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21 Attorneys for Plaintiffs

22 UNITED STATES DISTRICT COURT
 23 NORTHERN DISTRICT OF CALIFORNIA
 24 SAN FRANCISCO DIVISION

25 BERNARD PAUL PARRISH, HERBERT
 26 ANTHONY ADDERLEY, and Walter
 27 Roberts III, on behalf of themselves and all
 28 others similarly situated,

Plaintiffs

vs.

29 NATIONAL FOOTBALL LEAGUE
 30 PLAYERS ASSOCIATION, a Virginia
 31 corporation, and NATIONAL FOOTBALL
 32 LEAGUE PLAYERS INCORPORATED
 33 d/b/a PLAYERS INC, a Virginia
 34 corporation,

Defendants.

CIVIL ACTION NO. C07 0943 WHA

**DECLARATION OF RYAN S. HILBERT IN
 SUPPORT OF PLAINTIFFS' OPPOSITION
 TO DEFENDANTS' MOTION IN LIMINE
 NO. 5 TO EXCLUDE THE TESTIMONY OF
 PHILIP Y. ROWLEY**

Judge: Honorable William H. Alsup
 Date: October 15, 2008

1 I, Ryan S. Hilbert, declare as follows:

2 1. I am an associate with Manatt, Phelps & Phillips, LLP, attorneys of record for
3 Plaintiff Herbert Anthony Adderley and the GLA Class in the above-captioned matter. The facts
4 below are true and correct and within my own personal knowledge. If called on to testify to
5 them, I could and would competently do so.

6 2. Attached hereto as Exhibit A is a true and correct copy of excerpts from the
7 Deposition of Philip Y. Rowley, taken on July 22, 2008.

8 3. Attached hereto as Exhibit B is a true and correct copy of excerpts from the
9 Deposition of G. Stephen Jizmagian, taken on July 8, 2008.

10 I declare under penalty of perjury and the laws of the United States that the foregoing is
11 true and correct and that this declaration was executed on October 6, 2008.

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/s/ Ryan S. Hilbert
Ryan S. Hilbert

Exhibit A
to the
Declaration of Ryan S. Hilbert In Support of
Plaintiff's Opposition to Defendants' Motion In
Limine No. 5 To Exclude The Testimony Of
Philip Y. Rowley

Philip Y. Rowley

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION
4

5 BERNARD PAUL PARRISH, HERBERT)
6 ANTHONY ADDERLEY, and WALTER)
7 ROBERTS, III, on behalf of)
8 themselves and all others)
9 similarly situated,)

10 Plaintiffs,)

11 vs.) No. C07-0943-WHA

12 NATIONAL FOOTBALL LEAGUE)
13 PLAYERS ASSOCIATION, a)
14 Virginia corporation and)
15 NATIONAL FOOTBALL PLAYERS,)
16 INC., d/b/a PLAYERS, INC.,)
17 a Virginia)

18 Defendants.)

COPY

19 DEPOSITION OF PHILIP Y. ROWLEY,
20 San Francisco, California
21 Tuesday, July 22, 2008
22

23 Reported by:
24 Rebecca Romano,
25 CSR No. 12546
Job No. 81049/204031

1 Q (By Mr. Kessler) In your assignment paragraph, it
2 says, "I have been asked to analyze and to reach opinions
3 as to potential damages in this matter."

4 What do you mean by the word "potential"?

5 A Well, I think as -- as the dialogue has
6 progressed in the last couple of months, there's a
7 variety of liability decisions that need to be
8 determined. And so depending upon that, there could be
9 different damage scenarios.

10 Q Well, are you offering an opinion that the
11 damages you calculated were, in fact, incurred by the
12 class here, or are you offering an opinion that they
13 were potentially incurred by the class here?

14 MR. KATZ: Object.

15 THE DEPONENT: What my opinion is, is that if
16 the trier of fact determines certain liabilities, I
17 provided a construct as to what I believe the damages
18 were that were suffered by the plaintiffs.

19 Q (By Mr. Kessler) Okay. So your view is that
20 for each possible liability outcome, you're rendering an
21 opinion as to what the damages would be for that
22 liability outcome; is that fair?

23 MR. KATZ: Object.

24 THE DEPONENT: In my words, I -- I've offered
25 damage models or constructs that the trier of fact could

1 use in applying the damages.

2 Q (By Mr. Kessler) Okay. Would you offer an
3 opinion to the trier of fact as to which estimate is a
4 better estimate of the damages suffered by the class?

5 MR. KATZ: Object.

6 THE DEPONENT: As a general proposition?

7 Q (By Mr. Kessler) Yes.

8 A No.

9 Q Okay. So in your expert opinion, are they all
10 equally good estimates?

11 MR. KATZ: Object.

12 THE DEPONENT: Again, it depends upon the
13 specific determination of liability on the relevant
14 issues. If you defined this is the liability, I believe
15 I can apply a specific model.

16 Q (By Mr. Kessler) Okay. Well, if the jury
17 just finds breach of contract -- and that's all we
18 know -- the judge gets a verdict that says breach of
19 contract, which, in your expert opinion, is the best
20 estimate of damages if it's just a finding of breach of
21 contract?

22 MR. KATZ: Object.

23 THE DEPONENT: Not being a lawyer, I would
24 have anticipated that the jury instructions would have
25 looked to one of the key issues being, "Does breach of

1 contract mean only those contracts or agreements that
2 have specific language referencing retired players
3 versus all contracts," because that goes to groups
4 larger than six, which I understand from plaintiffs'
5 counsel is one of -- is one of their arguments.

6 So for me to, first off, give a model, I would
7 need to understand, is that -- is that the breach of
8 contract.

9 **Q (By Mr. Kessler) Do you have any opinion as**
10 **to what the contract means in this case?**

11 MR. KATZ: Object.

12 **Q (By Mr. Kessler) I'm referring to the group**
13 **licensing authorization signed by retired players.**

14 A As it means from a -- from a legal standpoint?

15 **Q Are you offering any expert opinion on that**
16 **issue?**

17 A On that language?

18 **Q Yes.**

19 A Either the Group 6 or the retired in escrow?

20 Not to the meaning. I take into account in my
21 damage constructs what an application might be of an
22 escrow account, as an example. But to the language, I'm
23 not offering an opinion as to what that specifically
24 means.

25 **Q Do your models distinguish between the amount**

1 THE DEPONENT: Well, to the extent that I have
2 built three constructs with percentages, based on
3 percentages that were provided by another expert, I have
4 provided some type of a model that could be used by the
5 trier of fact if it's deemed as a breach.

6 But I have not been asked and nor did I study
7 specifically the reasonableness of the percentages
8 independently from what I gathered from Dr. Rasher.

9 Q (By Mr. Kessler) Dr. Rasher came up with
10 these comparables and percentages, correct?

11 MR. KATZ: Object.

12 THE DEPONENT: The 10 percent, the 25 and the
13 40?

14 Q (By Mr. Kessler) Yes.

15 A Yes.

16 Q You haven't done anything to independently
17 verify the reasonableness of those comparables, have
18 you?

19 MR. KATZ: Object.

20 THE DEPONENT: That's not true.

21 Q (By Mr. Kessler) You have verified them?

22 A I have had at least two discussions with
23 Dr. Rasher as to how he -- how he came up with those and
24 what he's basing it upon.

25 Q Okay. And based on those discussions, you are

1 Q Okay. That's -- that's the full sum and
2 substance of your expert opinion on that particular
3 subject, correct?

4 A Correct.

5 Q Okay. Now --

6 MR. KATZ: Please note my objection to the
7 last question.

8 Q (By Mr. Kessler) Now, in terms of what you
9 did as opposed to what Dr. Rasher did --

10 A Yes.

11 Q -- in this analysis of the 10, 25 and 40
12 percent, other than performing arithmetic, what else did
13 you do in that particular analysis -- and rely upon
14 Dr. Rasher for the comparisons?

15 MR. KATZ: Object.

16 THE DEPONENT: Well, a significant amount of
17 work. And anyone who spent time with the NFLPA, PI
18 licensing program recognizes that the documentation and
19 the detail is -- is not clean.

20 And so there was quite a bit of work that went
21 into -- to determine the appropriate shared revenue
22 pool, the adjustments that are made, when those
23 adjustments are made, the number of active players, the
24 number of retired players; if you look to some of the
25 theories here on liability, which contracts or

1 agreements are appropriate in which years.

2 So quite a bit of work went into constructing
3 the damage models.

4 **Q (By Mr. Kessler) Did you make any judgment as**
5 **to which contracts and agreements were appropriate?**

6 MR. KATZ: Object.

7 THE DEPONENT: I was directed by counsel that
8 those agreements that had certain language that
9 referenced retired players should be considered a subset
10 of all agreements.

11 **Q (By Mr. Kessler) Okay. Other than counsel**
12 **directing you on that, did you form any expert judgment**
13 **as to whether those agreements should be included in**
14 **your damage analysis?**

15 MR. KATZ: Object.

16 THE DEPONENT: To the extent that they are
17 included or portions of them are included in the equal
18 share pool, yes.

19 **Q (By Mr. Kessler) Okay. On what basis do you**
20 **believe the language of those contracts support**
21 **including them?**

22 MR. KATZ: Object.

23 **Q (By Mr. Kessler) If you have an expert**
24 **opinion about that.**

25 A Yeah -- no. Counsel, are you talking about

1 Q (By Mr. Kessler) Are my questions unclear to
2 you?

3 A I -- I asked for clarification.

4 Q I'll ask it again. Okay.

5 Is counsel the one who decided these different
6 cuts of your damage analysis in terms of do one subset
7 with just the retired player language, one subset
8 including the NFL sponsorship agreement and the retired
9 player language, another subset having all the GLR
10 contracts in them?

11 Did counsel decide that or did you decide
12 that?

13 MR. KATZ: Object.

14 THE DEPONENT: Ultimately, I would say it was
15 a combination. And the reason for that is when I
16 initially was engaged, my assumption was there would be
17 a licensing pool that I would be able to access. I
18 would see here were the shares that were allocated to
19 certain players. And I didn't know at that time if
20 retired players had received any or not.

21 I would then find the number of active and
22 retired players, and I would come up with an adjusted
23 share.

24 Once I got into the engagement, some of the
25 things that I noted is that there were different

1 agreements; there are extensions.

2 This language later became one of the key
3 points turning on: Are those the specific agreements
4 that should be discussed.

5 I then had to go back into the data and find
6 the various agreements and pull them.

7 You can't see that in just the financial
8 records. It's simply listed as an entity and the amount
9 of the payments in the journal entries. You have to go
10 back and find the agreements, which I was able to do.

11 Also noted that some of the agreements -- part
12 of them went into the revenue sharing fund, part of them
13 went into the premium appearances or ad hoc or side
14 deals, as Dr. Noll calls them.

15 That exercise took a significant amount of
16 work. And I do rely on my expertise as a damage analyst
17 to go in and construct a model and to isolate it.

18 **Q (By Mr. Kessler) When you say your expertise**
19 **as a damage analyst, what area of expertise is that?**

20 **Is that accounting? Is that economics?**

21 **What body of expertise are you talking about**
22 **as a damage analyst?**

23 MR. KATZ: Object.

24 THE DEPONENT: I think to some extent it
25 combines those types of disciplines. And as you are

1 looking to but-for worlds along with lost profits, what
2 are incremental costs, it combines those types of
3 disciplines. And that's what I have testified on in
4 several occasions.

5 Q (By Mr. Kessler) Have you constructed a
6 but-for world here in your damage analysis?

7 A I believe the correct --

8 MR. KATZ: I'm going to object. Sorry.

9 THE DEPONENT: There's -- under the certain
10 parameters of what I was attempted (sic) to solve for as
11 it relates to the breach of contract and the certain
12 issues and the breach of fiduciary duty, I have built
13 what should be the but-for world, which would reflect
14 what the retired players would have received but for the
15 actions that are alleged.

16 Q (By Mr. Kessler) How did you eliminate the
17 possibility that in your but-for world, that if the
18 retired players were going to be participating in the
19 GLR pool, that their individual ad hoc monies would not
20 also go in that pool?

21 How do you know?

22 MR. KATZ: Object.

23 THE DEPONENT: That isn't what was practiced
24 or performed. I have looked to just specifically the
25 equal share pool as a surrogate for the escrow fund that

1 was supposed to have been established.

2 The appearance monies, premium monies, ad hoc
3 monies, et cetera, are a completely separate -- separate
4 fund.

5 **Q (By Mr. Kessler) Okay. But in the actual**
6 **world, retired players didn't share in the GLR pool at**
7 **all, correct?**

8 MR. KATZ: Object.

9 **Q (By Mr. Kessler) In the real world.**

10 **A In -- in each of the years, it was active**
11 **players who -- who received monies out of that pool,**
12 **along with a small amount for practice squad players.**

13 **Q So in the real world, retired players did not**
14 **share in the GLR pool, correct?**

15 MR. KATZ: Object.

16 THE DEPONENT: Yes.

17 **Q (By Mr. Kessler) Now, in the but-for world,**
18 **you're assuming retired players do share in the GLR**
19 **pool, correct?**

20 MR. KATZ: Object.

21 THE DEPONENT: I'm assuming that they would
22 have shared in some type of an escrow fund. And the
23 best measure or proxy that I have for that is the GLR
24 fund.

25 **Q (By Mr. Kessler) Okay. And if in your**

1 THE DEPONENT: Two -- two comments.

2 First off, I applied the pool exactly how
3 NFLPA/PI also utilized it during the relevant time
4 period.

5 The second goes to I haven't seen a formal
6 policy document or how that type of definition or
7 delineation was actually being done. And so I have
8 simply assumed that what was actually practiced is the
9 best measure.

10 So I don't have that the Hall of Fame
11 agreement, as an example -- why that went into ad hoc
12 versus it went into the general licensing revenues.

13 **Q (By Mr. Kessler) So other than the fact that**
14 **that was done in the past, do you have any other basis**
15 **for that assumption?**

16 MR. KATZ: Object.

17 THE DEPONENT: I can see different agreements.
18 The NFL sponsorship agreement, as an example, has
19 language where there are minimums that do go into the
20 general licensing revenue, but there also is a holdback,
21 roughly 25 percent, on the sponsorship agreement that
22 must go to specific people, so -- specific players.

23 So there can be designations throughout this.

24 I don't know if a -- if you would go back and
25 redo history and put those monies into that fund. I've

1 A An assumption that the -- an escrow account --
2 my understanding is an escrow account was not
3 established but that if I looked to the actual actions
4 and administration by NFLPA/PI, that the reasonable
5 proxy for what that escrow would have looked like --
6 account would have looked like is the equal share fund,
7 the gross licensing revenues.

8 **Q What's the basis for that assumption?**

9 A That assumption is that as I look to what is
10 a -- an account that has gross licensing revenues -- has
11 what I think are group licensing revenues that are
12 distributed on an equal share basis, that is the most
13 relevant account for our purposes.

14 **Q What's the basis for assuming that's the most**
15 **relevant account?**

16 A Really, my opinion that it would -- that would
17 look like what an escrow account that should have been
18 established, that's what would -- would be included.

19 **Q What expertise are you applying in giving an**
20 **opinion that if an escrow account were established, it**
21 **would look like that account? What area of expertise?**

22 **Is that an economic conclusion?**

23 MR. KATZ: Object.

24 THE DEPONENT: It's a -- really a conclusion
25 at looking at how did the defendants actually behave

1 Q (By Mr. Kessler) Right. So as an expert, why
2 would, in your view -- do you have an expert opinion
3 that the escrow fund would more look like the GLR pool,
4 okay, than it would look like either the ad hoc
5 agreement arrangements or the premium license agreement
6 arrangements for active players?

7 What expertise do you apply in making that
8 judgment?

9 MR. KATZ: Object.

10 THE DEPONENT: Part of it is some of the
11 guidance from counsel around language of being divided
12 between a player and an escrow account and then for all
13 eligible NFLPA members who have signed a group licensing
14 authorization.

15 And so as I look to where would I find a -- a
16 surrogate for something where a group of eligible
17 players have signed a GLA and how did they administer
18 that program, that's the most likely.

19 Q (By Mr. Kessler) Okay. Well, let's look at
20 that.

21 What did counsel advise you about the meaning
22 of divided between the player and an escrow account?

23 Let's start with that.

24 MR. KATZ: Object.

25 THE DEPONENT: Open to interpretation and that

1 the model.

2 Q (By Mr. Kessler) Right. So you were told by
3 counsel to make that assumption, and you made that
4 assumption in that model, correct?

5 A Yes.

6 Q Okay. Now, going back to 630. We were going
7 through the assumptions that you made.

8 You refer in the top of the next page --
9 actually, I can do this a little bit better. Let me go
10 to page 3.

11 You talk here about the damages for breach of
12 fiduciary duty?

13 A Yes.

14 Q And you say that you've been advised that
15 "damages for breach of fiduciary duty under applicable
16 law should be a reasonable connection to the defendants'
17 wrongful acts, or that the damages are the natural and
18 probable consequences of the wrongful act."

19 I assume you've been advised about that by
20 counsel; is that correct?

21 A Yes.

22 Q Okay. Now, looking at the different possible
23 breaches here, one of the breaches that's mentioned here
24 is that -- is -- under No. 2, is failing to accurately
25 report group licensing revenues to members of the GLA

1 class.

2 Do you see that?

3 A Yes.

4 Q If that is the only breach, how does your
5 damage model in any way represent the damages that will
6 be suffered by that particular alleged breach? Failure
7 to report.

8 A First off, Counselor, if -- if plaintiffs are
9 able to show that somehow, had members of the class had
10 that information, they would have behaved differently, I
11 could see how an equal share program would be the
12 appropriate measure of damages.

13 In other words, I get a report. I receive
14 zero. I don't get a report that tells me what efforts
15 are being made, what's planned in the future, I just get
16 zero.

17 It could be that that would have stimulated
18 activity if someone was to say, "I don't understand
19 what's going on. Explain the program to me." And
20 ultimately, then, there would have been an equal -- an
21 equal share determined based on the language.

22 I see that somewhat -- in the reporting, as
23 somewhat of a supplemental to the others, but I would --
24 I would leave that to the trier of fact.

25 I isolated that's -- that's how I would see

1 someone applying it.

2 Q Okay. Let me understand this.

3 Isn't it true that every retired player who
4 received nothing would know that they received nothing?

5 MR. KATZ: Object.

6 THE DEPONENT: By -- by receiving no
7 documentation, they would know they received nothing.

8 Q (By Mr. Kessler) Right. Okay.

9 So it wouldn't make any difference whether
10 they got a piece of paper saying they received nothing
11 or they received nothing.

12 They'd have the same information, right?

13 MR. KATZ: Object.

14 THE DEPONENT: I -- I disagree with that, at
15 least as a blanket statement for all -- for all the
16 members of the class.

17 Q (By Mr. Kessler) Okay. Have you seen any
18 evidence out of all these retired -- you know, most of
19 the members of the GLA class did not receive any --
20 well, strike that.

21 Do you know of any retired player who received
22 nothing, who took any actions to indicate that he
23 expected to receive something?

24 MR. KATZ: Object.

25 THE DEPONENT: Counselor, I think there were

1 **Fame agreement.**

2 A I have not.

3 MR. KATZ: Object.

4 You have to pause for a moment.

5 Q (By Mr. Kessler) Let's look back at 630, on
6 page --

7 A I guess, Counselor, if I may amend my answer
8 there.

9 Q Go ahead.

10 A As it relates to the breach of fiduciary duty,
11 if there was some type of -- part of the -- part of the
12 claims is placing themselves in a position of conflict
13 of interest, acting adversely to the interests of
14 retired NFL players.

15 If there was some type of a -- that that's an
16 example. I guess the fact that I have then gone to the
17 equal share pool could be considered a damages. But I
18 haven't -- I haven't made that exact nexus, which I
19 thought was your question.

20 Q Okay. Well, let me ask you that, then.

21 Why is placing themselves in a position of
22 conflict of interest and acting adversely to the
23 interests of retired NFL players who signed the GLA at
24 all related to your damage calculations based on retired
25 players getting an equal share of the GLR pool?

1 MR. KATZ: Object.

2 THE DEPONENT: Legally, my understanding would
3 be if they -- if they put themselves in this position
4 and intentionally or unintentionally -- no,
5 intentionally didn't -- didn't represent the retired
6 players appropriately, a measure would be that they
7 would have had access to the equal share --

8 Q (By Mr. Kessler) Well, why is --

9 A -- pool.

10 Q Why is there a connection between having a
11 conflict of interest and having access to the GLR pool?
12 How do you draw that conclusion?

13 MR. KATZ: Object.

14 THE DEPONENT: I draw that -- that plaintiffs
15 are attempting to argue is that there should have been,
16 for the group licensing programs, an account that was
17 established -- escrow account that was established that
18 was going to be for all eligible NFLPA members divided
19 between the player in an escrow account. That's -- that
20 is this language.

21 When I look and see what actually happened,
22 what type of an account would have been available, I
23 look to the GLR, the equal share account as that's --
24 that is the best proxy for what should have been
25 available.

1 sign up and get some free money.

2 MR. KATZ: Object.

3 THE DEPONENT: So the -- the question that is
4 posed isn't relevant to my analysis in that I simply
5 looked at potential class members who are both retired
6 players and who signed the GLAs that have the specific
7 language. There are other retired players who signed
8 different GLAs, which --

9 Q (By Mr. Kessler) Okay.

10 A -- have not been included. You can see, at a
11 later point in time, it doesn't have the language.

12 So the hypothetical isn't necessary for my
13 analysis.

14 Q Okay. Wait --

15 A The class, as I understand it, are only those
16 players who had signed the relevant GLAs, and that's all
17 that's included in my analysis.

18 Q Maybe you are not understanding my question.

19 Okay. In a but-for world you are trying to
20 create for damages purposes, the world that would have
21 existed had defendants complied with the law as
22 plaintiffs are interpreting it, correct?

23 MR. KATZ: Object.

24 THE DEPONENT: In a general sense, yes.

25 Q (By Mr. Kessler) Okay. Have you done any

1 THE DEPONENT: It's an interesting analysis.
2 I wasn't asked to do that and I didn't do that.

3 Q (By Mr. Kessler) Well, do you agree it would
4 be relevant to them?

5 MR. KATZ: Object.

6 THE DEPONENT: I think there's a whole series
7 of analyses, including liability points, around this
8 class as to why others didn't sign up or who did sign up
9 and who stopped signing up, and so to simply assume that
10 there now would be 13,000, I don't have -- I don't have
11 basis for that.

12 Q (By Mr. Kessler) Okay. I'm not asking you to
13 assume 13,000.

14 Did you assume that any new class -- any new
15 retired players would sign up in your analysis?

16 A Not for purposes --

17 MR. KATZ: Object. Object.

18 THE DEPONENT: Not for purposes of the damage
19 analysis.

20 Q (By Mr. Kessler) Okay. Now, I would like to
21 direct your attention to the next paragraph.

22 In the last sentence you said, "I have defined
23 causation as the fact that the retired players did not
24 receive any payments from the general licensing pool
25 (further definition below.)"

1 I don't see any tiering within the active
2 players for any type of other -- any type of other
3 matrix, one.

4 Two, I really looked to the -- this
5 establishment of an escrow account; that is, the only
6 escrow account that I can see that was established.

7 And I then looked at how it was administered
8 and make the assumption that had you included those
9 retired players into that account, they would have been
10 treated equally.

11 Q (By Mr. Kessler) Okay. Are you familiar with
12 the concept of an escrow account from your studying in
13 accounting courses?

14 A I'm familiar with escrow accounts from a
15 variety of --

16 Q Okay.

17 A -- sources.

18 Q From all of your sources, is there requirement
19 you are aware of in general where an escrow account
20 should be -- has to necessarily be equally divided
21 between its beneficiaries?

22 MR. KATZ: Object.

23 THE DEPONENT: They will be -- escrow accounts
24 can be set up individually and -- and how payments are
25 designated and what are the commitments or covenants

1 MR. KATZ: Object.

2 THE DEPONENT: That's my understanding, yes.

3 Q (By Mr. Kessler) Okay. Retired players are
4 not on the active roster of an NFL team, correct?

5 A That would certainly be my general
6 understanding, but the whole Brett Favre, I'm trying to
7 understand if he's even on a roster.

8 My general understanding is I would agree with
9 you, Counselor. There might be some exceptions of which
10 I'm not fully aware.

11 Q All right. Let's assume I'm right. Let me
12 represent to you -- okay? -- that retired players are
13 not on an active roster and the practice squad players
14 are not.

15 What is your expert basis for concluding that
16 if retired players were included in the GLR pool, they
17 would not be more similarly treated to practice squad
18 players, who, like them, are not on an active NFL roster
19 as opposed to the active NFL roster players?

20 MR. KATZ: Object.

21 THE DEPONENT: It's -- it's an assumption that
22 goes to eligibility and the eligibility requirements and
23 the signing of a -- of a GLA.

24 Q (By Mr. Kessler) Do you have any basis for
25 that assumption to distinguish one from the another?

1 MR. KATZ: Object.

2 THE DEPONENT: The reason for my pause, I'm
3 trying to go back and remember the definition of a -- of
4 a retired player, what that means. I think we talked
5 about that earlier and the participation in the -- in
6 the escrow account.

7 I guess I would go back to, Counselor, I see
8 how the escrow account -- the -- the shared account was
9 administered, and my assumption is that the retired
10 players would have similar type of eligibility
11 requirements.

12 Now, not that they were on a squad but that
13 they were officially a retired player and that they had
14 signed GLAs and, therefore, would be similarly
15 positioned to active players for purposes of the
16 administration of the equal share form.

17 **Q Is there anything else you can articulate as**
18 **the basis for that assumption, other than what you've**
19 **already testified to?**

20 MR. KATZ: Object.

21 THE DEPONENT: Not at this time.

22 **Q (By Mr. Kessler) By the way, you mentioned**
23 **other sports' unions. Other sports' unions don't**
24 **distribute any money to retired players, do they?**

25 MR. KATZ: Object.

1 MR. KATZ: Object.

2 THE DEPONENT: As I sit here right now, no,
3 but I will endeavor to research it.

4 Q (By Mr. Kessler) Okay. Do you know that
5 Stats also just publishes statistics apart from fantasy
6 football?

7 MR. KATZ: Object.

8 Q (By Mr. Kessler) Do you know that one way or
9 the other?

10 A No.

11 Q Do you know how it got the name Stats?

12 MR. KATZ: Object.

13 THE DEPONENT: Statistics.

14 Q (By Mr. Kessler) Let me ask you this: In
15 your list of breaches of fiduciary duties on the No. 4
16 on page 3, you have listed "failing to create an escrow
17 account for the retired players."

18 Is your understanding that plaintiffs are
19 claiming here that one of the breaches of fiduciary duty
20 is that the defendants failed to create an escrow
21 account for the retired players?

22 A This is my understanding, yes.

23 Q Okay.

24 A Did they?

25 Q Looking at the next thing you say,

1 "alternatively, failing to distribute to retired players
2 equal share of the fund from which the active players
3 were paid."

4 Do you understand that plaintiffs are arguing
5 in the alternative that either there was a breach by
6 failing to create an escrow account or there was a
7 breach by failing to distribute an equal share of the
8 fund from which the active players are paid; is that
9 your understanding?

10 MR. KATZ: Object.

11 THE DEPONENT: Yes, Counselor, either there
12 was -- there was not a escrow account that was
13 established or if the equal share fund is the escrow
14 account, that the retired players didn't receive their
15 distribution from that.

16 Q (By Mr. Kessler) If the breach was failing to
17 establish an escrow account --

18 MR. KATZ: Object.

19 Q (By Mr. Kessler) Okay. So that one.

20 Okay. And there's no reference in the GLA to
21 how the escrow account money would be shared and what
22 proportion.

23 It says, how would an equal share damages
24 theory be a measure of the damages in that case?

25 MR. KATZ: Object.

1 THE DEPONENT: We would look to an escrow
2 account that was established. There is an account and
3 look to how that was administered.

4 Q (By Mr. Kessler) What makes the GLR pool an
5 escrow account?

6 A Based on my definition, there are moneys --
7 these are licensing royalties, minimum fees, et
8 cetera -- that are being collected with a purpose down
9 the road for some type of distribution, and so there
10 isn't one check comes in and there's immediately an
11 overall distribution. But it's an account to hold
12 moneys with a specific designation and that ultimately
13 those moneys are distributed.

14 Q So in your definition of escrow account,
15 anytime moneys are brought in and their purpose is to
16 distribute, that's an escrow account; that is all that
17 is required?

18 MR. KATZ: Object.

19 THE DEPONENT: That's -- that's not what I
20 said, Counselor.

21 Q (By Mr. Kessler) I thought that's what you
22 said.

23 What else about the -- what else about the GLR
24 pool makes it an escrow account, other than the fact you
25 said that moneys came in and they were being held to be

1 that looks anything like the escrow
2 documents you recall when you were
3 involved in the distribution of the
4 insurance company funds?")

5 THE DEPONENT: Any -- any document, obviously,
6 there are eligibility requirements that I have seen that
7 are related to the distribution of the GLR fund.

8 I have seen accounting documents that walk
9 through the charges or adjustments made to the fund, as
10 well as the number that goes forward into the accrual
11 for that fund. I have also seen the journal entries for
12 the moneys that come into that fund.

13 **Q (By Mr. Kessler) And those are similar to the**
14 **escrow documents, that was my question, to the ones in**
15 **the insurance company that you were involved with?**

16 MR. KATZ: Object.

17 THE DEPONENT: In a general -- in a general
18 sense of moneys coming into funds, how those are being
19 done. There were -- there were in financial
20 institutions. There were construction loans, as an
21 example, where there were moneys set aside with a
22 specific purpose. In a general sense, yes.

23 **Q (By Mr. Kessler) What was the name of the**
24 **insurance company who was involved?**

25 A Investors Equity Life. And then I can provide

1 distributor who alleged that he didn't receive most
2 favored nation pricing and what that did to the demise
3 of his business.

4 Q Which side were you on there?

5 A Defendant there.

6 Q Defendant there.

7 Okay. Have you ever had your testimony
8 excluded by order of a trial court, either on Daubert
9 grounds or any other grounds?

10 A No. Not -- not that I'm aware of, no.

11 Q Take a look at footnote 6 on page 4.

12 A Yeah, the supplemental?

13 Q No, no, back on the initial report.

14 A The initial report?

15 Q Yes.

16 A Okay.

17 Q So this is 629.

18 A Yes.

19 I'm sorry. Footnote?

20 Q Footnote 6.

21 A Yes.

22 Q It says, "For the purpose of this calculation,
23 I assume that if a retired player had signed a GLA as in
24 the end of one calendar year, they would be eligible for
25 the player pool for that fiscal year."

1 MR. KATZ: Object.

2 Q (By Mr. Kessler) By that I mean, there would
3 have to be some way to know which retired players who
4 signed GLAs shared in which year's pool.

5 You'd have to have some standards for that,
6 right?

7 MR. KATZ: Object.

8 THE DEPONENT: And the -- the standard being
9 that you had signed a GLA during that fiscal year?

10 Q (By Mr. Kessler) Well, you --

11 A That's my assumption.

12 Q Your assumption, that's the standard. But you
13 don't know if that would be the standard, or someone
14 would say you have to sign in the end of November.

15 MR. KATZ: Object.

16 THE DEPONENT: Yeah, I don't -- I don't know
17 if -- if that's something they would have considered.

18 Q (By Mr. Kessler) Now, on page 4 again of this
19 report, it says, "I initially relied upon the GLA
20 calculations made by the NFLPA, as well as the NFLPA/PI
21 financial statements to determine" --

22 MR. KATZ: I'm sorry. Where are you reading
23 from?

24 MR. KESSLER: It says, "To this end" -- this
25 is on top of 4, first full paragraph.

1 Q (By Mr. Kessler) It says you have initially
2 relied upon the GLR calculations made by the NFLPA/PI,
3 as well as the NFLPA/PI financial statements to
4 determine the royalty pools.

5 Do you see that?

6 A Yes.

7 Q Now, those are just numbers that are listed on
8 those statements, correct?

9 You just literally lifted them off to start
10 out with that adjustment, correct?

11 MR. KATZ: Object to form.

12 THE DEPONENT: The -- yeah, the first step was
13 to understand exactly how PA/PI were doing the
14 calculations or the actual administration of the -- of
15 the equal share pool. There's quite a bit that goes on
16 after that in order to construct a model. But
17 initially, that's -- that's what I did.

18 And I also went back to the financial
19 statements to get an understanding of the accrual versus
20 some of the other payments, yeah.

21 Q (By Mr. Kessler) I know you read a lot of
22 documents to get an understanding. Now I want to focus
23 on the actual physical steps of putting together your
24 calculations.

25 A Yes.

1 Q Okay?

2 A Yes.

3 Q Step 1 was to take the GLR calculations. And
4 those are simply lifting the numbers that are stated on
5 an NFLPA/PI document, correct?

6 A For the model that contemplates all general
7 licensing revenues that were in the equal share pool,
8 yes.

9 Q So that model, you just lift the number that's
10 there on the papers.

11 MR. KATZ: Object.

12 THE DEPONENT: Ultimately. I mean, you
13 attempt to gain an understanding. We tried to -- well,
14 we had a deposition of Eyrich, attempting to understand
15 what are the various adjustments that are made and
16 reconciling those amounts.

17 Q (By Mr. Kessler) I understand you got an
18 understanding. But I'm saying, the steps you took
19 for -- for the model that uses the whole pool number,
20 you just took the whole pool number from the documents
21 with no adjustments, right?

22 A Outside of the adjustments that are made
23 within the calculation.

24 Q You don't make those adjustments, somebody
25 else made those adjustments in NFLPA.

1 MR. KATZ: Object.

2 THE DEPONENT: That's correct, to get the
3 initial overall pool number.

4 Q (By Mr. Kessler) Okay. Stop there.

5 Then when you were, for example, taking out
6 the NFL sponsorship number, which was in the pool,
7 correct?

8 A (Deponent nods head.)

9 Q What you did for that was you looked at the
10 NFL sponsorship number in the PA/PI documents and just
11 subtracted each year. You just took out the total for
12 the NFL sponsorship agreement from the total GLR pool.

13 You did simple arithmetic, right?

14 MR. KATZ: Excuse me. Can you read that
15 back.

16 (Record read as follows:

17 "QUESTION: What you did for that
18 was you looked at the NFL sponsorship
19 number in the PA/PI documents and just
20 subtracted each year. You just took out
21 the total for the NFL sponsorship
22 agreement from the total GLR pool.

23 You did simple arithmetic, right?")

24 MR. KATZ: Object.

25 THE DEPONENT: No. I wouldn't -- I wouldn't

1 characterize it that way.

2 There are -- there's an adjustment
3 specifically made to the NFL sponsorship and Internet
4 agreement.

5 Now, it's supposed to be 25 percent. As you
6 go through the documents, it's not clear how that number
7 is calculated. Part of that is because there are
8 minimums associated with the Internet aspect versus
9 minimums associated with the sponsorship.

10 So went through and verified that those
11 calculations were correct and then pull -- because you
12 already have some money being pulled out. And then
13 pulled out separately the amounts attributable to the
14 NFL sponsorship and Internet.

15 **Q (By Mr. Kessler) Okay. Those numbers, those**
16 **calculations you described appeared in the PA documents,**
17 **correct?**

18 **You didn't have to invent those numbers. They**
19 **were just in the PA documents.**

20 **A Yes.**

21 **Q So what you did is you copied the PA number**
22 **for the NFL sponsorship agreement amount that was in the**
23 **pool and you subtracted it, correct?**

24 **MR. KATZ: Object.**

25 **THE DEPONENT: Really, it's more of a -- it's**

1 an isolation because that's one of the aspects that's in
2 question as far as it relates to the liability issues --

3 Q (By Mr. Kessler) Okay.

4 A -- so it was isolated.

5 Q Right. But when you wanted to create the
6 variation that didn't include it, all I'm saying is --
7 I'm not trying to be complicated; I just want to
8 understand it.

9 You took the total GLR pool number that PA
10 reported and you subtracted the sponsorship agreement
11 number that PA reported and you came to a sum. And that
12 was now your calculation of the pool without the NFL
13 sponsorship agreement, right?

14 A Yes.

15 Q Okay. And when you wanted to get down to the
16 agreements that only had the language that counsel
17 identified for you -- okay? -- did you take a list of
18 those agreements and then calculate the revenues for
19 each of those agreements and add them up? Or did you
20 take the agreements that didn't have that language, add
21 them up and subtract them from the total?

22 I assume it's one way or the other. Which did
23 you do?

24 A Yeah, the --

25 MR. KATZ: Object.

1 THE DEPONENT: The practical application was
2 to run through concordance on all of the agreements the
3 relevant language and then find and pull all those.
4 Then we also had counsel verify that those were
5 appropriate.

6 You then go back into -- because you won't
7 find that in the summary documents to which we're
8 referring. You go back into the support behind the
9 calculations of the GLR equal share pool, and you can
10 find for each of the contracts -- that's one of my
11 exhibits -- the amounts that were included, and then you
12 add those -- add those total.

13 Q Let me understand this.

14 You went through all the agreements looking
15 for the language that counsel identified and came up
16 with a list of agreements.

17 That was the first step.

18 A Yes.

19 Q Then you showed it to counsel and said, "Did
20 we find the right group? Do you have any comments about
21 it?"

22 A Yes.

23 Q Then you had your final list of agreements,
24 and you went to the NFLPA listing of -- backup data that
25 showed the amounts generated by each agreement,

1 correct?

2 A In the respective years, yes.

3 Q And then you -- you extracted that amount for
4 each agreement and added that all up.

5 A Yes.

6 Q And that's how you came with your subset of
7 player pool A, your total amount.

8 A For the relevant revenues.

9 Q Yes.

10 A Yes.

11 Q And then to determine the number of active
12 players in each year, you went through the NFLPA
13 documents and -- this is for active players -- and
14 simply counted up the number of active players who were
15 distributed to each year, right?

16 A Yes.

17 Q Okay. And to get the number of -- of retired
18 players you were going to count, you looked through all
19 the GLA forms -- okay? -- and you counted up each year
20 the number of retired players who had GLAs during the
21 particular -- in effect, during the particular year you
22 were looking at, correct?

23 A Yes.

24 Q Okay. And then you divided the player royalty
25 pools you calculated by the total combined number of

1 active and retired players who you calculated.

2 A Yes. Now, there is a step that we have
3 missed.

4 Q Okay. What's the step that we missed?

5 A When you got your gross revenues that are
6 relevant, you then have to go back through and in the --
7 in the analysis and you have to take out the 40 percent
8 of those revenues that would go to NFLPA.

9 Q Okay.

10 A And then you also take out the percentage that
11 would go to NFLPI. So you --

12 Q Right.

13 A -- replicate what the model would look like.
14 Now, in the early years, as you can see in the
15 analysis, you're not getting over the \$35,000,000
16 threshold where the different percentage kicks in for
17 NFLPA versus kicking in for NFLPI.

18 But that's an important step. You're not just
19 taking the gross revenues and -- and then dividing them.
20 You're actually doing the calculation as if these were
21 the only revenues within the account.

22 Q Do you know what percentage of your damages
23 calculations is accounted for by the EA agreement?

24 A May I -- may I --

25 Q Sure.

1 **What was the basis of that assumption?**

2 A That if you had your -- if you had signed the
3 GLA and it ran through December 31st, 2002, that would
4 be part of the 2003 distribution.

5 Q Well, what if they -- if a retired player
6 signed the GLA in November -- okay?

7 A Yeah.

8 Q -- what is the basis for your assumption that
9 retired player would get a whole equal share for that
10 past year, even though their rights would not have been
11 available for most of the NFL season?

12 A I -- I looked to just how the current fund is
13 administered; where someone who's simply on the first --
14 you know, the first game the first day of the roster and
15 then may not play -- might be on injured reserve -- was
16 still eligible. I -- I took that as an assumption.

17 Q But you agree with me, you don't know what
18 criteria would actually be applied to retired players if
19 they were included in the GLR pool.

20 MR. KATZ: Object.

21 THE DEPONENT: No. That's the substance of
22 the litigation. Yeah, I don't know exactly how they
23 would have applied the -- the program.

24 Q (By Mr. Kessler) And you agree with me, there
25 would have to be criteria.

1 term. If --

2 Q (By Mr. Kessler) The amount of damages.

3 MR. KATZ: Well, let him finish.

4 THE DEPONENT: If the amount of money would be
5 the same that would be allocated to each of those
6 players, yes, that's what the model cares for. Someone
7 who is destitute, getting an additional \$3,000, that
8 means a lot more than someone who has several million
9 dollars, if you're defining injury.

10 Q (By Mr. Kessler) What I hear you saying is
11 that plaintiffs' counsel told you the theory of
12 plaintiffs is that the breach was not giving an equal
13 share; therefore, the damages is an equal share. Okay.

14 What I'm now asking you is something a little
15 bit different, which is that one of the breaches of
16 fiduciary duty alleges conflict of interest, for
17 example.

18 You're aware of that, right?

19 A Yes.

20 Q Okay. Taking out plaintiffs' counsel's theory
21 that the only actionable injury was failure to
22 participate in the GLR share, is it your opinion, as a
23 damage expert, that for a conflict of interest, in
24 general, every class member would suffer an identical
25 injury, an identical amount of injury?

1 MR. KATZ: Object.

2 THE DEPONENT: In assessing the potential
3 damages, I have not looked to the premium appearances,
4 ad hoc, side deals, any of those monies which an
5 individual active player or retired player can pursue
6 and can be assisted by NFLPI.

7 What I attempted to do was to construct a
8 model that would look at an escrow account for all
9 eligible NFL members divided between the player who've
10 signed the GLA.

11 In that instance, as I have looked to how a
12 like-type account, if not the account, has been
13 administered, it was on an equal share basis. Therefore,
14 the retired players, regardless of their status in the
15 league, would receive an equal amount of these monies.

16 Q (By Mr. Kessler) Okay. I'm really not trying
17 to trick you. I just want to understand and get a
18 yes-or-no answer.

19 So I understand your position is, which is --
20 you're entitled to have your position -- is that the
21 only possible damages in this case would be that
22 everybody suffered the exact amount of injury.

23 That's your expert opinion.

24 MR. KATZ: Object.

25 THE DEPONENT: Based on how the current

1 account, the GLR equal share account, was established
2 and administered, that's the most reasonable way to
3 measure the damages.

4 **Q** **(By Mr. Kessler) Okay. What would be other**
5 **ways to measure it?**

6 MR. KATZ: Object.

7 THE DEPONENT: Well, Counselor, you offered a
8 hypothetical that potentially the NFLPA/PI would have
9 had some type of a policy where, similar to practice
10 squad players, retired players only get a certain
11 amount.

12 I haven't seen any language to that effect or
13 documentation to that effect. That's an example that
14 you threw out; there would be some type of sliding
15 scale.

16 **Q** **(By Mr. Kessler) Any other examples --**

17 MR. KATZ: Jeff, are we going to take our
18 break?

19 MR. KESSLER: I thought it was to give you a
20 different answer. He's the one --

21 MR. KATZ: Well, you can ask questions before
22 the break, after the break. I just need a two-minute
23 break.

24 MR. KESSLER: All right. Let's take a
25 two-minute break.

1 A No. I had -- I had reviewed it -- I had
2 reviewed it --

3 Q Okay.

4 A -- previously. I didn't -- I didn't
5 appreciate that it was important to highlight it.

6 Q In terms of the documents that you reviewed,
7 which I was going to ask you about, so I might as well
8 turn to that now, who decided which depositions you
9 would review?

10 A To a great extent, it was my manager. It was
11 Susie Gerard. *f-s/b 'Susie Girard' per errata.*

12 I also was in -- I had attended Eyrich's
13 deposition, and I attended Linzner's deposition, so I
14 wanted those -- obviously, this report was done before I
15 did the -- reviewed the depositions of Jizmagian and
16 Noll.

17 Q Are those the only additional depositions you
18 reviewed between your initial report and your
19 supplemental report?

20 A In fact, I wrote the supplemental report
21 before I read those depositions. I read Upshaw -- not
22 Upshaw -- Jizmagian and Noll last week.

23 Yeah, the supplemental report was actually
24 written before I read those depositions.

25 Q Okay. All right. So the only depositions you

1 read before both the original report and the
2 supplemental report are the four depositions listed
3 here.

4 A Was there -- Counselor, I apologize. I don't
5 think it was a deposition.

6 As I'm going through the list, there may have
7 been a declaration by another individual.

8 Q Well, you listed two declarations, Doug Allen
9 and Joel Linzner.

10 A Yeah.

11 Q Did you review someone else's declaration?

12 A I want to say I read the Tops declaration.

13 Fleece (sic)? No.

14 What's his name?

15 Q You read -- there were several Tops. You read
16 one of the Tops declarations typically --

17 A That's the only thing that's jumping out at me
18 that before -- I thought it was -- it was quite brief.

19 Q Okay. Did you read these whole -- the
20 entirety of the four depositions listed -- Upshaw,
21 Eyrich, Allen and Linzner -- or just excerpts?

22 A Eyrich, Upshaw and Linzner, yes. Allen, I
23 kind of sped read. But one of my staff did read it in
24 its entirety.

25 Q Take a look at number -- I don't know how to

1

2

3

4

I, the undersigned, a Certified Shorthand
Reporter of the State of California, do hereby
certify:

7

That the foregoing proceedings were taken
before me at the time and place herein set forth; that
any witnesses in the foregoing proceedings, prior to
testifying, were placed under oath; that a verbatim
record of the proceedings was made by me using machine
shorthand which was thereafter transcribed under my
direction; further, that the foregoing is an accurate
transcription thereof.

15

I further certify that I am neither
financially interested in the action nor a relative or
employee of any attorney of any of the parties.

18

IN WITNESS WHEREOF, I have this date
subscribed my name.

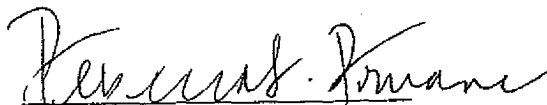
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Dated: July 23, 2008

22

23

24



REBECCA L. ROMANO

25

CSR No. 12546

Exhibit B
to the
Declaration of Ryan S. Hilbert In Support of
Plaintiff's Opposition to Defendants' Motion In
Limine No. 5 To Exclude The Testimony Of
Philip Y. Rowley

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION
4

5 BERNARD PAUL PARRISH, HERBERT
6 ANTHONY ADDERLEY, WALTER ROBERTS III,

7 Plaintiffs,

8 vs.

Case No. C 07 0943 WHA

9 NATIONAL FOOTBALL LEAGUE PLAYERS
10 ASSOCIATION and NATIONAL FOOTBALL
11 LEAGUE PLAYERS INCORPORATED d/b/a
12 PLAYERS INC.,

13 Defendants.
14

15 DEPOSITION OF DR. G. STEPHEN JIZMAGIAN

16 Tuesday, July 8, 2008

17 Pages 1 - 142

18 REPORTED BY: THERESA WARD, C.S.R. 9587
19
20
21

22 DE SOUZA & ASSOCIATES
23 Certified Shorthand Reporters
24 One Waters Park Drive, Suite 180
25 San Mateo, California 94403
(650) 341-2671

1 document which told you that they made that decision before
2 it appeared in the auditor reports, other than the auditor
3 reports? I understand you have testified to that.

4 A Yeah. I can't think of any, as I sit here.

5 Q Okay.

6 MR. KATZ: Want to just take a short break? I'm
7 just about finished.

8 THE VIDEOGRAPHER: This concludes tape 2 of
9 Volume I in the deposition of Dr. G. Stephen Jizmagian.

10 The time is 5:01 p.m.

11 (A break was taken.)

12 THE VIDEOGRAPHER: This begins tape 3, Volume I
13 in the deposition of Dr. G. Stephen Jizmagian.

14 The date is 7/8/2008, and the time is 5:10 p.m.
15 We are now back on the record.

16 BY MR. KATZ:

17 Q Dr. Jizmagian, did you find any mathematical
18 errors in Mr. Rowley's report?

19 A I did not look for any, so not looking for any, I
20 didn't find any.

21 MR. KATZ: Okay. Fine. I have got no further
22 questions.

23 MR. O'KELLY: I have got a handful of questions.

24 EXAMINATION BY MR. O'KELLY:

25 Q Dr. Jizmagian, you testified earlier that you

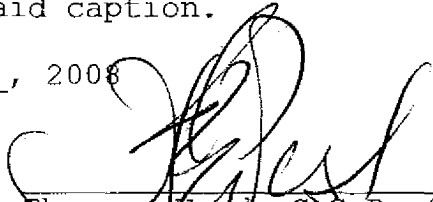
CERTIFICATION

I, THERESA WARD, duly authorized to administer oaths pursuant to Section 2093(b) of the California Code of Civil Procedure, do hereby certify that the witness in the foregoing deposition was administered an oath to testify to the truth in the within-entitled cause; that said deposition was taken at the time and place therein stated; that the testimony of said witness was reported by me and thereafter transcribed by me into typewriting; that the foregoing is a full, complete, and true record of said testimony; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself/herself of the opportunity to sign, or the signature has been waived.

I further certify that I am not of counsel nor attorney for any of the parties in the foregoing deposition and caption named, nor in any way interested in the outcome of the cause named in said caption.

DATED: July 11, 2008


Theresa Ward, C.S.R. 9587