

1 MANATT, PHELPS & PHILLIPS, LLP  
 2 RONALD S. KATZ (Bar No. CA 085713)  
 3 E-mail: rkatz@manatt.com  
 4 RYAN S. HILBERT (California Bar No. 210549)  
 5 E-mail: rhilbert@manatt.com  
 6 NOEL S. COHEN (California Bar No. 219645)  
 7 E-mail: ncohen@manatt.com  
 8 1001 Page Mill Road, Building 2  
 9 Palo Alto, CA 94304-1006  
 10 Telephone: (650) 812-1300  
 11 Facsimile: (650) 213-0260

12 McKOOL SMITH, P.C.  
 13 LEWIS T. LECLAIR (Bar No. CA 077136)  
 14 E-mail: lleclair@mckoolsmith.com  
 15 JILL ADLER (Bar No. CA 150783)  
 16 E-mail: jadler@mckoolsmith.com  
 17 300 Crescent Court, Suite 1500  
 18 Dallas, TX 75201  
 19 Telephone: (214) 978-4000  
 20 Facsimile: (214) 978-4044

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

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

Plaintiffs

vs.

25 NATIONAL FOOTBALL LEAGUE  
 26 PLAYERS ASSOCIATION, a Virginia  
 27 corporation, and NATIONAL FOOTBALL  
 28 LEAGUE PLAYERS INCORPORATED  
 d/b/a PLAYERS INC, a Virginia  
 corporation,

Defendants.

CIVIL ACTION NO. C07 0943 WHA

**PLAINTIFFS' OPPOSITION TO  
 DEFENDANTS' MOTION IN LIMINE NO. 6  
 TO EXCLUDE TRIAL TESTIMONY OF  
 PETER RHEE AND TO EXCLUDE FRE  
 RULE 1006 SUMMARY EXHIBITS**

[Filed Concurrently With Declaration of Noel S. Cohen in Support of Plaintiffs' Opposition to Defendants' Motion in Limine No. 6 to Exclude Trial Testimony of Peter Rhee and to Exclude FRE Rule 1006 Summary Exhibits]

Judge: Honorable William H. Alsup  
 Date: October 8, 2008

1 **I. INTRODUCTION**

2 Through their Sixth Motion In Limine (“Motion”), Defendants seek to exclude at trial the  
3 testimony of Peter Rhee and his summaries of voluminous data prepared and offered under Rule  
4 1006 of the Federal Rules of Evidence (FRE) on the grounds that (1) Mr. Rhee is purportedly an  
5 “expert” who did not prepare a report under Federal Rule of Civil Procedure (“FRCP”) Rule 26,  
6 (2) he is a “fact witness” whom Plaintiffs were required to disclose earlier in the case, and (3) the  
7 summaries somehow do not comply with FRE Rule 1006 because the underlying “documents”  
8 (specific versions of Electronic Arts’ (“EA”) Madden video football games which Defendants  
9 have stipulated are admissible)<sup>1</sup> are not voluminous, nor were they compiled from one source.

10 Defendants’ Motion is meritless and should be denied for several reasons.

11 First, Mr. Rhee is not an “expert” and does not purport to be. He will offer *no opinion*  
12 *testimony* under FRE Rule 702. He is simply the individual who compiled the Rule 1006  
13 summaries and will lay the foundation for admission of those at trial. As such, there were no  
14 required expert disclosures or reports under FRCP Rules 26(a)(2)(B) and 37.

15 Second, Mr. Rhee is not a traditional “fact witness” as defined under Rule 26(a)(1)(A)(i).  
16 He has no knowledge of the operative facts or circumstances central to this case (the GLAs,  
17 defendants’ conduct, non-payment to class members, etc.), and, as such, never had discoverable  
18 information. As mentioned above, Mr. Rhee merely compiled summaries under specific  
19 guidelines (evident from the summaries themselves) that were established by the Plaintiffs. If  
20 called to testify at trial, he will lay the appropriate evidentiary foundation for admission of the  
21 summaries, **the accuracy of which is not in dispute**. There is no rule or case that required  
22 Plaintiffs to disclose Mr. Rhee as a “fact” witness, and Defendants have cited no such authority.  
23 Rather, as set forth below, the rules require only that Plaintiffs make Mr. Rhee available for cross-  
24 examination *at trial*, not during discovery.

25  
26

27 <sup>1</sup> See concurrently filed Declaration of Noel S. Cohen (“Cohen Decl.”) Ex. A (Stipulation  
28 Regarding Testimony of EA’s Joel Linzner, filed September 19, 2008, (“Linzner Stipulation”), ¶  
7 and Exh. C thereto).

1 Finally, Defendants argue unavailingly that the summaries should be excluded because  
2 they do not comply with FRE Rule 1006. Rather than analyzing the *four* factors that the Ninth  
3 Circuit has held trial courts are to utilize in determining if summary exhibits comply with Rule  
4 1006, Defendants object based on only one of the factors – and are wrong even in that analysis.  
5 They incorrectly argue that Mr. Rhee’s summaries are not a compilation of voluminous records as  
6 the summaries contain data from multiple sources. There is, however, no requirement that a  
7 compilation come from a single source. Indeed, the rule contemplates exactly the contrary. To  
8 meet the “voluminous” records requirement, a summary must be compiled from multiple sources  
9 that cannot be conveniently examined by a trier of fact. Here, the summaries contain information  
10 from more than 500 pages of documents and multiple editions of video games that require several  
11 different gaming platforms. As such, this factor has been met. Further, although Defendants do  
12 not and cannot dispute that Plaintiffs have met the remaining elements of Rule 1006.

13 Accordingly, Defendants’ Sixth Motion In Limine should be denied.

## 14 **II. FACTUAL BACKGROUND**

15 As detailed in Plaintiffs’ Opposition to Defendants’ Seventh Motion in Limine, Electronic  
16 Arts (“EA”) was instructed by the NFLPA through Players Inc to “scramble” the identities of  
17 former class members in its Madden NFL video games. [Cohen Decl., Ex. A (Linzner  
18 Stipulation, ¶ 6, Exh. A)]. As proved by documents produced on the eve of the discovery cut-off  
19 by EA and Defendants, remarkably, and in clear violation of duties owed to the GLA class,  
20 **“despite [EA’s] attempts to convince them otherwise, [defendants took] a hard line on no  
21 retired players in the [Madden] game in any form.”** [*Id.* at ¶ 7, Exh. B (emphasis added).]

22 Of course, this evidence absolutely contradicts Defendants’ fundamental positions in this  
23 case: that (1) licensees such as EA never wanted to license and therefore never actually did  
24 license retired player rights under the GLAs, so that (2) no monies received from such licensees  
25 (hundreds of millions of dollars over the years) are due to the class of retired players who signed  
26 GLAs. In fact, the evidence shows that EA desperately wanted to use GLA retired players in the  
27 lucrative Madden game (specifically in connection with its “vintage” team feature), “attempt[ed]  
28 to convince” the Defendants that EA use retired members in the games, that Defendants

1 consistently said “no,” and that, in order to try to avoid required payments to the GLA class, the  
2 retired player images were “scrambled.”

3 Despite the undisputed appearance of class members’ “scrambled identities” in numerous  
4 versions of the Madden games, and the fact that defendants received guaranteed royalties from  
5 EA, GLA class members did not receive a penny of those millions. Mr. Rhee’s summaries show  
6 the extent of EA’s “scrambled” use of class members.

7 Mr. Rhee is an associate at OSKR LLC, a consulting firm. Unlike plaintiffs’ disclosed  
8 expert Dr. Daniel Rascher, Mr. Rhee was never retained by Plaintiffs to testify as an expert  
9 witness in this case. He will offer no opinions at trial under FRE Rule 702. Neither is Mr. Rhee a  
10 true “fact witness.” He was merely instructed by Plaintiffs’ counsel to compile summary exhibits  
11 -- using materials that have all been produced to Defendants almost a month before trial. The  
12 summaries were identified timely on Plaintiffs’ Exhibit List and produced.<sup>2</sup> Defendants have  
13 been advised repeatedly that Mr. Rhee will be made available at trial for cross-examination to the  
14 extent they wish to question him on the accuracy of his compilation. And despite the fact that  
15 Plaintiffs have produced all underlying materials some time ago, Defendants have never contested  
16 the accuracy of any summary.

17 **III. LEGAL ARGUMENT**

18 **A. Rule 1006 Is Liberally Employed to Permit Summaries of Documents.**

19 Rule 1006 permits a proponent to use charts or summaries to prove the content of  
20 voluminous documents that cannot conveniently be examined in court. *See, e.g., Amarel v.*  
21 *Connell*, 102 F.3d 1494, 1516 (9th Cir. 1996); 31 Charles Alan & Victor James Gold, *Federal*  
22 *Practice and Procedure* § 8042 (2000) (“Wright & Miller) (Rule 1006 creates an exception to the  
23 best evidence doctrine). Because Rule 1006 eliminates unjustifiable expense and delay, it  
24 “should be liberally employed in complex cases.” *In re U. S. Fin. Sec. Litig.*, 609 F.2d 411, 428  
25 (9th Cir. 1979), *cert. denied sub nom, Gant v. Union Bank*, 446 U.S. 929 (1980).  
26

27 \_\_\_\_\_  
28 <sup>2</sup> The Rhee Summaries (Trial Exhibits 1239 and 1240) that are the subject of the instant motion  
are attached as Exhibit B to the Cohen Decl.

1 A proponent of a summary exhibit must establish a foundation that (1) the underlying data  
2 upon which the summary is based consists of voluminous writings, recordings, or photographs;  
3 (2) the underlying data upon which the summary is based is independently admissible; (3) the  
4 proponent made the underlying data available to the opposing party at a reasonable time and place  
5 prior to introducing the summary at trial; and (4) the summary “fairly represents” the underlying  
6 data that it purports to convey. *See Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1516 (9th Cir.  
7 1985); *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1259 (9th Cir. 1984); *see* 6 Jack B.  
8 Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence*, § 1006.07[1 ] (2d ed.1998)  
9 (summary should “accurately reflect the underlying documents”). Whether a proponent has  
10 satisfied the conditions of Rule 1006 and the summary is admissible is left to the discretion of the  
11 trial judge. *Davis & Cox*, 751 F.2d at 1516.

12 **B. Plaintiffs Have Satisfied Rule 1006 and the Proffered Summaries Compiled**  
13 **By Mr. Rhee Are Admissible For Substantive Purposes.**

14 **1. The Documents Making Up the Summary Are Voluminous.**

15 The purpose of Rule 1006 “is to allow the use of summaries when the documents are  
16 unmanageable or when the summaries would be useful to the judge.” *Id.* The “voluminous”  
17 requirement is satisfied “where, even though it is possible for the [finder of fact] to digest the  
18 source material, appreciable time and effort can be saved by admitting summary evidence.”  
19 Wright & Miller § 8044.

20 Here, the supporting materials contain over 580 pages of documents as well as numerous  
21 EA Madden video games that require several different gaming platforms, including the Sony  
22 Playstation 2, the Nintendo GameCube and Microsoft’s Xbox. The summaries simplify these  
23 multiple and diverse materials into a form that is convenient and easy to understand. They will  
24 save the Court and jury appreciable time and effort. The first element of Rule 1006 (“voluminous  
25 writings”) is thus satisfied.<sup>3</sup>

26  
27 <sup>3</sup> Defendants argue that the summaries contained in Trial Exhibit 1240 are not a “compilation of  
28 voluminous records” under Rule 1006 because they are “extrapolated from multiple sources.”  
This is precisely the purpose of Rule 1006: to summarize “the contents of voluminous writings,  
recordings, or photographs which cannot conveniently be examined in court.” F. R. Evid. 1006.

1                                   **2.       The Underlying Documents Are Independently Admissible.**

2           The second element is also satisfied because the underlying documents are independently  
3   admissible. Defendants do not dispute that. Indeed, the parties entered into a stipulation with EA  
4   establishing the authenticity and admissibility of the Madden games. [Cohen Decl., Ex. A.]  
5   Rather, Defendants dispute that the Rule 1006 Summaries (and the materials underlying them) are  
6   irrelevant, and contend that they are more prejudicial than probative. But as further detailed in  
7   Plaintiffs' Opposition to Defendants' Seventh Motion in Limine, such materials and summaries  
8   are in fact highly relevant to this dispute. Indeed, Plaintiffs' "scrambled" identities are at the  
9   heart of this case: instructing EA to strip the identities of retired players in the EA Madden game  
10  is a perfect example of the lengths to which Defendants will go to avoid paying retired players  
11  guaranteed group licensing revenue under the GLA. As such, there can be no good faith  
12  argument that such summaries are not relevant to this action.

13                                   **3.       The Underlying Documents Have Been Made Available to Defendants.**

14           Rule 1006 requires that the materials underlying a summary must be made available to the  
15  opposing party at a reasonable time and place. Fed. R. Evid. 1006. The purpose of this  
16  requirement is to give the opposing party an opportunity to verify the reliability and accuracy of  
17  the summary and to prepare for cross-examination. *See Amarel v. Connell*, 102 F.3d 1494, 1516  
18  (9th Cir. 1997); *see also Air Safety, Inc. v. Roman Catholic Archbishop of Boston*, 94 F.3d 1, 8  
19  (1st Cir. 1996).

20           Rule 1006 does not mandate that the summary itself be made available to opposing party,  
21  only the underlying documents. *U.S. v. Foley*, 598 F.2d 1323, 1338 (4th Cir. 1979); *cf.*, *Wright &*  
22  *Miller* § 8045 (“[t]he proponent of summary evidence must give the adverse parties not only  
23  access to the source material but, at the same time, also must give notice of the contents of the  
24  summaries”). Nonetheless, each summary was provided to Defendants on September 11, 2008,  
25  as part of the parties' mutually agreed exchange of exhibits.<sup>4</sup> In analyzing whether a proponent

26 \_\_\_\_\_  
27 <sup>4</sup> Plaintiffs have satisfied the third element of Rule 1006. On or about August 25, 2008, Plaintiffs  
28 disclosed that they would be utilizing facts from the ESPN Pro Football Encyclopedia  
("Encyclopedia") to compile their summaries. [Cohen Decl., ¶ 4.] It should be noted that  
Defendants will also be relying on information from this encyclopedia at trial (which makes their

1 has made the underlying data available to the opposing party at a reasonable time and place, the  
2 key is whether that opponent has had sufficient time to inspect the source of the summary, detect  
3 any inaccuracies, and prepare to challenge any such inaccuracies. See Wright & Miller § 8045.

4 The Ninth Circuit has not created a bright-line test as to what is a reasonable time under  
5 Rule 1006. See *Davis & Cox*, 751 F.2d at 1516 (affirming only that “just before trial” is not  
6 sufficient). Most courts in other circuits, however, agree that two weeks to one month before trial  
7 is sufficient time for an opponent to review Rule 1006 source documents. See, e.g., *Fidelity,*  
8 *Nat’l Title v. Intercountry Nat’l Title*, 412 F.3d 745, 753 (7th Cir. 2005) (30 days sufficient time to  
9 review hundreds of thousands of pages of contracts); *U.S. v. Gorel*, 622 F.2d 100, 106 (5th Cir.  
10 1979) (two weeks before trial reasonable). The documents need not be produced during  
11 discovery as Defendants mistakenly contend.

12 **4. Defendants Do Not Dispute That The Summaries Fairly Represent**  
13 **The Underlying Documents.**

14 Rule 1006 summaries must be accurate reflections of the underlying material and must  
15 not be misleading. See *Martin v. Funtime, Inc.*, 963 F.2d 110, 115-116 (6th Cir. 1992) (“Under  
16 Rule 1006, the summary must be “accurate, authentic and properly introduced before it may be  
17 admitted into evidence”); see also, *U.S. v. Driver*, 798 F.2d 248, 252-253 (7th Cir. 1986)  
18 (“admission of a summary under [Rule 1006] requires a proper foundation as to the admissibility  
19 of the material that is summarized and a showing that the summary is accurate”); *U.S. v.*  
20 *Wainright*, 351 F.3d 816, 820 n. 3 (8th Cir. 2003) (“the information on the document [must]  
21 summarize[] the information contained in the underlying documents accurately, correctly, and in  
22 a nonmisleading manner”).

23  
24  
25  
26 objection to Plaintiffs’ use curious, at best. Additionally, more than one month before trial,  
27 Plaintiffs produced each of the Madden games referenced in the summaries (September 11,  
28 2008), as well as the encyclopedias utilized for the summaries (September 19, 2008). [*Id.* at Exs.  
C, D.] As such, Defendants have had ample time to review the materials comprising the Rule  
1006 Summaries in anticipating of cross-examining Mr. Rhee at trial.

1 Here, Defendants do not even attempt to argue (nor can they) that the fourth element of  
2 Rule 1006 is not met because the proposed summaries “fairly represent” the materials that have  
3 been made available to Defendants.

4 Finally, although not considered a “factor,” a Rule 1006 summary must be prepared by a  
5 witness who is available for cross-examination at trial. *See U.S. v. Green*, 428 F.3d 1131, 1134-  
6 1135 (8th Cir. 2005). Plaintiffs are making the preparer of the summaries, Mr. Rhee, available at  
7 trial to testify about this compilation. Defendants’ complaint -- without a shred of legal authority  
8 -- that Mr. Rhee’s identity should have been made available to them prior to the close of  
9 discovery is simply wrong.

10 **IV. CONCLUSION**

11 For the reasons given above, Defendants’ Motion to exclude the testimony of Peter Rhee  
12 and the summaries he created should be denied.

13 Dated: October 6, 2008

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By: \_\_\_\_\_/s/\_\_\_\_\_

Ronald S. Katz (SBN 085713)

Ryan S. Hilbert (SBN 210549)

Noel S. Cohen (SBN 219645)

1001 Page Mill Road, Building 2

Palo Alto, CA 94304-1006

Telephone: (650) 812-1300

Facsimile: (650) 213-0260

MCKOOL SMITH, P.C.

Lewis T. LeClair (SBN 077136)

Jill Adler Naylor (SBN 150783)

300 Crescent Court

Dallas, TX 75201

Telephone: (214) 978-4984

Facsimile: (214) 978-4044

*Attorneys for Plaintiffs*

25 41325234.1