programs. Although class
4 counsel told the Court at the recent class certification hearing that he did not know whether the
5 \$30 million paid to retired players from ad hoc agreements was generated and paid by Players
6 Inc, (Class Hearing Tr. 10:18-11:5) (Greenspan Decl. Ex. 13), the undisputed record evidence
7 establishes that it was, in fact, Defendants who generated this substantial amount of money for
8 retired players, including many GLA Class members. See Feffer Decl. ¶ 2. Indeed, the GLA
9 Class has disavowed any legal complaint with respect to the distribution of this money.²³

10 There can also be no genuine dispute that – contrary to class counsel’s
11 unsupported representations, (Class Hearing Tr. 10:3-9) – much of this \$30 million in ad hoc
12 licensing revenues constituted “group” licensing of retired player rights, not “individual”
13 licensing. To give just one example, in March 2005, Defendants licensed the rights of 30 retired
14 players – including Joe Montana and Adderley – to Upper Deck.²⁴ It is undisputed that
15 Defendants generated approximately \$301,175 through this group licensing program and passed
16 every penny of it through to Montana, Adderley, and the other retired players whose group rights
17 were licensed.²⁵ The fact that ad hoc agreements, rather than GLAs, were used to license and
18 compensate retired players for this program does not change the indisputable fact that the
19 program involved six or more players and thus constituted group licensing.

20 The reason that GLAs were not used for such group licensing programs, involving
21 limited numbers of retired players selected by the licensees, is that, as Plaintiffs’ list of GLA
22 Class members shows, many of the retired players who participated in this (and other) ad hoc
23

24 _____
25 ²³ See, e.g., Mot. for Leave to File TAC at 4 n.1 (“Plaintiffs are not claiming that Defendants
26 failed to pay Mr. Adderley pursuant to an ‘ad hoc’ agreement, nor have they based any claims
27 upon an ‘ad hoc’ agreement.”) (Rec. Doc. 190).

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

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

1 group licensing programs did not sign GLAs.²⁶ Ad hoc license agreements were thus typically
2 used for these group license programs, in which licensees would designate a small number of
3 retired players for inclusion, including some who had signed, and some who had never signed,
4 GLAs. If ad hoc agreements were not made available to the retired players who also signed
5 GLAs, many of them would not have signed GLAs in the first place:

6 “We wouldn’t have been able to get the players to [sign GLAs] in the first place if
7 they weren’t getting paid. We learned that lesson. And all of the money secured
8 for retired player licensing was distributed to the players who were involved in
9 those license programs.”²⁷

* * *

9 “[T]he companies that we discussed this with were only interested in particular
10 players at particular prices, and that’s why we had to do ad hoc agreements,
11 because the high profile players they were interested in were not going to
12 participate in a program, and we can use Reebok as an example, unless they knew
13 how much money they were getting and we had to memorialize that dollar
14 amount in an agreement, and those are the ad hoc agreements.”²⁸

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

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

16 Q: Sir, do you believe, as a retired player, you’re entitled to any money that’s
17 generated by the licensing of active players?

17 A: No.

* * *

18 Q: And what you thought you were agreeing to get [in the Adderley GLA] was
19 that if your rights were licensed and used, you would get some money;
20 correct?

20 A: Correct.

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

25 _____
26 ²⁶See Report of Philip Y. Rowley (“Rowley Report”), Ex. 7 (May 23, 2008) (list of GLA Class
27 members that does not include, e.g., Joe Montana, Troy Aikman, Joe Theismann, Bo Jackson or
28 Marcus Allen – all of whom participated in the Upper Deck program) (Greenspan Decl. Ex. 20).

²⁷ D. Allen Depo. 148:16-149:10 (Greenspan Decl. Ex. 8).

²⁸ Nahra 30(b)(6) Depo. 208:21-209:19 (Greenspan Decl. Ex. 6).

1 deals, to acquire the group licensing rights to specified GLA Class members and other retired
2 players. One example of this was EA’s agreement with the Pro Football Hall of Fame (“HOF”),
3 whereby EA paid \$400,000 (through Players Inc) to acquire the group licensing rights of 148
4 specified retired players. 2006 EA-HOF Agreement ¶ 9A, Ex. A (Greenspan Decl. Ex. 22).³¹
5 Some of these 148 retired players – including Adderley himself – had signed GLAs, but EA
6 nevertheless entered into a separate, designated retired players deal with HOF. See id. It cannot
7 be genuinely disputed, as Mr. Linzner attested, that “EA would not have paid these additional
8 monies if EA had already received, under its main licensing agreement with Players Inc, group
9 licensing rights for retired players who had previously signed the standard form GLA.”³²

10 Another undisputed example of EA paying additional money to acquire the group
11 rights of GLA Class members occurred in June 2004, when EA agreed to pay \$5,000 and \$2,500
12 respectively for the right to use Joe Greene and Randall Cunningham, and at least nine other
13 retired players in the “NFL Street 2” video game.³³ Greene and Cunningham are GLA Class
14 members, and Plaintiffs have no evidence to explain why EA would have paid \$7,500 to acquire
15 their group licensing rights (a second time) if Players Inc had previously licensed to EA the
16 group rights to GLA Class members. The text of the Greene ad hoc agreement further confirms
17 that, in fact, EA did not already have any retired player rights, but instead had previously
18 acquired only active player rights in the 2004 EA Agreement:

[Greene] agrees that Players Inc shall grant [EA] the right, but not the
obligation, to use [Greene’s] name, likeness, image, and biographical
information (“Identity”) in their “NFL Street 2” video game. [Greene]
agrees that Players Inc shall also grant [EA] the right to market [Greene’s]
in-game image under the same guidelines that are granted to [EA] for
group licensing active player rights through the License Agreement with
Players Inc.

19
20
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25 ³¹ See PI051532-PI051542 (documents evidencing the \$400,000 “pass through” from EA to
26 Players Inc to HOF) (Greenspan Decl. Ex. 23).

27 ³² Linzner Decl. ¶ 7 (Greenspan Decl. Ex. 21).

28 ³³ See Letter Agreements between certain GLA Class members (including Greene and
Cunningham) and Players Inc, and corresponding Letter Agreements between Players Inc and
EA (Greenspan Decl. Ex. 24).

1 E.g., Greene-PI Agreement ¶ 2 (at PI009619) (emphasis added) (Greenspan Decl. Ex. 24).³⁴

2 **2. The 2004/2007 Topps Agreements Did Not Convey Retired Player Rights**

3 The undisputed evidence relating to the NFLPA’s 2004 and 2007 agreements with
4 Topps (the “2004 and 2007 Topps Agreements”) establishes that those agreements also were not
5 intended to, and did not, license any retired player rights. As Topps’s 30(b)(6) witness testified:

6 Q: Was it Topps’ intention to acquire the group licensing rights of retired players
7 under the 2004 license agreement?

8 A: No.

9 Q: Was it Topps’ intention to acquire the group licensing rights of retired players
10 under the 2007 license agreement?

11 A: No.³⁵

12 It is further undisputed that during the term of the 2004 and 2007 Topps
13 Agreements, Topps, like EA, entered into separate ad hoc deals, and paid additional money, to
14 acquire the rights of retired players (including some GLA Class members):

15 Q: And is it your understanding today that under the 2007 license agreement
16 Topps still needs to enter into individually negotiated deals with retired
17 players or through Players, Inc. with respect to a particular retired player in
18 order to obtain the rights to such a retired player?

19 A: Yes. It’s my understanding that we did not get those rights from the license
20 agreement; that we had to do a separate agreement and make a separate
21 payment for these rights.

22 Q: Is it Topps’ understanding that Topps needs to pay additional money beyond
23 what’s provided for in the 2007 license agreement in order to attain the rights
24 of retired players?

25 A: Yes.³⁶

26 * * *

27 “It’s my understanding and it always has been that we cannot make a trading card
28 unless we obtain the rights individually from that retired player which we have to
do through NFLPA. We have never published a picture of a retired player

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

35 Friss 30(b)(6) Depo. 77:18-25, 72:3-73:4 (further testifying as to Topps’s understanding that under the 2004 Topps Agreement, the only rights acquired, and the only moneys paid, were for active NFL players) (Greenspan Decl. Ex. 3); see also Decl. of Warren Friss ¶¶ 2, 4-6 (Oct. 10, 2007) (Greenspan Decl. Ex. 26).

36 Friss 30(b)(6) Depo. 73:23-75:3.

1 Agreement included only active players was discussed orally and is also reflected
2 in the language of the 2005 License Agreement . To the limited extent that
3 Fathead has sought to acquire the rights of retired players for use in Fathead’s
4 products, Fathead has entered into separate agreements, and paid additional
5 money, to acquire those retired players’ rights.”⁴¹

6 * * *

7 “At the time MBI entered into the 2004 License Agreement, it intended to acquire
8 the rights of active players only, and all money MBI paid under the 2004 License
9 Agreement was paid for the rights of said players.”⁴²

10 * * *

11 “The 2005 License Agreement was not intended to, and did not, include the rights
12 of any retired players. Rather, the 2005 License Agreement includes the rights of
13 active players only, and all money paid by Todd McFarlane pursuant to the 2005
14 License Agreement was paid for the rights to active players only.”⁴³

15 * * *

16 “All revenues paid by STATS pursuant to the 2007 License Agreement were paid
17 for the rights of active players only. The fantasy games licensed pursuant to the
18 2007 License Agreement did not involve any retired players.”⁴⁴

19 **D. The GLA Class Is Seeking “Equal Shares” of Active Player Money**

20 It similarly cannot be disputed that the GLA Class’s “equal shares” claim is an
21 attempt to obtain “equal shares” of the active player licensing revenues generated by EA, Topps,
22 Upper Deck, and all of the other active player license agreements at issue. See, e.g., Rascher
23 Report, Ex. 4 (calculating that in Defendants’ 2007 fiscal year, EA, Topps, and Upper Deck
24 comprised approximately 75% of the revenues being sought by the GLA Class) (Greenspan
25 Decl. Ex. 16). Pursuant to the 2000 NFLPA-PI Agreement, a fixed percentage of these “gross
26 licensing revenues” (“GLR”) is distributed from a pool (the “GLR pool”) to active players “who
27 meet [certain] eligibility requirements,” such as being on a team’s roster on the first or last day of
28 a particular season.⁴⁵ Based upon these criteria, some active players received a full share (the so-
called “equal share”) of the GLR pool, other active players with the status of “practice squad”
received a lesser share of the GLR pool, and active players who did not meet the criteria received

⁴¹ Castillon Decl. ¶¶ 3-4 (Greenspan Decl. Ex. 11).

⁴² Decl. of Jason Brenner (“Brenner Decl.”) ¶ 3 (June 10, 2008) (Greenspan Decl. Ex. 29).

⁴³ Decl. of Christine Finch (“Finch Decl.”) ¶ 3 (June 6, 2008) (Greenspan Decl. Ex. 30).

⁴⁴ Decl. of Steve Byrd (“Byrd Decl.”) ¶ 5 (June 6, 2008) (Greenspan Decl. Ex. 31).

⁴⁵ 2000 NFLPA-PI Agreement §§ 4(B), (D) (Greenspan Decl. Ex. 32); TAC ¶¶ 29-35; see also Rowley Report § IV.C (Greenspan Decl. Ex. 20); “Equal Share Licensing Royalty Distribution Criteria” Memoranda dated 2002 – 2006 (Greenspan Decl. Ex. 33).

1 no share of the GLR pool (despite having a GLA in effect).

2 Plaintiffs contend that each GLA Class member should have received an “equal
3 share” of the GLR pool for each year that he had a retired player GLA in effect. See TAC ¶¶ 32-
4 34.⁴⁶ But, as set forth above, the undisputed evidence establishes that the EA and other licensing
5 revenues that go into the GLR pool are 100% attributable to active player licensing. See also
6 Glenn Eyrich 30(b)(6) Depo. Tr. (“Eyrich 30(b)(6) Depo.”) 11:22-25 (Greenspan Decl. Ex. 34).
7 Stated in the alternative, the undisputed evidence establishes that there is no retired player money
8 in the GLR pool, and that virtually all retired players’ money has been paid directly to the retired
9 players whose rights were licensed. See, e.g., D. Allen Depo. 108:11-111:16 (“[I]t would have
10 been counting the money twice to have included it [in the GLR pool] if it was already paid out to
11 retired players.”) (Greenspan Decl. Ex. 8); 2000 NFLPA-PI Agreement § 4(A)(v) (defining GLR
12 as all licensing revenues “exclud[ing] ... amounts received by retired players”) (emphasis
13 added) (Greenspan Decl. Ex. 32).

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

16 **1. The \$8 Million Reallocation of Active Player Licensing Money**

17 The 1994 and 2000 agreements between the NFLPA and Players Inc (the “1994
18 and 2000 NFLPA-PI Agreements”) provided for the division of the GLR pool between active
19 players, Players Inc and the NFLPA. The 1994 and 2000 NFLPA-PI Agreements permit changes
20 to that allocation, subject to the approval of the NFLPA’s Board of Player Representatives.⁴⁷ In
21 February 2006, such an amendment was passed (the “2006 Amendment”), providing for
22 \$8 million to be taken out of the GLR pool each year, and then reallocated between the NFLPA
23 and Players Inc. See TAC ¶ 38; 2006 Amendment (Greenspan Decl. Ex. 36). Since it is
24 undisputed that this \$8 million was taken out of the GLR pool,⁴⁸ there can be no genuine dispute

25 ⁴⁶ See also Rowley Report § IV.C (Greenspan Decl. Ex. 20).

26 ⁴⁷ See 2000 NFLPA-PI Agreement §§ 4(C), 14; 1994 NFLPA-PI Agreement § 5(B) (Greenspan
Decl. Exs. 32, 35).

27 ⁴⁸ E.g., Pls.’ Mot. for Class Certification at 12 (“in a February 2006 agreement, Defendants
28 diverted to themselves in a 40%-60% split at least \$8 million from the GLRD account”) (emphasis added) (Rec. Doc. 217).

1 that this reallocation only was comprised of active player licensing revenues, as those are the
2 only revenues in the GLR pool. See, e.g., Eyrich 30(b)(6) Depo. 89:12-20 (“one hundred percent
3 of [the \$8 million reallocation] was taken from the equal share pool which went to active
4 players”) (Greenspan Decl. Ex. 34).⁴⁹

5 **2. The Portion of the GLR Pool Retained by Defendants for**
6 **Union Operations Was Also 100% Active Player Money**

7 The 1994 and 2000 NFLPA-PI Agreements provide that in each fiscal year, the
8 NFLPA receives approximately 40% of the GLR pool, Players Inc receives approximately 23%
9 of the GLR pool, and approximately 37% is paid to active players who meet the eligibility
10 criteria discussed above.⁵⁰ Plaintiffs claim that Defendants retain too high of a percentage of the
11 GLR pool, and that some portion of the NFLPA’s and Players Inc’s share of the GLR pool
12 should instead be distributed in “equal shares” to the GLA Class. See TAC ¶ 37; Rowley Report
13 § IV.E (Greenspan Decl. Ex. 20). But, as set forth above, the undisputed evidence establishes
14 that all of the money in the GLR pool is active player licensing revenues, and thus Plaintiffs’
15 claim for the approximately 40 percent of the GLR pool retained by the NFLPA is another
16 baseless attempt to claim a share of active player licensing revenues.⁵¹

17 **ARGUMENT**

18 “Summary judgment is appropriate if the nonmoving party bears the ultimate
19 burden of proof at trial as to an element essential to its case, and fails to make a showing
20

21 ⁴⁹ See also Deposition transcript of NFLPA General Counsel Richard Berthelsen (“Berthelsen
22 Depo.”) 33:13-19 (“[W]hat we’ve talked about as far as the 8 million and the allocations that
23 you’ve asked me about, there we are talking about active player licensing or marketing money.”)
(Greenspan Decl. Ex. 37); 2006 Amendment (stating that the \$8 million constitutes “‘gross
licensing revenue’ as defined [in the 2000 NFLPA-PI Agreement],” i.e., excluding retired player
revenues) (Greenspan Decl. Ex. 36).

24 ⁵⁰ See 1994 NFLPA-PI Agreement §§ 4-5 (Greenspan Decl. Ex. 35); 2000 NFLPA-PI
25 Agreement § 4 (Greenspan Decl. Ex. 32). This division of the active player licensing revenues
26 was supported by an independent evaluation conducted by Duff & Phelps Capital Markets Co. in
27 an opinion letter dated January 13, 1995. See Duff & Phelps Report at 6-8 (Greenspan Decl. Ex.
38). Each year, Defendants financial statements – including the distribution of the GLR pool – is
submitted to and approved by the Board of Player Representatives, which is comprised of active
players elected by their teammates. E.g., Fiscal Year 2007 Annual Financial Report at 1-2
(Greenspan Decl. Ex. 39).

28 ⁵¹ See Eyrich 30(b)(6) Depo. 50:8-16, 50:24-51:2, 11:22-25 (Greenspan Decl. Ex. 34).

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

5 **I. SUMMARY JUDGMENT SHOULD BE GRANTED AGAINST**
6 **THE GLA CLASS’S BREACH OF CONTRACT CLAIM**

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

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

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

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

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

24 Although, as the Court has recognized, the Adderley GLA is not a model of
25 clarity, several points are undisputed. First, the GLA language provides that the only moneys to
26 “be divided between the player and an escrow account” are “moneys generated by such licensing
27

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

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

1 of retired player group rights.” *Id.* (emphasis added). Adderley himself has thus admitted that
2 retired players are not “entitled to any money that’s generated by the licensing of active
3 players.”⁵⁴ And, even the TAC characterizes the Adderley GLAs as “provid[ing] that moneys
4 generated by licensing of retired player rights” should be divided among the GLA Class. TAC
5 ¶ 29 (emphasis added). Second, Adderley and Defendants agree that the GLA only provides for
6 retired players to be paid when their rights are used. *See* Adderley Depo. 89:13-90:1, 92:8-17
7 (testifying that he understood the GLA to mean “that if [his] rights were licensed and used, [he]
8 would get some money” and that he “never thought that [he] should get something if nobody
9 used [his] image”) (Greenspan Decl. Ex. 4). This agreement between Adderley and Defendants
10 about the intended meaning of the GLA conclusively resolves any ambiguity in the contractual
11 language. Simply put, there is no basis in the GLA for a claim to be made against any active
12 player licensing revenues.

13 **B. The EA, Topps and Other Licensing Revenues Sought**
14 **By Plaintiffs Do Not Involve Retired Player Rights and**
15 **Thus Cannot Be the Basis of Any Claim of Breach**

16 The GLA Class alleges that Defendants “breached the terms of the Adderley
17 GLA(s) by failing to share the revenues they received from such licenses – including the
18 guaranteed minimum royalties under the EA Agreements, and other licensing royalties – with
19 retirees.” TAC ¶ 29. The undisputed evidence establishes, however, that all of the revenues
20 generated by the license agreements put at issue by Plaintiffs are solely attributable to active (not
21 retired) player licensing, to which the GLA Class has no contractual entitlement by the express
22 terms of the GLA.

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

25 Plaintiffs’ claim that Defendants licensed the GLA Class members’ rights without
26 compensating them rests entirely on a boilerplate “retired player” reference that appears in 96
27 license agreements Plaintiffs have identified. But, it is clear from the face of these agreements,
28

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

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

3 Players Inc represents that it is a licensing affiliate of the [NFLPA]; that the
4 NFLPA has been duly appointed and is acting on behalf of the football players of
5 the National Football League who have entered into a [GLA], either in the form
6 attached hereto as Attachment “A” or through the assignment contained in
7 Paragraph 4(b) of the NFL Player Contract, which have been assigned to Players
8 Inc; and that in such capacity Players Inc has the right to negotiate this contract
9 and the right to grant rights and licenses described herein.⁵⁶ Licensee
10 acknowledges that Players Inc also on occasion secures authorization for
11 inclusion in Players Inc licensing programs from players, including but not
12 limited to retired players, who have not entered into such Group Licensing
13 Authorization, but who, nevertheless, authorize Players Inc to represent such
14 players for designated Players Inc licensed programs.

15 * * *

16 Upon the terms and conditions hereinafter set forth, Players Inc hereby grants to
17 Licensee and Licensee hereby accepts the...right, license and privilege of
18 utilizing the...names, likenesses..., pictures, photographs, voices, facsimile
19 signatures and/or biographical information...of the NFL players referenced in
20 Paragraph 1(A) above...

21 TAC ¶¶ 25, 26 (quoting 2005 EA Agreement, ¶¶ 1A, 2A) (emphasis added) (emphases in
22 original omitted). Plaintiffs argue that, because the second paragraph grants the rights to “the
23 NFL players referenced in [the first paragraph],” and because that first paragraph includes the
24 words “retired players,” this means that retired players’ rights are being licensed pursuant to the
25 2005 EA Agreement (as well as the other license agreements Plaintiffs have identified with the
26 same language).

27 But this is not what the plain language states. Whereas in the first sentence of
28 Paragraph 1(A), “Players Inc represents” that it is authorized to act on behalf of all active players
who assigned their group licensing rights to the NFLPA, in the second sentence of Paragraph
1(A), it is the “Licensee acknowledg[ing]” that Players Inc “on occasion” secures retired players’

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

⁵⁶ Plaintiffs concede that this first sentence refers only to active players, who are the only players who would “have entered into a [GLA]...in the form attached hereto as Attachment A,” which Plaintiffs state was “designed for active players,” or had an “assignment” through an NFL Player Contract. TAC ¶¶ 22, 21 (quoting 2005 EA Agreement ¶ 1(A)).

1 rights for inclusion in certain “designated” licensing programs, e.g., “ad hoc” deals. Id.
2 (emphasis added). This provision does not even contain a reference to the fact that Players Inc
3 also obtains the rights to certain retired players pursuant to non-program specific GLAs.
4 Moreover, when viewed in the overall context of this language, it is clear that the reference in the
5 second paragraph, which grants certain group licensing rights to “the NFL Players referenced in”
6 the first paragraph, only grants rights to the active NFL players mentioned in the first sentence of
7 the first paragraph.

8 The plain language of the “Approvals” paragraph further confirms that the GLA
9 Class members’ rights were not being licensed in the 2005 EA agreement, or any of the other
10 agreements with the same language:

11 The list of players for whom Players Inc has group licensing authorization (the
12 “Player Agreement Report”) is available to the Licensee via the Internet at
13 www.nflplayers.com/licensee. . . . In addition, Players Inc may secure
14 authorization from players not listed on the Player Agreement Report, including
15 but not limited to retired players.

16 2005 EA Agreement ¶ 12 (emphases added) (Greenspan Decl. Ex. 40). The language of this
17 provision refers licensees to a website containing the names of active players whose images
18 were licensed under the agreement so that licensees would know whose images they could
19 use in licensed products.⁵⁷ Contracts must be interpreted as a whole, and, as the language
20 makes clear, retired players were not listed on the “Approvals” website because they were
21 not part of the license grant.⁵⁸

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

24 If the Court was to determine that the language of the EA and other license

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

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

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

7 In this case, as set forth in detail at pp. 9-14, supra, the undisputed extrinsic
8 evidence confirms that the license agreements at issue were not intended to, and did not, convey
9 retired players’ rights. For example, NFLPA Staff Counsel Joe Nahra explained the meaning of
10 the boilerplate “retired player” reference as follows:

11 “Doug Allen wanted to include that phrase [“including, but not limited to retired
12 players”] as a way of signaling to our licensees that it’s possible to secure retired
13 player rights from Players Inc because we do occasionally obtain those rights.
14 The whole sentence is aimed at securing rights for players who have not entered
15 into a GLA who are not part of the description. Right. It is for letting the licensee
16 know that there are occasions when we get rights from other players and if they
17 are interested in using other players that are not identified on the list that’s on the
18 website, then they can inquire as to us whether we can get those rights if they
19 want to include those rights, but if you will look in paragraph 12, that additional

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

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

21 ⁶¹ See, e.g., Reliance Standard Life Ins. Co. v. Matula, No. 05-C-0788, 2007 U.S. Dist. LEXIS
22 24523, *25 (E.D. Wis. Mar. 30, 2007) (“[D]efendants are trying to tell a party to an agreement
23 [plaintiff] that that party’s interpretation of its own agreement is wrong. As strangers to the
24 Agreement, the . . . defendants are not in an authoritative position regarding what the Agreement
25 means and how the parties to the Agreement interpret it.”); Waddy v. Sears, Roebuck & Co., No.
26 C-92-2903-VRW, 1994 WL 392483, *11 (N.D. Cal. July 8, 1994) (“Tucker’s employment
27 contract is defined by the understanding and intent of Sears and Tucker, not third parties to the
28 contract.”); Williams Tile & Marble Co., Inc. v. Ra-Lin & Assocs., 426 S.E.2d 598, 600 (Ga. Ct.
App. 1992) (the “interpretation of a contractual provision by a stranger to the contract obviously
has no probative relevance whatsoever”); Combs v. Hunt, 140 Va. 627, 640 (1924) (“[W]e know
of no principle of law or public policy which forbids [the] operation [of an agreement] exactly as
stipulated by the parties, with which, as already stated, a stranger to the contract has absolutely
no concern.”); Matsushita Elec. Corp. v. Loral Corp., No. 93-1435, 1994 WL 497955, *2 (Fed.
Cir. Sept. 23, 1994) (rejecting a third party’s interpretation of a license agreement where the
original contracting parties both understood the contract to have a different meaning)
(unpublished opinion).

1 use of players may require additional payment These players were not part of
2 this license agreement, but if they wanted to inquire about using retired players
they could do that.”⁶²

3 The Rule 30(b)(6) designees from EA and Topps, the only licensees that Plaintiffs
4 deposed, testified to the exact same understanding of this language:

5 Q: [W]hat was your understanding, when you signed this agreement, of [the
boilerplate retired player reference] that I just read to you, saying that the –
6 that it was included, but not limited to retired players?

7 A: My understanding was that this license agreement and the fees that [EA]
8 agreed to pay in this license agreement were to secure the rights of active NFL
9 players and that Players Inc represented retired players, which, if we wanted
to purchase those rights separately, Players Inc would work on our behalf to
do so.⁶³

* * *

10 “Well, my understanding of what NFL players referred to on the last line of page
11 1 of [the 2005 EA Agreement] was active NFL players... Now, you – you may
not – you know you may not like that understanding, but I’m telling you, sir,
12 that’s my understanding of what it meant.”⁶⁴

* * *

13 Q: Did you have occasion to read that language in paragraph 2-A of the [2004
14 Topps Agreement]?

A: Yes.

15 Q: And when it says that it is granting a license to the “NFL Players referenced in
16 paragraph 1-A above,” what did you understand that phrase to include...if you
had any understanding?

A: Active players.⁶⁵

17 Indeed, the evidence is undisputed that licensees such as Topps did not intend to
18 acquire retired players’ rights through their license agreements with Defendants:

19 Q: Was it Topps’ intention to acquire the group licensing rights of retired players
20 under the 2004 license agreement?

A: No.

21
22 ⁶² Nahra 30(b)(6) Depo. 277:18-280:1 (Greenspan Decl. Ex. 6). Nahra also explained in his
23 deposition that the language was changed to its current formulation because there was no longer
24 any need to attach a list of active players for whom Players Inc had rights, as had been the prior
practice and contractual language, because the list of active players became available on the
website, and was not intended to make any substantive change adding retired players. See id. at
273:15-274:9.

25 ⁶³ Linzner 30(b)(6) Depo. 71:18-72:4 (Greenspan Decl. Ex. 2).

26 ⁶⁴ Id. at 73:2-25, 75:7-13; see also Berthelsen Depo. 60:8-60:13 (“Counsel, you always seem to
27 sneak that retired player part into your question. The deal with EA Sports was for active players
for the video game. If there was anything about retired players, that was a separate matter and
retired players were separately compensated.”) (Greenspan Decl. Ex. 37).

28 ⁶⁵ Zucker Depo. 34:16-35:4 (Greenspan Decl. Ex. 27).

1 Q: Was it Topps' intention to acquire the group licensing rights of retired players
2 under the 2007 license agreement?

3 A: No.

4 Friss 30(b)(6) Depo. 77:18-25 (Greenspan Decl. Ex. 3); see also Linzner 30(b)(6) Depo. 35:1-14,
5 70:20-72:4 (same for 2004/2005 EA Agreements); Castillon Decl. ¶¶ 3-5 (same for 2005/2007
6 Fathead Agreements); Sullins Decl. ¶¶ 3, 6 (same for 2004/2007 Upper Deck Agreements);
7 Brenner Decl. ¶ 3 (same with respect to 2004 MBI agreement); Finch Decl. ¶ 3 (same for 2005
8 Todd McFarlane Agreement); Byrd Decl. ¶¶ 3, 5 (same for 2006/2007 STATS agreements)
(Greenspan Decl. Exs. 2, 11, 28, 29, 30, 31).

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

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

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

22 For example, if the Court were to adopt Plaintiffs' position that the boilerplate

23 ⁶⁶ In a recent Interrogatory response, and in their "expert's" damages report, Plaintiffs indicated
24 that the GLA Class may also be seeking to recover revenues paid under the agreements that do
25 not include even the boilerplate "retired player" reference, *i.e.*, the remainder of the license
26 agreements that go into the GLR pool. Pls.' Resps. and Objs. to Defs.' Third Set of Interrogs. at
Resp. No. 9 (May 19, 2008); Rowley Report § IV.C (Greenspan Decl. Exs. 42, 20). Since these

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

1 “retired player” language had the effect of licensing retired players’ rights, it would have the
2 absurd consequence that retired players were licensed in 21 agreements for fantasy football
3 products.⁶⁸ As the Court may know, fantasy football is based upon the real-time statistics of
4 active players, and thus “you cannot have fantasy football for retired players.” Linzner 30(b)(6)
5 Depo. 191:17-193:2 (Greenspan Decl. Ex. 2).⁶⁹ Plaintiffs’ contractual “interpretation” of
6 Defendants’ license agreements would also have the absurd result that retired players were
7 licensed in two agreements covering “draft pick trading cards,” i.e., rookie trading cards, since
8 those agreements also included the boilerplate “retired player” language.⁷⁰

9 Another illustration of the absurdity of Plaintiffs’ contractual interpretation is that
10 it would mean that dozens of licensees paid twice to acquire the rights of certain GLA Class
11 members (i.e., once through the license agreements allegedly including all GLA Class members’
12 rights, and a second time through “ad hoc” deals to acquire the group license rights of specified
13 retired players, including many GLA Class members). The undisputed testimony as to the
14 economic absurdity of this interpretation speaks for itself:

15 “EA would not have paid these additional monies if EA had already received,
16 under its main licensing agreement with Players Inc, group licensing rights for
17 retired players who had previously signed the standard form GLA.”

18 * * *

19 “Whenever [Upper Deck] has sought to acquire the rights of retired players for
20 use in [Upper Deck’s] products, [Upper Deck] has entered into separate
21 agreements, and paid additional money, to acquire those retired players’ rights.
22 This type of separate agreement for a specific retired NFL player occurred, for
23 example, on March 10, 2005 and July 8, 2005, when [Upper Deck] agreed to pay
24 additional money to acquire the rights of Herbert Adderley.... If [Upper Deck]
25 had already acquired Mr. Adderley’s rights pursuant to the 2004 License

22 ⁶⁸ See Rowley Report, Ex. 8 (identifying fantasy agreements with All Sport Entertainment, AOL,
23 Sporting News, CDM Fantasy Sports, Fantasy Sports Championships, ESPN, Excalibur, F&W
24 Publications, Fanball, Fox Sports Interactive Media, Fox Interactive Media, Head2Head, PayDay
25 Sports, Pro Trade, Sportsline.com, Stats, Vulcan Sports and Yahoo) (Greenspan Decl. Ex. 20);
26 see also Excerpts from Fantasy License Agreements (Greenspan Decl. Ex. 43).

25 ⁶⁹ See also C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media,
26 505 F.3d 818, 820-21 (8th Cir. 2007) (“[F]antasy baseball products incorporate the names along
27 with performance and biographical data of actual major league baseball players.... A
28 participant’s success, and his or her team’s success, depends on the actual performance of
fantasy team’s players on their respective actual teams during the course of the major league
baseball season.”) (emphases added).

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

1 Agreement, [Upper Deck] would not have paid this additional money to acquire
2 Mr. Adderley’s rights.”
3 Linzner Decl. ¶ 7; Sullins Decl. ¶¶ 4-5 (Greenspan Decl. Exs. 21, 28); see also Adderley Depo.
4 150:15-22 (admitting that “if Upper Deck already had the rights to [Adderley’s] image, in 2005,
5 they would have no reason to pay [him] more money to get those rights again”) (Greenspan
6 Decl. Ex. 4).⁷¹

7 Yet another absurd consequence of the contractual interpretation advanced by
8 Plaintiffs is the absence of any evidence that the licensees ever used any of the retired players’
9 rights that they supposedly acquired, especially when there is no evidence the licensees ever
10 knew the identities of the retired players who signed GLAs but who were never requested for an
11 ad hoc deal. Under Plaintiffs’ contractual “interpretation,” thousands of GLA Class members’
12 rights would have been licensed to dozens of licensees, pursuant to almost 100 agreements, and
13 yet not one of these licensees ever used a single GLA Class member’s rights without paying a
14 second time for such rights through an ad hoc agreement.⁷²

15 **C. The GLA Class Is Not Contractually Entitled to Any Share of the GLR Pool**
16 **1. The “Equal Shares” Claim**

17 The GLA Class alleges that, “[p]ursuant to the [2000 NFLPA-PI Agreement],”
18 “royalties under the EA 2004 Agreement and EA 2005 Agreement” and the other licensing
19 agreements at issue “should have been distributed on an ‘equal share’ basis to all retired players
20 who had executed GLAs.” TAC ¶ 34. As set forth above, however, the undisputed evidence
21 establishes that those revenues are 100% attributable to active player licensing, and thus the

22 ⁷¹ Plaintiffs have tried to argue that some of the “ad hoc” agreements were merely autograph
23 deals, but the undisputed testimony of the licensees establishes that this was not the case: “With
24 retired players it’s not strictly an autograph deal. It’s a rights and autograph deal and when
25 negotiating those respective deals for rights and autographs on retired players, to feature that
26 respective player in an ad, [Topps] would have had to specifically secured ad rights.” Zucker
27 30(b)(6) Depo. 64:17-23 (Greenspan Decl. Ex. 27); see also Friss 30(b)(6) Depo. 69:24-70:25
28 (testifying that whereas Topps retired player “ad hoc” deals have “grants of rights,” active player
“ad hoc” deals do not) (Greenspan Decl. Ex. 3).

⁷² Plaintiffs also argue that some of the license agreements – such as the 2005 EA Agreement –
included “guarantees” requiring that the revenues be paid regardless of whether all of the
licensed rights are used. See TAC ¶ 27. But just because EA agreed to guarantee certain
royalties, even if it did not use all of the active player rights licensed under the 2005 Agreement,
does not explain why EA (or any other licensee) would pay millions of dollars per year for
retired players rights that it never asked for or intended to use.

1 GLA Class has no contractual entitlement to an “equal” – or any other – share of this money.

2 Plaintiffs’ related allegation that the 2000 NFLPA-PI Agreement “arbitrarily,
3 capriciously and in violation of the GLA excluded retired players from the ‘equal share’ royalty”
4 fails for the same reason. TAC ¶ 96. There is nothing “arbitrary” about excluding retired
5 players from an equal share of the GLR pool, since the language of the GLA says nothing about
6 such an equal share, see Adderley Depo. 255:4-257:11 (“‘Equally’ is not in here.”) (Greenspan
7 Decl. Ex. 4), and the undisputed evidence establishes that the GLR pool does not include any
8 retired player licensing revenues. Among other things, the 2000 NFLPA-PI Agreement
9 expressly provides that retired player licensing revenues (such as the roughly \$30 million paid to
10 retired players between February, 2003 and August, 2007) were excluded from the GLR pool:

11 (A) Gross licensing revenue shall exclude any revenues derived from ...

12 (v) amounts received by retired players pursuant to Group Licensing
13 Assignments or Group Licensing Rights.

14 2000 NFLPA-PI Agreement § 4(A)(v) (Greenspan Decl. Ex. 32).

15 Moreover, since even Plaintiffs do not dispute that the over \$30 million generated
16 by retired player licensing through ad hoc agreements was paid directly to the retired players
17 whose rights were licensed, the GLR pool could not possibly contain retired player money:

18 “[I]t would have been counting the money twice to have included it [in the GLR
19 pool] if it was already paid out to retired players.”⁷³

20 * * *

21 “[T]he retired Players have ... designated deals that are not part of the gross
22 licensing equal share pool.”⁷⁴

23 Contrary to what class counsel told the Court,⁷⁵ the undisputed evidence
24 establishes that the GLR pool is not the “escrow account” referenced in Adderley’s GLA:

25 “And all of the money secured for retired player licensing was distributed to the
26 players who were involved in those license programs. There was no other money
27 to escrow. There was no other money to divide.”⁷⁶

28 ⁷³ D. Allen Depo. 108:11-111:16 (Greenspan Decl. Ex. 8).

⁷⁴ Eyrich 30(b)(6) Depo. 50:21-51:2 (Greenspan Decl. Ex. 34).

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

⁷⁶ D. Allen Depo. 148:16-149:10 (Greenspan Decl. Ex. 8); see also P. Allen Depo. 82:5-7 (Greenspan Decl. Ex. 7).

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* * *
“The reason it [the referenced escrow in the retired player GLA] wasn’t created, because we passed the money straight to the players. There was no money to set up an escrow account.”⁷⁷

* * *
Q: To your knowledge was such an escrow account ever created?

A: It was not.

Q: Do you know why it wasn’t created?

A: Because the efforts to generate the money for the retired players were unsuccessful.⁷⁸

* * *
“There was never any money created or generated that wasn’t attributable to specific retired player image use and no escrow account was ever created because there was no money to go into an escrow account, because all of the money generated was for specific use of individual retired players and in, I will say, most, if not all, instances was paid directly to those specific retired players.”⁷⁹

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

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

⁷⁷ Upshaw Depo. 40:11-18 (Greenspan Decl. Ex. 10).

⁷⁸ Berthelsen Depo. 50:5-50:18 (Greenspan Decl. Ex. 37).

⁷⁹ Nahra 30(b)(6) Depo 76:7-77:12 (Greenspan Decl. Ex. 6). As Mr. Nahra further explained, this is why, several years ago, Defendants removed the “escrow” language from the GLA: “[T]he escrow account [language] was removed because it didn’t make sense to have it any longer because in approximately 10 years of licensing efforts, we were not able to generate any money for an escrow account so there was never one set up.” Id. 141:4-11.

⁸⁰ Defendants note that Plaintiffs’ breach of contract claim is not based on the absence of any escrow account (to the contrary, Plaintiffs make the unsupported claim that the GLR pool is the escrow account). See, e.g., Class Hearing Tr. 8:10-17 (Greenspan Decl. Ex. 13); Pls.’ Mot. for Class Cert. at 7, 10 (Rec. Doc. 217). Nor, in any event, could Plaintiffs claim any material breach or injury from Defendants’ failure to set up an escrow account that would have had no money in it. Indeed, the only retired player money that could have gone into such an escrow account would have been the group licensing revenues generated through “ad hoc” agreements – but Plaintiffs have disavowed any complaint about the distribution of such revenues. See, e.g., Pls.’ Resps. and Objs. to Defs.’ First Set of Interrogs. at Resp. No. 9 (Feb. 4, 2008) (stating that Plaintiffs do not contend that any money generated by ad hoc agreements should have been divided among the class members) (Greenspan Decl. Ex. 45).

1 Finally, there is no legal basis for the GLA Class to claim a breach of the 1994 or
2 2000 NFLPA-PI Agreements. As non-parties to those agreements, it is black letter law that GLA
3 Class members have no standing to sue for any purported breach.⁸¹ The only situation in which
4 non-parties have standing to sue over a contract is if they are third-party beneficiaries to that
5 contract.⁸² Plaintiffs, however, have not alleged, and cannot allege, that the GLA Class members
6 are third-party beneficiaries to the NFLPA-PI Agreements. Third-party beneficiaries “must
7 show that the parties to a contract ‘clearly and definitely intended’ to confer a benefit upon
8 [them].”⁸³ There is not a shred of evidence to indicate that this was the case.

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

11 Plaintiffs also allege that Defendants “have misappropriated funds totaling eight
12 million dollars (\$8,000,000) or more that should have been paid, in part, to Adderley and the
13 GLA Class under the terms of the GLA.” TAC ¶¶ 96(c), 36, 38. But it is undisputed that the \$8
14 million in reallocated funds were taken from the GLR pool (with the approval of the NFLPA
15 Board of Player Representatives). See TAC ¶ 38; Pls.’ Mot. for Class Cert. at 12 (Rec. Doc.
16 217); Rowley Report, Ex. 3D (Greenspan Decl. Ex. 20); Eyrich 30(b)(6) Depo. 89:12-20
17 (Greenspan Decl. Ex. 34).⁸⁴ Accordingly, just as with the royalties paid to active players from
18 the GLR pool, the undisputed evidence establishes that the \$8 million in reallocated funds was
19 comprised solely of active player licensing money.⁸⁵

20 ⁸¹ See, e.g., Combs v. Hunt, 140 Va. 627, 640 (1924); Ford v. Sturgis, 14 F.2d 253, 255 (D.C.
21 1926) (“[I]f we hold that the plaintiff can sue in such case, there is no point at which such actions
22 will stop. The only safe rule is to confine the right to recover to those who enter into the
23 contract; for if we go one step beyond that, there is no reason why we should not go fifty.”).

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

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

⁸⁴ Indeed, the 2006 Amendment defines the \$8 million as “‘gross licensing revenues,’ as defined
in Section 4(A) of the [2000 NFLPA-PI Agreement],” which expressly excludes revenues paid to
retired players. See 2006 Amendment to the NFLPA-PI Agreement; 2000 NFLPA-PI
Agreement §4(A) (Greenspan Decl. Exs. 36, 32).

⁸⁵ Although the reasons underlying the \$8 million reallocation are irrelevant since it is purely
active player money, Defendants note the undisputed fact that this reallocation was approved by

1 The GLA Class’s claim that the “forty percent (40%) of gross licensing revenues”
2 retained by the NFLPA should have been paid in equal shares to GLA Class members also fails.
3 Again, there is no dispute that the 40% retained by the NFLPA comes out of the GLR pool, see,
4 e.g., Rowley Report § IV.E, Exs. 3E.1-12, and there can thus be no genuine dispute that this
5 money consisted only of the active player licensing revenues that comprise the GLR pool. See,
6 e.g., Eyrich 30(b)(6) Depo. 50:8-51:2 (“[T]he NFLPA receiv[es] 40 percent of the active player
7 gross licensing share.”).⁸⁶ Summary judgment must thus be granted against all of Plaintiffs’
8 breach of contract claims.

9 **II. SUMMARY JUDGMENT SHOULD ALSO BE GRANTED AGAINST**
10 **THE GLA CLASS’S BREACH OF FIDUCIARY DUTY CLAIM**

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

14 **A. The Adderley GLA Does Not Create a Fiduciary Duty**

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

19 the active players whose rights generated the money, that the reallocation was based upon the
20 increased value of the NFL Players name and logo, and that the value ascribed to the NFL
21 Players name and logo was based upon “a peer review of another sports organization’s logo use
22 revenue.” Eyrich 30(b)(6) Depo. 92:10-17, 85:23-86:19; Players Inc’s Resps. and Objs. to Pls.’
23 Third Set of Interrogs. at Resp. No. 10(a) (Jan. 22, 2008) (Greenspan Decl. Exs. 34, 42).

24 ⁸⁶ Further underscoring that this allocation has nothing to do with retired players is the
25 undisputed fact that the division of GLR between players, Players Inc, and the NFLPA “was all
26 based on a model that included only active players” and “preceded any involvement [in
27 Defendants’ licensing program] by retired players by a great number of years” Berthelsen
28 Depo. 77:17-78:5 (Greenspan Decl. Ex. 37).

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

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

⁸⁹ Although the TAC also avers a fiduciary relationship based upon an “agency by estoppel”
theory, TAC ¶46, since the Court determined that California law does not apply, Plaintiffs have
conceded that “there is no longer an ‘agency by estoppel’ claim at issue.” Pls.’ Opp’n to Defs.’
Pet. for Permission to Appeal at 10 (May 21, 2008) (Greenspan Decl., Ex. 47). Even if an
agency by estoppel claim were still at issue, it would fail as a matter of law because Virginia and

1 As to Plaintiffs’ “express agency” theory, the TAC alleges that the GLAs create a
2 fiduciary relationship between the GLA Class and Defendants because the class members
3 “retained control over Players Inc’s conduct by having the ability to approve all personal
4 appearance and additional services that might be requested by a licensee” and because they
5 “ha[d] the ability to withdraw their participation in Defendants’ Group Licensing Program, and
6 to terminate the relationship.” TAC ¶ 45. While these complaint allegations may have arguably
7 stated a basis for a fiduciary duty under California law, they do not support the existence of a
8 fiduciary duty under Virginia or D.C. law, and are, in any event, unsupported by the record
9 evidence.⁹⁰

10 Unlike the mere power to terminate the alleged agency relationship claimed by
11 Plaintiffs, under Virginia and D.C. law, “the critical test is the nature and extent of the control
12 agreed upon.” Murphy v. Holiday Inns, Inc., 216 Va. 490, 493 (1975).⁹¹ “[T]he determinative
13 [factor] is usually whether the [principal] has the right to control and direct the [agent] in the
14 performance of his work and the manner in which the work is to be done.” Judah v. Reiner, 744
15 A.2d 1037, 1040 (D.C. 2000) (internal quotation omitted) (emphasis added). See also Wells v.
16 Whitaker, 207 Va. 616, 624 (1966). Specifically, the level of control necessary to establish an
17 agency relationship under Virginia or D.C. law is “control over the day-to-day operations of the
18 alleged [agent]” and the “right to control the methods or details of doing the work.” Ames v.
19 Yellow Cab of D.C., Inc., No. 00-3116 (RWR)(DAR), 2006 WL 2711546, *5 (D.D.C. Sept. 21,
20 2006) (applying D.C. law); Wells, 207 Va. at 624.

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

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

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

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

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

5 A: If there was some type of conflict ... or if they use me in some type of
6 promotion that I didn’t agree to, that I would have the authority to ask them
7 not to use it....

8 Q: So, apart from that, did you have any ability to control Players, Inc[’s] use of
9 your GLA rights?

10 A. No.

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

12 The record evidence thus falls far short of raising a genuine issue that any class
13 member had the ability to control the “day-to-day operations” of Players Inc. Further, the record
14 is devoid of any evidence with respect to the purported ability of Plaintiffs to control, at any level
15 of activity, the NFLPA. See Murphy, 216 Va. at 495 (hotel franchise agreement providing
16 purported principal with control over use of its intellectual property insufficient to create agency
17 relationship as it still had “no power to control daily maintenance of the premises[.]
18 [purported agent’s] current business expenditures, fix customer rates, [...] demand a share of the
19 profits[, and] was given no power to hire or fire [purported agent’s] employees, determine
20 employee wages or working conditions, set standards for employee skills or productivity,
21 supervise employee work routine, or discipline employees”); Ames, 2006 U.S. WL 2711546, *5-
22 7 (no agency relationship created by agreement licensing purported principal’s “name, logo and
23 optional services,” even though the agreement stated it could be terminated by either party at any
24 time, and purported principal retained the right to ban purported agent from using its dispatch
25 system).⁹² Because there is no evidence to raise a genuine issue of material fact in support of the

25 ⁹² See also DNM, Inc. v. S.H. Clark & Sons Roofing, Inc., No. 911233, 1992 Va. LEXIS 102,
26 *5-6 (Va. April 17, 1992) (memorandum opinion) (holding that even a contract that “establishes
27 an on-site representative of the owner who retains authority to approve the construction budget,
28 and . . . reject trade contracts” does not provide enough control to establish agency); Bangkok
Crafts Corp. v. Capitolo di San Pietro in Vaticano, No. 03 Civ. 0015 (RWS), 2004 U.S. Dist.
LEXIS 25235, *19-20 (S.D.N.Y. Sept. 13, 2004) (License provisions allowing licensor “to
protect the goodwill associated with its name and marks . . . are clearly insufficient to create an
agency relationship”) (citing Murphy, 216 Va. at 495).

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

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

5 Even if Defendants had any fiduciary obligations arising out of the GLA, the
6 undisputed evidence establishes that there has been no breach of any such duty. The alleged
7 breaches of Defendants' purported fiduciary duty are identical to Defendants' purported
8 contractual breaches (e.g., failing to "distribute[] revenues to the members of the GLA Class that
9 should have been distributed and were owed to them;" "arbitrarily, capriciously and wrongfully
10 exclud[ing] retired players from the 'equal share' royalty;" and "misappropriat[ing] funds
11 totaling eight million dollars ... or more"). TAC ¶ 54. But, as discussed above (pp. 9-16, supra),
12 the undisputed evidence establishes that all of these monies were active player licensing
13 revenues to which the GLA Class members have no legal entitlement.

14 There was thus no breach of any fiduciary duty, nor anything arbitrary or
15 capricious, in not distributing to retired players revenues generated by active players.⁹³ Indeed,
16 Adderley himself has admitted that retired players are not entitled to active player licensing
17 money, and that he only expected to be paid when Players Inc utilized his rights. See Adderley
18 Depo. 89:13-90:1, 96:13-18 (testifying that he believes that "as a retired player, [he is not]
19 entitled to any money that's generated by the licensing of active players" and that he "never
20 thought that [he] should get something if nobody used [his] image"). The purported premise of
21 Plaintiffs' breach of fiduciary duty claim is that "Players Inc licensed the rights of retired players
22 to licensees such as EA" without compensation. TAC ¶¶ 51-54 (emphasis added). Since the
23 undisputed evidence establishes that retired players rights were not included in such licenses (pp.
24 9-16, supra), it follows that the breach of fiduciary duty claim must fail.

25 _____
26 ⁹³ As the NFLPA's General Counsel explained: "[Y]ou want the people who generate the money
27 to benefit from it.... It would be unfair to the retired players to give active players a share of
28 [retired player money]. And that's true on the flip side." Berthelsen Depo. 75:19-76:4, 76:5-17
(further testifying that the active player group licensing program "is a viable ongoing program
and has been for decades," whereas the retired player program "was a try and see which did not
succeed. It wouldn't make any sense to combine the two.") (Greenspan Decl. Ex. 37).

1 Plaintiffs alternatively allege that Defendants breached their fiduciary duty by
2 failing to represent the GLA Class members' best interests in pursuing licensing opportunities.
3 See generally TAC ¶¶ 40-55. The undisputed evidence, however, shows that Defendants did
4 attempt to promote the GLA Class members, including the lower profile retired players, but that
5 there was simply no market for the group rights of most of these individuals.⁹⁴ Even so, the
6 undisputed facts show that Defendants still managed to generate over \$30 million for retired
7 players by licensing designated groups of retired player rights, while retaining less than two
8 percent of that money in administrative fees.⁹⁵ This is not a record upon which to base a breach
9 of fiduciary duty claim.

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

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

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

25 ⁹⁴ See generally pp. 5-7, supra; Nahra 30(b)(6) Depo. 67:19-68:15 ("[T]here was a hope that
26 licensees would be willing to pay money to get retired player rights in general without regard to
27 who those particular players were but that never happened. Despite our efforts that never
28 happened."); D. Allen Depo. 181:16-183:22 ("[O]ne of the most important things I did was
emphasize to the Players Inc staff how important it was to promote retired players as an integral
part of our approach to the marketplace.") (Greenspan Decl. Ex. 8).

⁹⁵ See Feffer Decl. ¶ 2 (Greenspan Decl. Ex. 15).

1 Fame members or members of Super Bowl teams”).⁹⁶

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

4 Even if Plaintiffs could demonstrate a genuine issue of material fact in support of
5 Defendants’ alleged breach of fiduciary duty (they cannot), the claim would still fail because
6 Plaintiffs have not come forward with any evidence to raise a genuine issue of material fact to
7 show individual injury or damages for each of the GLA Class members.⁹⁷ The undisputed
8 evidence and admissions by Adderley and class counsel demonstrate that the licensing rights of
9 most GLA Class members had no economic value because they are virtually unknown to the
10 public.⁹⁸ Injury and damages could not result from licensing economically worthless rights and,
11 in any event, Plaintiffs simply have no evidence to raise a genuine issue on the element of injury
12 as to individual class members. See Noll Decl. ¶¶ 4-12 (Greenspan Decl. Ex. 12).

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

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

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

⁹⁸ See pp. 5-7, supra.

⁹⁹ See, e.g., Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 306 (5th Cir. 2003) (“[P]laintiffs’
proposed damages formula . . . attempts to project a measure of damages, for all the class
members, that in no way accounts for the vast differences among those class members.”); Corley
v. Entergy Corp., 220 F.R.D 478, 485 (E.D. Tex. 2004) (rejecting average dollar-per-foot
measure of trespass damages because “some parcels of land are more valuable than others”).

1 rights having no economic value, injury may not be economically presumed. See Noll Decl. ¶¶
2 4-12. As this Court has previously noted, why should an unknown retired player whose
3 licensing rights have no value have a claim to any payment at all?¹⁰⁰

4 Further, there is no evidence to establish that even one penny of the \$25 million in
5 minimum guarantees paid by EA or, for that matter, any other licensee was attributable to the
6 retired player rights of any GLA Class member. See pp. 9-16, supra. The total absence of
7 evidence as to fact of injury for individual GLA Class members by itself requires summary
8 judgment against the breach of fiduciary duty claim.¹⁰¹

9 CONCLUSION

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

16 Date: June 13, 2008

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17 BY: /s/ Jeffrey Kessler
18 Jeffrey L. Kessler
19 *Attorneys for Defendants*

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22 ¹⁰⁰ May 31, 2007 Hearing Tr. 43:25-45:13 (“COURT: People decide that in the marketplace. If
23 they are famous, they get more money. If they are not famous, they don’t get much. They get
24 nothing.”); Class Hearing Tr. 8:6-9, 9:7-13, 11:20-22 (Class Counsel: “A lesser player would get
25 another thing. He probably wouldn’t be used.”); Adderley Depo. 83:3-84:1 (Greenspan Decl.
26 Exs. 14, 13, 4).

25 ¹⁰¹ This evidentiary failure also means that Plaintiffs cannot recover anything more than
26 “nominal damages” on their breach of contract claim. See, e.g., Garcia v. Llerena, 599 A.2d
27 1138, 1142 (D.C. 1991); Orebaugh v. Antonious, 190 Va. 829, 834 (1950).

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