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12 *Attorneys for Plaintiffs*

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT
15 SAN FRANCISCO DIVISION

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

19 Plaintiffs,

21 NATIONAL FOOTBALL LEAGUE
22 PLAYERS ASSOCIATION, a Virginia
corporation, and NATIONAL FOOTBALL
23 LEAGUE PLAYERS INCORPORATED
d/b/a PLAYERS INC, a Virginia
24 corporation,

25 Defendants.

CIVIL ACTION NO. C07 0943 WHA

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION IN LIMINE NO. 1
TO EXCLUDE EVIDENCE REGARDING
HOW DEFENDANTS ALLEGEDLY SPENT
MONIES CLAIMED BY PLAINTIFFS, AND
EVIDENCE REGARDING THE ECONOMIC
WEALTH OF DEFENDANTS AND ACTIVE
NFL PLAYERS**

Judge: Honorable William H. Alsup
Date: October 15, 2008
Time: 2:00 p.m.
Place: Courtroom 9, 19th Floor

1 In their first motion in limine, Defendants ask the Court to exclude evidence related to the
2 expenditures and economic wealth of Defendants. The Court should summarily deny this
3 Motion.

4 The evidence sought to be excluded is highly relevant and, indeed, will be a central part of
5 **Defendants'** case to which Plaintiffs will be entitled to respond. For example, evidence showing
6 Defendants' distribution of a relatively small portion of the funds from received group licensing
7 revenue, as shown in Defendants' financial statements and their LM-2 filings, proves that
8 Defendants' astounding 64-69% licensing capture rate is patently unreasonable. Defendants
9 intend to argue, presumably, that this retained "commission" is somehow "fair" or "appropriate"
10 based upon their expenditure levels and financial needs. Plaintiffs will need to, and will, rebut
11 this attempted showing. This Motion is a naked and unjustified attempt to tie Plaintiffs' hands in
12 this regard. Furthermore, evidence of the Defendants' wealth will be a necessary component of
13 the jury's finding of an appropriate punitive damage amount. As such, the challenged evidence is
14 directly relevant to the case, and the Court should deny Defendants' first motion in limine.

15 **I. Evidence of how Defendants Use Licensing Proceeds Rebutts Defendants' Damages**
16 **Theories, and Supports Plaintiffs' Theories**

17 Evidence of Defendants' expenditures is relevant, indeed necessary, in evaluating the
18 reasonableness of Defendants' licensing practices. For example, Defendants' expert Roger Noll
19 criticizes Plaintiffs' expert Daniel Rascher's methodology, in part, for not properly accounting for
20 Defendants' use of their licensing revenues "to deliver services to its members" in determining an
21 appropriate revenue share for Defendants to keep from their licensing efforts. *See* Garza Decl.,
22 Ex. A at 51. Noll thus demonstrates in his critique of Plaintiffs' expert that the jury in this case
23 will be called upon to consider how Defendants have used licensing revenues in determining
24 whether the 64%-69% licensing capture is reasonable. If Defendants have not provided adequate
25 compensation to retired players, whether through actual payments to players or benefits-in-kind,
26 then a reasonable jury may infer that a 64%-69% licensing capture rate is unreasonable. In the
27 same vein, evidence that Defendants have failed to distribute a sizable portion of received group
28

1 licensing revenue, as shown in Defendants' financial statements and their LM-2s, shows that the
2 high licensing capture rate is unreasonable.

3 Notwithstanding the instant motion, Defendants recognize that evidence of Defendants'
4 use of licensing proceeds helps the jury understand the parties' damages positions. Defendants'
5 retained expert, Dr. Noll, cited to the *use* of licensing proceeds to form a strike fund as rebutting
6 any comparisons between the NFLPA and the MLBPA. *See* Garza Decl., Ex. A at 13. In fact,
7 Defendants have included the NFLPA's annual financial statements on their proposed exhibit list.
8 *See* Garza Decl., Ex. B at 33-34 (including financial statements as proposed exhibits 380-84). As
9 Defendants intend to rely on how the NFLPA has chosen to use licensing proceeds, Plaintiffs
10 should be able to do the same.

11 **II. Plaintiffs Will Not Seek to Introduce Specific Active Player Salaries, the Specific**
12 **Salary of Gene Upshaw, or the Specific Salary of Any of Defendants' Employees**

13 Plaintiffs do not intend to introduce evidence relating to active player salaries, the salary
14 of Gene Upshaw, or the specific salary of any of Defendants' employees during its case-in-chief.
15 Plaintiffs agree that evidence of these salaries is of little probative value, in light of the added
16 evidence that would likely be adduced to explain the terms and conditions associated with those
17 salaries.

18 Plaintiffs will stand prepared, however, to introduce evidence of active player salaries to
19 rebut certain arguments relating to the "equal share" royalty. As an example, Defendants have
20 argued that an "equal share" royalty is inappropriate for retired players, because "their careers are
21 over, and [their] marketability, or lack thereof, is fixed." *See* Dkt. No. 312 at 12.
22 "Marketability," however, is not a key factor in determining licensing rates for collective group
23 licenses -- were marketability a major factor, active superstar players (like Brett Favre or Frank
24 Gore), would earn a larger share of group licensing revenue than the rank-and-file active player.
25 In response to Defendants' positions, Plaintiffs may introduce evidence of active salaries, to show
26 how disparities between active players are not reflected in their "equal share" licensing rates. In
27

1 the same vein, Plaintiffs will be prepared to introduce evidence of Defendants' employees'
2 salaries, if necessary, to rebut any relevant arguments raised by Defendants.

3
4 **III. Evidence of Defendants' Wealth is Relevant to the Jury's Determination of Punitive
Damages**

5 Plaintiffs seek punitive damages in this lawsuit. The laws of Virginia and the District of
6 Columbia recognize that the jury may consider the size and wealth of Defendant in determining
7 an appropriate punitive award. *See Norfolk & W. Ry. Co. v. A. C. Allen & Sons*, 95 S.E. 406, 409
8 (Va. 1918) ("In a case in which exemplary or punitive damages are properly allowable, evidence
9 of the wealth of the defendant may be introduced . . ."); *Jonathan Woodner Co. v. Breeden*, 665
10 A.2d 929, 941 n.19 (D.C. 1995) (holding that proof of Defendants' net worth "is only one of
11 several considerations relevant to a punitive damages determination."); *see also Pac. Mut. Life*
12 *Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (approving, among other factors used to determine a
13 punitive damage award, the "financial position" of the defendant). Thus, the Court should allow
14 Plaintiffs to introduce such evidence to support their punitive damages claim.

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16 **IV. Conclusion**


17 Plaintiffs request that the Court deny Defendants' Motion in Limine No. 1.
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Dated: October 6, 2008

Respectfully submitted,

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