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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. 3
TO EXCLUDE EVIDENCE REGARDING
PLAINTIFFS' COMPLAINTS RELATING
TO "AD HOC" AGREEMENTS**

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

1 Although Defendants' third motion in limine is broadly directed to "ad hoc" agreements,
2 the argument focuses on only one agreement: the agreement between Players Inc., Electronic
3 Arts, Inc., and the Pro Football Hall of Fame (the "EA-HOF Agreement"). This agreement, and
4 the negotiations leading up to this agreement, show how Defendants do not negotiate in the best
5 interests of the retired players, as they are obligated to do; rather, Defendants negotiate in their
6 own best interests or even that of a third party (which, in turn, serves the Defendants' best
7 interest). This evidence directly rebuts Defendants' claims that they have adequately represented
8 the class members during negotiations with third parties and that they were not influenced by
9 their conflicts of interests and thereby supports Plaintiffs' claims for breach of fiduciary duty.
10 The Court should allow the jury to consider this evidence in determining whether Defendants
11 have breached their fiduciary duty to the class members.

12 **I. Defendants' Conduct Related to the EA-HOF Agreement, Including the Preceding**
13 **Negotiations, Show Defendants' Approach to Licensing, and Support Plaintiffs' Claims for**
14 **Breach of Fiduciary Duty**

15 The background of the EA-HOF Agreement is laid out in an email exchange between
16 Clay Walker and Joe Nahra:

17 For the record, [the EA-HOF Agreement] came up because Take
18 Two went after retired players to create and [sic] "NFL" style
19 videogame after we gave the exclusive to EA. I was able to forge
20 this deal with the HOF that provides them with \$400k per year
21 (which is significantly below market rate) in exchange for the HOF
22 player rights. EA owes me a huge favor because that threat was
23 enough to persuade Take Two to back off its plans, leaving EA as
24 the only professional football videogame manufacturer out there.

25 Garza Decl., Ex. A, at PI 126892. Later, Andy Feffer confirmed that the HOF retired players
26 rights are worth much more than the \$400,000 contractual price:

27 I can tell you that Clay and Joe's negotiation of these discounted
28 terms was a significant contribution to EA as you more than likely
29 would have paid in excess of \$1M for these rights without their
30 involvement and assistance.

31 Garza Decl., Ex. B, at PI 121593.

1 This email exchange shows the realities of Defendants' approach to licensing --
2 Defendants are not adequately looking out for player interests, rather, they are looking to protect
3 their own interests by cutting the licensor a "below market" deal. These emails, and the EA-HOF
4 licensing agreement, are powerful evidence of Defendants' conflicts of interests apparent in
5 attempting to serve multiple masters and their willingness to demote the retired players' interests
6 below any other. Defendants brokered an agreement between EA and the HOF such that (1) the
7 licensed retired players did not receive full market value for their rights, and (2) as a result, a
8 possible competitor for retired player rights, Take Two, was persuaded to "back off its plans" to
9 enter the videogame football market. While the retired players at issue received certain
10 compensation in this deal, a reasonable jury may find that Defendants failed to maximize the
11 value of retired players licenses, in this instance, due to its elevated competing interest in pleasing
12 EA, an exclusive licensor.

13 Defendants' actions in relation to the EA-HOF agreement casts doubt on their defense to
14 Plaintiffs' claim of breach of fiduciary duty. Defendants claim that they adequately attempted to
15 promote retired players rights. *See* Dkt. No. 305 at 33 ("[D]efendants did attempt to promote the
16 GLA Class members . . . [but] there was simply no market for the group rights of most of these
17 individuals."); *Garza Decl., Ex. C*, at 68:4-10 (Nahra 30(b)(6) deposition) ("[T]here was a hope
18 that licensees would be willing to pay money to get retired player rights in general without regard
19 to who those particular players were but that never happened. Despite our efforts that never
20 happened.") Defendants' approach to licensing, as shown by the negotiations leading up to the
21 EA-HOF Agreement, undercuts these assertions. A reasonable jury may question whether
22 Defendants adequately represent retired player rights if Defendants fail to maximize the value of
23 those rights, by working with EA to dissuade third-parties from becoming viable competitors for
24 licensing rights, or by working with EA to lowball the payments for retired player licensing
25 rights. As a result, evidence related to the EA-HOF Agreement is probative and helpful, and
26 should be considered in determining whether Defendants breached their fiduciary duties to the
27 class members.
28

1 **II. The Amounts Paid to Retired Players in the EA-HOF Agreement, or Any Other Ad Hoc**
2 **Agreement, Is Not Relevant to Plaintiffs' Claims or the Appropriate Measure of Damages,**
3 **but the Negotiations of Such Agreements are Highly Relevant.**

4 As Plaintiffs have consistently maintained throughout this litigation, the amounts paid to
5 retired players under the EA-HOF Agreement, or any other ad hoc agreement, is not relevant in
6 determining the amount of damages Plaintiffs are entitled to in this case under the GLA.
7 However, the background to the ad hoc agreements are certainly relevant in showing the overall
8 payment scheme for retired player licensing deals. Ad hoc agreements ensure that star players are
9 paid additional fees for being highlighted on product packaging, commercials, or other features.
10 Many active players, for example, collect money from equal GLA shares and from individually
11 negotiated ad hoc agreements. As a result, Plaintiffs, as always, do not rely on any ad hoc
12 agreements to show the compensation that Plaintiffs should receive for Defendants' breach of
13 contract and/or fiduciary duties, as the collective group licensing rights implicated by the GLAs
14 are separate and apart from the individual amounts paid pursuant to ad hoc agreements.
15 Therefore, even though the amounts paid pursuant to the EA-HOF Agreement is not relevant to
16 this litigation, Defendants' *conduct* in regards to those negotiations, including Defendants' failure
17 to maximize retired player licensing value in favor of brokering a better deal for EA, calls into
18 question whether Defendants have adequately represented class member rights in other licensing
19 negotiations. This evidence of Defendants' conduct and position toward retired players
20 outweighs any confusion arising from the introduction of the dollar amount bargained for in the
21 EA-HOF license agreement. Indeed, Defendants' position that such evidence is irrelevant is
22 nonsensical. Defendants contend that all licensing of retired players was done pursuant to ad hoc
23 agreements. Thus, the only conduct of the defendants related to retired player licensing is that
24 related to negotiation of ad hoc agreements. To suggest that all such evidence of the Defendants'
25 actions and state of mind is irrelevant means that no evidence of what actually happened related
26 to retired player licensing is relevant.

27 Thus, this evidence is apposite to the contested issues at the heart of this case, and
28 deserves to be adequately addressed in front of the jury. Plaintiffs and Defendants fundamentally

1 disagree as to whether Defendants adequately represented the class members' interests in their
2 licensing negotiations. The evidence listed above suggests that they have not. Whether or not the
3 amount of the agreement is adequate in an absolute sense, Defendants contended that EA received
4 a bargain, suggesting that Defendants did not maximize the value of the retired players' rights.

5
6 **III. Defendants' Proposed "Rebuttal" Evidence Does Not Show that Defendants**
7 **Adequately Represented Class Members' Interests in Licensing Negotiations, and the Court**
8 **should Consider Excluding Such Evidence**

9 Defendants may choose, as they have suggested in their motion, to try and rebut evidence
10 of the EA-HOF negotiations by showing that \$400,000 is "economic[ally] adequ[ate]"-- despite
11 their own emails to the contrary. But this evidence does nothing to rebut the fundamental
12 inference Plaintiffs will urge the jury to draw from these negotiations -- that Defendants are
13 beholden to multiple masters in licensing negotiations, and thus could not and did not adequately
14 represent the class members' interests in licensing negotiations. Nor does a defined
15 "economic[ally] adequ[ate] amount" answer the breach of fiduciary duty questions posed to the
16 jury. As a result, if the Defendants try to introduce evidence that goes to the economic adequacy
17 of the EA-HOF Agreement, because that evidence would not substantially help the jury in its
18 decisionmaking, the Court should consider excluding such evidence under Rule 403.


19 **IV. Conclusion**

20 Plaintiffs request that the Court deny Defendants' Motion in Limine No. 3.
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Dated: October 6, 2008

Respectfully submitted,
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