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19 Incorporated d/b/a Players Inc., a Virginia Corporation

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

21 BERNARD PAUL PARRISH, HERBERT
22 ANTHONY ADDERLEY, WALTER
ROBERTS III on behalf of themselves and all
23 others similarly situated,

24 Plaintiffs,

25 v.

26 NATIONAL FOOTBALL LEAGUE
PLAYERS INCORPORATED d/b/a/
27 PLAYERS INC., a Virginia Corporation,

28 Defendant.

Case No. C 07 00943 WHA

**PLAYERS INC.'S CORRECTED
OPPOSITION TO PLAINTIFFS'
MOTION TO APPOINT INTERIM
CLASS COUNSEL**

Date: May 3, 2007

Time: 8:00 a.m.

Ctrm: 9

Judge: William H. Alsup

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18 Daniel Kaplan, New Group May Seek Retired NFLers’ Rights,
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19 Manual for Complex Litig. (Fourth) § 21.11 (2004)..... 6

20 “Retired Professional Football Players for Justice,”
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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant National Football League Players Incorporated, d/b/a Players Inc (“Players Inc”), hereby opposes Plaintiffs’ Motion to Appoint Manatt, Phelps & Phillips, LLP as Interim Class Counsel.

INTRODUCTION

On February 14, 2007 – the same day that the original complaint was filed in this lawsuit – Plaintiffs moved for the appointment of Manatt, Phelps & Phillips, LLP (“Manatt”) as interim class counsel. Plaintiffs’ motion should be denied because: (1) appointment of class counsel is premature and not warranted under Fed. R. Civ. P. 23(g)(2)(A); and (2) Manatt cannot “fairly and adequately” represent the interests of the class as required by Fed. R. Civ. P. 23(g)(1).

Plaintiffs’ motion should be denied in the first instance because it is premature. It is long-established procedure in United States courts that class counsel ordinarily is not appointed until such time – and if – a class is certified. Rule 23(g)(2)(A) of the Federal Rules of Civil Procedure, as amended in 2003, provides a very limited exception to this long-established procedure by permitting appointment of interim class counsel to protect the interests of the putative class in extraordinary cases where many class actions have been consolidated and numerous firms are jockeying for position as lead counsel. This is not one of those cases. A single class action lawsuit was commenced by the filing of a complaint by Manatt almost two months ago. No competing complaints have been filed on behalf of other named plaintiffs since. There are no other law firms wrestling with Manatt for the role of lead counsel. In short, there is no basis for invoking the extraordinary procedure provided by Rule 23(g)(2)(A) and departing from the normal process of determining first whether a class should be certified and then appointing suitable class counsel.

Plaintiffs’ motion should be also be denied because, even if appointment of interim class counsel were appropriate at this time (and it is not), Manatt cannot “fairly and adequately” represent the interests of the class as required by Fed. R. Civ. P. 23(g)(1). First, Manatt faces irreparable conflicts of interest that make it impossible for that firm to fairly and adequately represent the interests of the purported class. The purported class comprises former

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1 National Football League (“NFL”) players who participate in Players Inc group licensing
2 programs. It clearly is in the interest of such individuals for Players Inc’s retired player group
3 licensing programs to be successful commercially, thereby generating revenues for the members
4 of the class. Manatt, however, has taken the lead in establishing an entity named Retired
5 Professional Football Players for Justice (“Retired Players for Justice”), which will compete
6 directly with Players Inc for the commercial licensing of former NFL players’ names and
7 images, and whose interests thus are directly adverse to those of the class.

8 Manatt’s conflicts do not end there. Ronald Katz, the Manatt partner who signed
9 the complaint and first amended complaint, as well as two of Manatt’s co-counsel, are identified
10 as Officers and Directors of Retired Players for Justice. Two of the named plaintiffs, Bernard
11 Parrish (“Parrish”) and Herbert Adderley (“Adderley”), are Co-Presidents of the organization
12 and thus have interests that are directly adverse to those of the class as well.

13 Moreover, not only has Manatt put forward as purported class representatives two
14 individuals with interests opposed to the interests of the class (Parrish and Adderley), it has
15 underscored the conflict by selecting Parrish and another one of the purported class
16 representatives, Walter Roberts III (“Roberts”), although they are not members of the purported
17 class at all. The Amended Complaint asserts that Players Inc breached some unspecified
18 fiduciary duty that it owed to the class members, former NFL players who participated in Players
19 Inc group licensing activities. Neither Parrish nor Roberts signed a group licensing authorization
20 (“GLA”) or participated in any Players Inc group licensing programs and, indeed, neither has any
21 relationship with Players Inc at all. Thus, neither Parrish nor Roberts has any claim against
22 Players Inc for breach of any duty (much less breach of fiduciary duty) and cannot be members
23 of the putative class. The only reason experienced counsel would sponsor such unqualified class
24 representatives is because of counsel’s conflict of interest in establishing Retired Players for
25 Justice.

26 Further demonstrating Manatt’s unsuitability as class counsel is the fact that it
27 commenced this lawsuit without sufficient factual or legal bases for Plaintiffs’ claims. It did so
28 for improper purposes that include advancing Parrish’s long-running dispute with an entity

1 affiliated with Players Inc, the National Football League Players Association (“NFLPA”), over
2 retirement and disability benefits – issues that have nothing at all to do with the group licensing
3 activities of Players Inc.

4 In sum, Plaintiffs’ Motion should be denied because (1) appointment of interim
5 class counsel is not warranted under Fed. R. Civ. P. 23(g)(2)(A), and (2) even if it were, Manatt
6 fails to meet the requirements for class counsel of Fed. R. Civ. P. 23(g)(1).

7 **STATEMENT OF FACTS**

8 On February 14, 2007, Plaintiffs Parrish and Adderley, purportedly on behalf of
9 themselves and all others similarly situated, filed a class action complaint against Players Inc for
10 breach of fiduciary duty, unjust enrichment, and an accounting. See Complaint for Breach of
11 Fiduciary Duty, Unjust Enrichment and an Accounting (“Complaint”). On the same day,
12 Plaintiffs filed a Motion to Appoint Manatt, Phelps & Phillips, LLP as Interim Class Counsel.

13 On February 23, 2007, Plaintiffs filed an Amended Complaint (“Am. Compl.”),
14 adding Walter Roberts III as a named plaintiff. The Amended Complaint alleges that Players Inc
15 breached some unspecified fiduciary duty to owed to Plaintiffs and to a putative class of former
16 NFL players who participate in Players Inc group licensing programs. As described more fully
17 in Players Inc’s Motion for Sanctions Pursuant to Fed. R. Civ. P. 11, 28 U.S.C. § 1927, and the
18 Court’s Inherent Powers (“Sanctions Motion”), and as attested to by the Declaration of Gene
19 Upshaw (both submitted simultaneously herewith),¹ the NFLPA has signed current and certain
20 former NFL players to GLAs, whereby a player agrees to assign rights to his name, image and
21 other attributes to the NFLPA for licensing to entities such as video game companies, trading
22 card companies, and sports merchandise companies. See Upshaw Decl. ¶ 5. The NFLPA, in
23 turn, assigns the GLAs to Players Inc for group licensing activities. Id. Certain individual
24 retired players may also enter into ad hoc licensing agreements with Players Inc from time to
25 time, whereby a player licenses rights to his name or image to Players Inc for use in a specific
26

27 ¹ Players Inc will not burden the Court by repeating herein the full discussion contained in the
28 Sanctions Motion, but instead will summarize relevant portions where appropriate and
incorporate the more complete discussion by reference.

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1 group licensing program. Id. ¶ 6. If a retired player does not sign a GLA or ad hoc licensing
 2 agreement, Players Inc has no relationship with him, does not license the retired player’s name or
 3 image, and does not include the retired player in its group licensing programs. Id. ¶ 7. Neither
 4 Parrish nor Roberts ever signed a GLA or licensing agreement, never participated in Players Inc
 5 licensing activities, and never had any relationship with Players Inc. See Upshaw Decl. ¶ 8-9.
 6 Therefore, Players Inc, a for-profit corporation, did not owe any duty to Parrish or Roberts, much
 7 less a fiduciary duty. See Sanctions Mot. at 8-10 for discussion. Neither Parrish nor Roberts has
 8 any claim against Players Inc for breach of such duty and, thus, neither of them can be a member
 9 of, or representative of, the purported class.²

10 Upon information and belief (and as discussed in more detail in the Sanctions
 11 Motion), Plaintiffs apparently filed the Complaint and Amended Complaint, in significant part,
 12 in order to seek publicity for a long-running campaign by Parrish against the NFLPA (the union
 13 that represents athletes who play in the NFL) concerning retired players’ pension and disability
 14 payments. See Sanctions Mot. at 4-5. These matters have nothing to do with Players Inc, a for-
 15 profit corporation that licenses names and images of current and certain former NFL players to
 16 entities such as video game companies, sports merchandise companies, and apparel companies.
 17 See Upshaw Decl. ¶ 3,5; Sanctions Mot. at 3.

18 Shortly after commencing this lawsuit, Manatt announced the formation of
 19 Retired Players for Justice, which plans to enter into group licensing contracts with retired
 20 players, competing with Players Inc “in deals with commercial interests, such as video game and
 21 apparel companies.” Daniel Kaplan, New Group May Seek Retired NFLers’ Rights, Sports Bus.
 22 J., Feb. 26-Mar. 4, 2007, at 5 (attached to the Sanctions Motion as O’Kelly Decl. Ex. B).
 23 According to its website, the Co-Presidents of this entity are Parrish and Adderley. Its Secretary-
 24 Treasurer is Manatt’s co-counsel on the Complaint and Amended Complaint, Samuel Mutch.
 25 And Ronald S. Katz of Manatt (who signed the Complaint and Amended Complaint) and his co-
 26

27 ² As discussed in Players Inc’s motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (also filed
 28 simultaneously herewith), Players Inc did not owe – and thus did not breach – any fiduciary
 duty to Adderley either.

1 counsel Lewis T. LeClair are also identified as “Officers and Directors.” See “Retired
 2 Professional Football Players for Justice,” at <http://www.playersforjustice.org> (last visited Mar.
 3 9, 2007) (attached to the Sanctions Motion as O’Kelly Decl. Ex. D). The stated purposes of this
 4 entity include “bringing class action lawsuits,” providing “an organized voice to all retired NFL
 5 players on issues such as royalties, pensions, and disability payments,” and “establish[ing] an
 6 alternative to the current marketing and licensing system which will empower players.” See
 7 O’Kelly Decl., Ex. D (emphasis added).

8 ARGUMENT

9 **I. PLAINTIFFS’ MOTION SHOULD BE DENIED BECAUSE APPOINTMENT OF 10 INTERIM CLASS COUNSEL IS PREMATURE AND UNWARRANTED UNDER 11 FED. R. CIV. P. 23(g)(2)(A)**

12 Appointment of interim class counsel is not warranted under Fed. R. Civ. P.
 13 23(g)(2)(A) because appointment is not necessary to protect Plaintiffs' interests at this early stage
 14 of the litigation. Ordinarily in a class action lawsuit, the court does not appoint class counsel
 15 until such time as it determines whether to certify the class. See Donaldson v. Pharmacia
 16 Pension Plan, Civ. No. 06-3-GPM, 2006 WL 1308582, at *1 (S.D. Ill. May 10, 2006). As set
 17 forth in the Advisory Committee’s comments, this is because “such work (as would be handled
 18 by interim class counsel) is handled by the lawyer who filed the action.” Fed. R. Civ. P.
 19 23(g)(2)(A) advisory committee notes to 2003 amendments. In 2003, however, Rule 23 was
 20 amended to provide a limited exception to the usual procedure. Fed. R. Civ. P. 23(g)(2)(A) now
 21 provides that “(t)he court may designate interim counsel to act on behalf of the putative class
 22 before determining whether to certify the action as a class action.” The Advisory Committee
 23 notes explain that this amendment “authorizes the court to designate interim counsel during the
 24 pre-certification period if necessary to protect the interests of the putative class.” Fed. R. Civ. P.
 25 23(g)(2)(A) advisory committee notes to 2003 amendments.

26 The exception for appointing interim class counsel is very limited, and applies
 27 only in extraordinary circumstances. “Appointment of interim class counsel is not appropriate
 28 where ... a single law firm has brought a class action and seeks appointment as class counsel....
 Absent special circumstances requiring appointment of interim counsel, the Court prefers to take

1 up adequacy of representation and appointment of class counsel at such time as Plaintiffs may
 2 seek class certification.” Donaldson, 2006 WL 1308582, at *1. The Manual for Complex
 3 Litigation (Fourth) explains:

4 If the lawyer who filed the suit is likely to be the only lawyer seeking
 5 appointment as class counsel, appointing interim class counsel may be
 6 unnecessary. If, however, there are a number of overlapping, duplicative, or
 7 competing suits pending in other courts, and some or all of those suits may be
 8 consolidated, a number of lawyers may compete for class counsel appointment.
 In such cases, designation of interim counsel clarifies responsibility for protecting
 the interests of the class during precertification activities....

9 Manual for Complex Litig. (Fourth) § 21.11 (2004). See In re Issuer Plaintiff IPO Antitrust
 10 Litig., 234 F.R.D. 67, 69-70 (S.D.N.Y. 2006) (refusing to appoint interim class counsel where
 11 there was “no rivalry among competing law firms to represent the putative class”); Carrier v.
 12 Am. Bankers Life Assurance Co. of Fla., No. 05-cv-430-JD, 2006 WL 2990465, at *1 (D.N.H.
 13 Oct. 19, 2006) (refusing to appoint interim class counsel where the putative class was
 14 represented only by the firm that filed the complaint). In the words of the Donaldson court, “the
 15 kind of matter in which interim counsel is appointed is one where a large number of putative
 16 class actions have been consolidated or otherwise are pending in a single court” and rival law
 17 firms are competing to represent the class. Donaldson, 2006 WL 1308582 at *1; cf. Hill v.
 18 Tribune Co., Nos. 05-C-2602, 05-C-2640, 05-C-2684, 05-C-2927, 05-C-3374, 05-C-3377, 05-C-
 19 3390, 05-C-3928, 2005 WL 3299144, at *3-4 (N.D. Ill. Oct. 13, 2005) (appointing interim class
 20 where eight cases were consolidated and two sets of lawyers were actively competing for
 21 appointment as class counsel); Turner v. Murphy Oil U.S.A., Inc., 234 F.R.D. 597, 611 (E.D. La.
 22 2006) (appointing interim class counsel after twenty-seven cases were consolidated and
 23 defendant initiated settlement discussions); In re Delphi ERISA Litigation, 230 F.R.D. 496, 489-
 24 90 (E.D. Mich. 2005) (appointing interim class counsel where fifteen cases were consolidated
 25 and different lawyers were competing to be class counsel); Smith v Aon Corp., 238 F.R.D. 609,
 26 613 (N.D. Ill. 2006) (noting interim class counsel had been appointed upon consolidation of
 27 twelve competing class action lawsuits).
 28

1 By contrast, interim class counsel should not be appointed where, as here, there is
 2 no special circumstance warranting such action. Here, there is a single purported class action
 3 pending, with the interests of the putative class represented, at least for now, by the lawyers who
 4 filed the complaint. No other actions have been consolidated with this one and there are not
 5 competing groups of plaintiffs' counsel jockeying for appointment as class counsel. Thus, this
 6 case is in all relevant respects identical to those cases such as In re Issuer Plaintiff IPO Antitrust
 7 Litig., Carrier, and Donaldson, where courts refused to invoke the extraordinary procedures
 8 provided by Fed. R. Civ. P. 23(g)(2)(A). For all of these reasons, Plaintiffs' Motion should be
 9 denied.

10 **II. PLAINTIFFS' MOTION SHOULD ALSO BE DENIED BECAUSE MANATT**
 11 **FAILS TO MEET THE REQUIREMENTS OF FED. R. CIV. P. 23(g)(1)**

12 Even if it were appropriate to apply the extraordinary procedure provided by Fed.
 13 R. Civ. P. 23(g)(2)(A) and appoint interim class counsel at this time, Plaintiffs' Motion should be
 14 denied because Manatt does not satisfy the requirement of Fed. R. Civ. P. 23(g)(1) that class
 15 counsel be able to "fairly and adequately represent the interests of the class." Manatt fails this
 16 test for several reasons, including: (1) Manatt and its co-counsel have irreparable conflicts of
 17 interest though their association with Retired Players for Justice, an entity whose interests are
 18 directly adverse to those of the putative class; (2) apparently because of its conflicts, Manatt has
 19 put forward as purported class representatives individuals who themselves (a) are not class
 20 members, and/or (b) have interests adverse to those of the class; and (3) as discussed in Players
 21 Inc's Sanctions Motion, Manatt has not adequately "identif[ied] or investigat[ed] potential claims
 22 in the action" as required by Fed. R. Civ. P. 23(g)(1)(C).

23 Fed. R. Civ. P. 23(g)(1)(B) provides that "(a)n attorney appointed to serve as class
 24 counsel must fairly and adequately represent the interests of the class." Fed. R. Civ. P.
 25 23(g)(1)(B). Fed. R. Civ. P. 23(g)(1)(C) provides in relevant part that "(i)n appointing class
 26 counsel, the court (i) must consider: ... the work counsel has done in identifying or investigating
 27 potential claims in the action, ... counsel's knowledge of the applicable law, and ... (ii) may
 28 consider any other matter pertinent to counsel's ability to ... adequately represent the interests of

1 the class.” Fed. R. Civ. P. 23(g)(1)(C). The Advisory Committee notes to Fed. R. Civ. P.
 2 23(g)(1)(C) state that “(i)f, after review of all applicants, the court concludes that none would be
 3 satisfactory class counsel, it may deny class certification, [and] reject all applications” Fed.
 4 R. Civ. P. 23 advisory committee notes to the 2003 Amendments. The same standards apply
 5 whether the decision to appoint class counsel is being made on an interim basis or at the class
 6 certification stage. Hill, 2005 WL 3299144, at *3.

7 **A. Manatt Has Irreparable Conflicts of Interest That Preclude It from Fairly**
 8 **and Adequately Representing the Interests of the Class**

9 Manatt has irreparable conflicts of interest that would preclude it from “fairly and
 10 adequately represent[ing] the interests of the class,” as required by Fed. R. Civ. P. 23(g)(1)(B).
 11 Players Inc is a for-profit corporation that, among other things, licenses names and images of
 12 certain former NFL players and pays royalties to such players based on those licensing activities.
 13 See Upshaw Decl. ¶ 5; Sanctions Mot. at 3. The putative class comprises former NFL players
 14 who participate in Players Inc’s group licensing programs. See Am. Compl. ¶ 20. It clearly is in
 15 the interests of members of the putative class that Players Inc’s group licensing programs be as
 16 successful as possible, thereby generating the maximum royalties for the class members. Manatt,
 17 however, played a leading role in establishing Retired Players for Justice, an entity formed with
 18 express purposes of competing with Players Inc for the commercial licensing of retired NFL
 19 players’ names and images and “establish[ing] an alternative to the current marketing and
 20 licensing system,” (see O’Kelly Decl. Exs. B, D (emphasis added)), something that is directly at
 21 odds with the interests of the purported class.³

22 ³ Even if some class members (i.e., certain retired players who participate on a non-exclusive
 23 basis in Players Inc’s group licensing programs) were also to participate in the licensing
 24 programs of Retired Players for Justice, this would do nothing to alleviate the conflict. There are
 25 many class members who would assign their group licensing only to Players Inc (probably a
 26 majority). But as long as at least some class members chose not to participate in Retired Players
 27 for Justice licensing programs, their continued interest in the success of Players Inc’s group
 28 licensing programs would conflict directly with the interests of Retired Players for Justice and
 Manatt. See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (holding that
 conflict between majority of class (which was represented by class counsel) and minority
 defeated adequate representation requirements of Rule 23). Indeed, not only would participation
 of some class members in Retired Players for Justice’s licensing programs not alleviate the
 conflict, it would aggravate it, likely making it impossible to certify a class at all. See id. at 625-
 27; DuPont v. WYLY, 61 F.R.D. 615, 622 (D. Del. 1973) (“Because the members of the class
 and their representatives must share common interests, ‘diverse and potentially conflicting

1 Moreover, the Secretary and Treasurer of Retired Players for Justice is Manatt’s
2 co-counsel, Samuel Mutch, while Ronald S. Katz of Manatt (who signed the Complaint and
3 Amended Complaint) and his co-counsel Lewis T. LeClair are also identified as “Officers and
4 Directors.” See O’Kelly Decl. Ex. D. Presumably, as officers and directors of Retired Players
5 for Justice, Messrs. Katz, LeClair, and Mutch have an obligation to work for its success – again,
6 an obligation that squarely conflicts with the interests of the putative class.

7 In light of the leading role played by Manatt in establishing Retired Players for
8 Justice, Manatt’s continued representation of that organization, and the fact that Manatt litigation
9 partner Ronald Katz acts as one its Officers and Directors, Manatt has an obvious conflict that
10 precludes it from representing the putative class in this lawsuit. See, e.g., Piambino v. Bailey,
11 757 F.2d 1112, 1145-46 (11th Cir. 1985) (disqualifying class counsel because of conflict of
12 interest); Armstrong v. Powell, 230 F.R.D. 661, 681 (W.D. Okla. 2005) (“Due process demands
13 that class members receive adequate representation before they are bound by a judgment. An
14 attorney who labors under a conflict of interest cannot satisfy the requirements of Rule 23(g).”)
15 (citations and internal quotation marks omitted); Fechter v. HMW Indus., 117 F.R.D. 362, 363-
16 64 (E.D. Pa. 1987) (disqualifying class counsel because of potential conflict of interest).

17 Manatt’s conflicts do not end there. Manatt has named as plaintiffs and putative
18 class representatives Parrish and Adderley, who themselves have irreparable conflicts with the
19 interests of the class. This action, apparently motivated by Manatt’s own conflicts, further serves
20 to disqualify Manatt. According to the website of Retired Players for Justice, Parrish and
21 Adderley are Co-Presidents of this new entity. See O’Kelly Decl. Ex. D. The interest of Parrish
22 and Adderley in ensuring the success of their new venture, in which Manatt is so closely
23 involved, is directly at odds with the interests of the putative class members, and disqualifies
24 Parrish and Adderley from representing the class. See Amchem Products, Inc. v. Windsor, 521
25 U.S. 591, 625 (1997) (stating that Rule 23 requirements of adequate representation cannot be
26 satisfied where there are conflicts between named plaintiffs and members of the class they
27 _____
28 interests within the class are incompatible with the maintenance ... of a class action.” (citing
Carroll v. Am. Fed’n of Musicians, 372 F.2d 155, 162 (2d Cir. 1967)).

1 purport to represent); William Penn Management Corp. v. Provident Fund for Income, Inc., 68
 2 F.R.D. 456, 459 (E.D.P.A. 1975) (“‘adequate representation’ requires, at a minimum, that the
 3 representative party have no interests which may conflict with those of the person he purports to
 4 represent”); see also Legge v. Nextel Communications, Inc., CV 02-8676 DSF (VBKx), 2004
 5 U.S. Dist. LEXIS 30333, at *37-*40 (C.D. Cal. June 25, 2004); Cardinal Indus., Inc. v. The
 6 Huntington Nat’l Bank, 139 B.R. 703, 706-07 (Bankr. S.D. Ohio 1991); Manual for Complex
 7 Litigation (Fourth) §21.26 (2004) (Rule 23 requires that class representatives “remain free of
 8 conflict”).

9 Because Manatt represents and has an obligation to Parrish and Adderley, named
 10 plaintiffs who cannot satisfy the “adequate representation” requirements of Rule 23, Manatt itself
 11 cannot “fairly and adequately” represent the interests of the class as required by Rule 23(g)(1).
 12 See Amchem, 521 U.S. at 625 n.20 (noting interrelationship between “adequate representation”
 13 requirement and conflicts of counsel); Hill, 2005 WL 3299144, at *3 (“Class counsel’s primary
 14 obligation is to the interests of the class and not any conflicting interests of the named plaintiff
 15 who may have been the initial client.”) (citing Advisory Committee Notes to the 2003
 16 Amendments to Fed. R. Civ. P. 23); see also id. (stating that Rule 23(g)(1)(B) requires that “class
 17 counsel ‘must fairly and adequately represent the interests of the class,’ not the named or lead
 18 plaintiff”).⁴

19 **B. Manatt Proposed Class Representatives Who Are Not Members of the**
 20 **Putative Class, Contrary to the Requirements of Fed. R. Civ. P. 23(g)(1)**

21 Manatt’s conflict of interest and unfitness to act as interim class counsel is further
 22 illustrated by the fact that it not only put forward as putative class representatives two individuals

23 ⁴ Indeed, Manatt’s inability to comport with its obligations under Rule 23(g)(1) are illustrated by
 24 its failure to inform the court of its present conflicts of interest. See In re Delphi ERISA
 25 Litigation, 230 F.R.D. at 499 (stating that interim class counsel, in representing the putative
 26 class’s best interests, has an ongoing duty to advise the court of any conflicts of interest that may
 27 arise so the court may modify its interim appointments to address and mitigate such conflicts);
 28 Piambino, 757 F.2d at 1144-45 (“When very early in this case Lead Counsel found themselves in
 a conflict of interest with [certain class members], they became, under Rule 23, generally unable
 to conduct the litigation and there [was] inadequate representation of the [class members’]
 interest. Counsel certainly knew, or should have known, that the presence of the ... conflict
 would create divided loyalties which would constitute inadequate representation”) (internal
 quotations omitted).

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1 with irreparable conflicts with the class (Parrish and Adderley), but it also named as plaintiffs
 2 (and putative class representatives) two individuals who are not and cannot be members of the
 3 class at all – Parrish and Roberts. As discussed (at 4, supra), because Parrish and Roberts never
 4 signed GLAs, never participated in Players Inc group licensing activities and, indeed, never had
 5 any relationships at all with Players Inc, Players Inc did not owe any duty to Parrish or Roberts,
 6 much less a fiduciary duty. (See Sanctions Mot. at 8-10 for more complete discussion.) Because
 7 neither Parrish nor Roberts has any claim against Players Inc for breach of such duty, neither of
 8 them can be a member of the purported class – let alone act as class representatives. See
 9 Amchem, 521 U.S. at 625 (“[A] class representative must be part of the class and ‘possess the
 10 same interest and suffer the same injury’ as the class members.”); General Tel. Co. of the S.W. v.
 11 Falcon, 457 U.S. 147, 156 (1982) (same); E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431
 12 U.S. 395, 403 (1977) (same); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208,
 13 216 (1974) (same).

14 Fed. R. Civ. P. 23(g)(1)(C) provides in relevant part that “(i)n appointing class
 15 counsel, the court (i) must consider: ... the work counsel has done in identifying or investigating
 16 potential claims in the action, ... counsel's knowledge of the applicable law, and ... (ii) may
 17 consider any other matter pertinent to counsel's ability to ... adequately represent the interests of
 18 the class.” Fed. R. Civ. P. 23(g)(1)(C). The fact that Manatt has proposed as class
 19 representatives two individuals who could not be members of the putative class under any
 20 cognizable legal theory speaks volumes about its own conflict of interest.

21 **C. Manatt Is Unfit to Act as Class Counsel Because It Filed This Lawsuit for**
 22 **Improper Purposes and Without Conducting the Necessary Factual and**
 23 **Legal Inquiry**

24 Players Inc discusses in detail in its Sanctions Motion how Manatt filed this
 25 lawsuit without sufficient factual or legal bases for the claims set forth in the Complaint and
 26 Amended Complaint, and for the apparent improper purposes of engaging in a fishing expedition
 27 for public relations purposes, attacking the unrelated collective bargaining activities of the
 28 NFLPA, and promoting the competing commercial interests of Retired Players for Justice. Not
 only was Manatt’s conduct contrary to its obligations under Fed. R. Civ. P. 11 and 28 U.S.C.

1 § 1927, it also further illustrates Manatt’s conflict with the class and unsuitability to act as class
2 counsel.

3 Had Manatt conducted a reasonable investigation of the facts and controlling law
4 before it filed the Complaint and Amended Complaint in this lawsuit, or adhered to its Rule 11
5 obligations if such an investigation was in fact made, it would have concluded that at least as to
6 Parrish and Roberts, the claims asserted in the initial Complaint were without any possible
7 foundation because neither Parrish nor Roberts had any relationship at all with Players Inc. See
8 discussion at 4, supra. Thus, in light of the requirements of Fed. R. Civ. P. 23(g)(1)(C) that “(i)n
9 appointing class counsel, the court (i) must consider: ... the work counsel has done in
10 identifying or investigating potential claims in the action, ...[and] counsel's knowledge of the
11 applicable law,” this Court should not appoint Manatt as interim class counsel here.

12 Moreover, in addition to filing this lawsuit in order to promote the commercial
13 interests of Retired Players for Justice (which, as discussed above), conflict with the interests of
14 the putative class, Manatt also acted with the apparent improper purpose of advancing the agenda
15 of a non-class member, Parrish, in his long-running campaign against the NFLPA – an agenda
16 that has nothing to do with the claims in this case. See Sanctions Motion at 4-5 for discussion.
17 Another named plaintiff, Adderley, may also have shared Parrish’s agenda of harassing the
18 NFLPA. See Norman, D.D.S., P.C. v. ARCS Equities Corp., 72 F.R.D. 502, 506 (S.D.N.Y.
19 1976) (stating that a class representative “who is motivated by spite against a defendant is no
20 different from one which has an adverse pecuniary interest”); DuPont v. WYLY, 61 F.R.D. 615,
21 622-23 (D. Del. 1973) (finding putative class representative to be inadequate where “this suit
22 may be an attempt to open still another front in a wide ranging battle having objectives unrelated
23 to those shared by the class”). In short, Manatt’s conduct is contrary to the obligations of class
24 counsel pursuant to Fed. R. Civ. P. 23(g)(1) to “fairly and adequately represent the interests of
25 the class,” and further demonstrates why Plaintiffs’ motion should be denied. See Taub v.
26 Glickman, 67 Civ. 3447, 1970 WL 210, at *1 (S.D.N.Y. 1970) (denying class certification
27 because plaintiffs’ counsel had been “criticized for conduct that would at least seem to be of
28 questionable propriety” and thus would “not fairly and adequately represent the suggested

1 class”); see also Sweet v. Pfizer, 232 F.R.D. 360, 371 (C.D. Cal. 2005) (disqualifying class
2 counsel because of questionable quality of his work).

3 **CONCLUSION**

4 For all of the foregoing reasons, Players Inc respectfully requests that the Court
5 deny Plaintiffs' Motion to Appoint Manatt, Phelps & Phillips, LLP as Interim Class Counsel, and
6 enter an order denying Plaintiffs' motion.

7 Date: April 4, 2007

DEWEY BALLANTINE LLP

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10 BY: s/Jeffrey L. Kessler

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12 Attorneys for Defendant Players Inc
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