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12 *Attorneys for Plaintiffs*

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

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

19 Plaintiffs,

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

25 Defendants.

CIVIL ACTION NO. C07 0943 WHA

**PLAINTIFFS' MOTION IN LIMINE NO. 6,  
 REQUESTING EXCLUSION OF EVIDENCE  
 AND ARGUMENTS OF LEGAL  
 CONCLUSIONS MADE BY HERB  
 ADDERLEY**

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

1  
2 **I. The Court Should Exclude Any Evidence, Testimony, Argument or Reference to Legal**  
3 **Conclusions Made by Herb Adderley in his Deposition.**

4 In Herb Adderley's deposition, Defendants' Counsel asked various questions that invited  
5 a legal conclusion. However, as a fact witness and former NFL football player, Mr. Adderley is  
6 not competent to testify about legal issues, especially without proper foundational questions.  
7 Thus, the Court should exclude evidence or argument related to these statements.

8 A. Courts Routinely Exclude Evidence of Legal Conclusions.

9 Statements of law and legal conclusions are not proper testimony for lay witnesses. *See*  
10 *Christiansen v. Nat'l Savs. & Trust Co.*, 683 F.2d 520, 529 (D.C. Cir. 1982) ("The existence of  
11 fiduciary duties in the context of this case is a legal conclusion. The duty to issue such  
12 conclusions devolve on the courts and lay legal conclusions are inadmissible in evidence."). The  
13 Ninth Circuit has recognized as such, and has excluded lay opinion testimony about the proper  
14 construction of a contract. *See Evangelista v. Inlandboatman's Union of Pac.*, 777 F.2d 1390,  
15 1398 n.3 (9th Cir. 1985) ("Mihalopoulos's opinion as to the correct construction of the collective  
16 bargaining agreement -- *i.e.*, what is or is not the proper procedure for handling grievances -- is an  
17 inadmissible legal conclusion.") (citing Fed. R. Evid. 701); *see also* Fed. R. Evid. 704 advisory  
18 committee notes (Rules 701 and 702 "afford ample assurances against the admission of opinions  
19 which would merely tell the jury what result to reach. . . . [The Rules] also stand ready to exclude  
20 opinions phrased in terms of inadequately explored legal criteria."). Of course, a lay witness's  
21 opinions as to legal conclusions do not assist the factfinder in its determinations, and can be  
22 unduly prejudicial, and are therefore excludable under Rules 402 and 403.

23 B. Adderley's Legal Conclusions Should be Excluded.

24 Defendants asked Mr. Adderley multiple questions that asked him for "his understanding"  
25 of various issues and allegations in this lawsuit, which called for a legal conclusion. The Court  
26 should exclude this testimony as calling for legal conclusions.  
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1 First, Defendants asked Mr. Adderley about whether the First Amended Complaint  
2 included a claim for breach of a licensing agreement:  
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4 Page 72

22 Q. Okay. Now, did you know  
23 that in this First Amended Complaint that  
24 was filed, you did not make any claim for

6 Page 73

1 any breach of your licensing agreement;  
2 did you know that, sir?

3 MR. KATZ: Object. It calls  
4 for a legal conclusion.

5 THE WITNESS: No.

9 \*\*\*

10 Page 77

11 13 Q. Okay. What did you think,  
12 14 when your lawsuit was first filed, first  
13 15 filed, what claim did you think you were  
14 16 asserting, sir?

15 17 A. I was thinking that this  
16 18 referred to the agreement that I signed  
17 19 with player's name with Reebok, that I  
18 20 didn't get paid for, I couldn't get any  
19 21 acknowledgement from, in the beginning.

20 22 Q. That's what you thought this  
21 23 was about?

22 24 A. Yeah.

17 Page 78

1 18 MR. KATZ: Object.

2 19 BY MR. KESSLER:

3 20 Q. But there's nothing in here  
4 21 about that; right?

5 22 A. Right.

23 See Garza Decl., Ex. A at 72:22-73:5, 77:13-78:5; see also *id.* at 73:5-73:18, 74:1-75:16, 76:5-  
24 78:5 (additional questioning Mr. Adderley's understanding of the First Amended Complaint).  
25 Adderley's opinion as to the legal effect of the First Amended Complaint is wholly irrelevant as  
26 to the issues remaining in the case. Additionally, Adderley's understanding of the First Amended  
27 Complaint -- which is not even the operative pleading at this point -- may supplant the  
28 instructions by the Court in the jury's mind, and is therefore highly prejudicial to Plaintiffs. As  
such, the Court should exclude this testimony under Rules 402, 403, and 701.

1 Second, Defendants presented a series of questions to Mr. Adderley that explored, under  
2 the terms of the GLA, (1) whether retired players were entitled to revenues from the use of active  
3 player images, and (2) whether retired player images must be "used" to generate revenue:  
4

5 Page 92

8 Q. And what you thought you  
9 were agreeing to get was that if your  
10 rights were licensed and used, you would  
11 get some money; correct?

12 A. Correct.

13 MR. KATZ: Object.

14 BY MR. KESSLER:

15 Q. And that was your  
16 understanding of this agreement?

17 A. Yes.

18 \*\*\*

19 Page 96

20 Q. Sir, do you believe, as a  
21 retired player, you're entitled to any  
22 money that's generated by the licensing  
23 of active players?

24 MR. KATZ: Object.

25 THE WITNESS: No.

26 See Garza Decl., Ex. A at 92:8-17, 96:13-18; see also *id.* at 89:13-90:7 (similar testimony). Mr.  
27 Adderley's opinion of the legal effect of the GLA is inadmissible under Rule 701. Furthermore,  
28 Mr. Adderley was unable to review confidential documents to prepare for this deposition,  
including Players Inc. licenses that require payment for the *right* to use player images, even if  
those images are not actually used. See Hilbert Decl., Dkt. No. 311, at ¶ 70. In light of the fact  
that Mr. Adderley is the class representative, his testimony, given his incomplete access to the  
facts in the case, is unfairly prejudicial, given the lack of probative value, and should be excluded  
under Rule 403.

Third, Defendants asked Mr. Adderley whether EA had the right to use his image, at the  
time that Mr. Adderley had sold the Hall of Fame the right to use his image:

Page 109

6 Q. Let me ask it this way: At  
7 the time you gave these rights to the

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8 Hall of Fame, at that time, you didn't  
9 think then that EA already had your  
10 rights; did you?  
11 A. No.  
12 MR. KATZ: Object.  
13 BY MR. KESSLER:  
14 Q. You did not believe that?  
15 MR. KATZ: Object.  
16 THE WITNESS: I didn't know  
17 whether they had or not.  
18 BY MR. KESSLER:  
19 Q. But you didn't think they  
20 already had it at that time?  
21 MR. KATZ: Object.  
22 THE WITNESS: That's  
23 correct.

See Garza Decl., Ex. A at 109:6-23. Mr. Adderley's opinion as to whether EA already had the rights to use his image is an opinion on EA's legal rights, and should be excluded under Rule 701 as a lay opinion, and under Rule 402 as irrelevant.

Fourth, Defendants questioned Mr. Adderley as to identify all instances in which defendants or their licensees used his image, and he did not receive payment due for using that payment:

Page 121  
19 Identify any situation in  
20 which defendants or their licensees used  
21 your image and did not pay you 100  
22 percent of the money due for using your  
23 image?  
24 A. The only one I know of is  
Page 122  
1 the Reebok jersey that I just explained  
2 about.  
3 Q. That's the only one you know  
4 of?  
5 A. Yes.  
6 MR. KATZ: And I'm going to  
7 object to that question.

See Garza Decl., Ex. A at 121:19-122:6. This question requires Mr. Adderley to opine as to all agreements in which money was legally due him, under the terms of those agreements. The question requires a legal determination, and should be excluded under Rule 701.

Fifth, Defendants asked Adderley of his analysis of the class's theory of damages:

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Page 135

24 Is it your understanding you

Page 136

1 are seeking damages in this case?

2 A. Yes.

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Page 137

16 Q. Do you agree if some class  
17 members' rights are more valuable, like a  
18 Joe Montana, that that person would be  
19 more damaged than somebody who just  
20 played one game, one year on special  
21 teams?

22 MR. KATZ: Object.

23 THE WITNESS: Yes.

24 BY MR. KESSLER:

Page 138

1 Q. The damages should vary  
2 depending on how valuable your rights  
3 are; correct?

4 A. Yes.

5 MR. KATZ: Object.

See Garza Decl., Ex. A at 135:24-136:2, 137:16-138:5. Mr. Adderley's off-the-cuff opinion as to "value" of various players' rights, under the operative theories of this case, are legal conclusions excludable under Rule 701.

Finally, Defendants questioned Adderley about the presence of an "equal share" provision in the GLA:

Page 256

13 Q. There's nothing in the GLA  
14 that talks about how it will be divided  
15 among any players; right?

16 MR. KATZ: Object.

17 THE WITNESS: You just read  
18 it.

19 BY MR. KESSLER:

20 Q. Is there anything in there  
21 that says how it will be divided or what  
22 portions?

23 A. No.

24 MR. KATZ: Objection.

Page 257

1 BY MR. KESSLER:

2 Q. When you read the GLAs, you  
3 read and understood this GLA; correct?

4 A. Yes.

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5 Q. Here when you read and  
6 understood it, you didn't see anything  
7 there about how the money might be  
8 divided between particular retired  
9 players; right?  
10 MR. KATZ: Object.  
11 THE WITNESS: Correct.

See Garza Decl., Ex. A at 256:13-257:11. Mr. Adderley's opinion as to the construction of his  
GLA is a classic legal opinion excludable under Rule 701. See *Evangelista*, 777 F.2d at 1398 n.3.  
Thus, the Court should exclude this testimony.

**II. Conclusion**

Plaintiffs respectfully request that the Court grant its Motions in Limine.

Dated: August 19, 2008

Respectfully submitted,  
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1 **PROOF OF SERVICE**

2 I, Daniel Q. Crim, declare:

3 I am a resident of the State of California and over the age of eighteen years, and  
4 not a party to the within action; my business address is 1001 Page Mill Road, Building 2, Palo  
5 Alto, CA 94304-1006. On August 19, 2008, I served the following documents:

6  
7 1. **Plaintiffs' Motion In Limine No. 1, Requesting Exclusion Of Evidence And**  
8 **Argument Related To Bernard Parrish;**

9 2. **Plaintiffs' Motion In Limine No. 2, Requesting Exclusion Of Evidence Or**  
10 **Argument Relating To The Possibility Of Suing Additional Parties For Relief;**

11 3. **Plaintiffs' Motion In Limine No. 3, Requesting Exclusion Of Evidence And**  
12 **Argument Related To Mr. Adderley's Purported Fiduciary Relationship With Members Of**  
13 **Retired Professional Football Players For Justice;**

14 4. **Plaintiffs' Motion In Limine No. 4, Requesting Exclusion Of Parol Evidence**  
15 **Tending To Prove The Intent Of The Parties To Third-Party Licensing Agreements;**

16 5. **Plaintiffs' Motion In Limine No. 5, Requesting Exclusion Of Evidence Or**  
17 **Argument Relating To Dismissed Causes Of Action And The Uncertified Putative Class;**

18 6. **Plaintiffs' Motion In Limine No. 6, Requesting Exclusion Of Evidence And**  
19 **Arguments Of Legal Conclusions Made By Herb Adderley; and**

20 7. **Plaintiffs' Motion In Limine No. 7, Requesting Exclusion Of Evidence,**  
21 **Testimony And Argument Related To The Nfl Sponsorship And Internet Agreement.**

- 22  
23  By placing the document(s) listed above in a sealed envelope with postage thereon  
24 fully prepaid, in the United States mail, addressed as set forth below.
- 25  By transmitting via facsimile the document listed above to the fax number(s) set forth  
26 below on this date before 5:00 p.m.
- 27  By placing the document(s) listed above in a sealed Federal Express envelope and  
28 affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal  
Express agent for overnight delivery.



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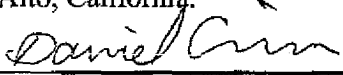


By electronic mail to the below email addresses:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 19, 2008, at Palo Alto, California.

  
\_\_\_\_\_  
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18

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

21 BERNARD PAUL PARRISH, HERBERT  
ANTHONY ADDERLEY, WALTER  
ROBERTS III,

22 Plaintiffs,  
23

24 v.

25 NATIONAL FOOTBALL LEAGUE  
PLAYERS ASSOCIATION and NATIONAL  
FOOTBALL LEAGUE PLAYERS  
26 INCORPORATED d/b/a PLAYERS INC,

27 Defendants.  
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Case No. C 07 0943 WHA

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION IN  
LIMINE NO. 6**

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**ARGUMENT**

In their Motion in Limine No. 6 (“Mot. No. 6”), Plaintiffs seek to exclude evidence of statements and admissions by Plaintiff Herb Adderley that are directly relevant to some of the most important factual issues in the case. These statements include Mr. Adderley’s factual understanding of: (1) the meaning of the Retired Player GLA to which he is a party; (2) why it was necessary for Electronic Arts, Inc. (“EA”) to enter into an ad hoc license agreement with him; (3) when, if ever, Defendants or their licensees used Mr. Adderley’s licensing rights without paying him for that use; (4) the value of Mr. Adderley’s licensing rights in comparison to the value of the rights of other GLA Class members; and (5) whether at the time Mr. Adderley filed this lawsuit he had any licensing complaints against Defendants with respect to anything other than his ad hoc license agreement for Reebok jerseys. Mot. No. 6 at 3-7. All of this testimony concerns Mr. Adderley’s understanding of some of the central factual issues in the case. There is no basis for Plaintiffs’ ipse dixit assertion that this testimony consists of “legal conclusions,” and there is no basis to exclude this highly relevant evidence from the trial.

This Court has already determined, in strong language, that the Retired Player GLA is an ambiguous contract. Order Granting in Part and Denying in Part Pls.’ Mot. for Class Cert at 3 (Apr. 29, 2008) (describing the Retired Player GLA as a “masterpiece of obfuscation”). It is axiomatic that when a contract, such as the Retired Player GLA, is ambiguous, vague, or indefinite, “parol evidence is always admissible . . . to establish the real contract between the parties.” Shockey v. Westcott, 189 Va. 381, 387-89 (1949) (emphasis added); Sundown, Inc. v. Canal Square Assocs., 390 A.2d 421, 432 (D.C. 1978) (same); 11 Williston on Contracts § 33:39.

Despite this well established principle, Plaintiffs argue that Mr. Adderley’s testimony about his understanding of the Retired Player GLAs at the time he entered into them –

1 including his understanding of how licensing revenues would be generated and distributed under  
2 the GLAs – should be excluded as inadmissible legal conclusions under Federal Rule of  
3 Evidence 701. Mot. No. 6 at 4, 6-7. The absurdity of Plaintiffs’ argument is laid bare by a  
4 simple reading of Mr. Adderley’s deposition testimony. Mr. Adderley was not asked to opine on  
5 the legal effect of his Retired Player GLA. Rather, he testified as to the facts of his own  
6 understanding of the Retired Player GLAs at the time he entered into them – e.g., “what [he]  
7 thought [he was] agreeing to,” what his “understanding of this agreement” was, and what his  
8 knowledge was when he “read and understood this GLA.” Id. at 4, 6-7. Under black-letter law,  
9 such factual testimony by a party to an ambiguous contract is “always admissible,” and is not  
10 excludable under Federal Rule of Evidence 701. See, e.g., McDowell Welding & Pipefitting,  
11 Inc. v. United States Gypsum Co., 258 B.R. 460, 466-67 (D. Or. 2002) (denying plaintiff’s  
12 motion to strike defendant’s declaration under Fed. R. Evid. 701, and finding defendant’s  
13 interpretation of contracts at issue to be admissible).<sup>1</sup>

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16           There is also no basis for Plaintiffs’ argument that Mr. Adderley’s testimony  
17 about his understanding of the Retired Player GLA should be excluded because he was “unable  
18 to review confidential documents . . . , including Players Inc. licenses . . . .” Mot. No. 6 at 4.  
19 First, this purported “explanation” for Mr. Adderley’s admissions is not a ground for excluding  
20 highly relevant evidence. Second, Plaintiffs do not – and cannot – explain how access to the  
21

22 <sup>1</sup> Plaintiffs cite only two cases to support their misguided argument that Mr. Adderley’s  
23 testimony is an inadmissible legal conclusion. See Mot. No. 6 at 2 (citing Evangelista v.  
24 Inlandboatman’s Union of the Pac., 777 F.2d 1390 (9th Cir. 1985) and Christiansen v. Nat’l  
25 Savings & Trust Co., 683 F.2d 520 (D.C. Cir. 1982)). However, neither case involved a  
26 contracting party’s understanding of an ambiguous contract at the time he or she entered into it;  
27 nor did they concern a witness’s factual understanding or knowledge – as Mr. Adderley’s  
28 testimony did – but instead involved documents purportedly evidencing opinions about the legal  
consequences of a relevant instrument or the legal status of a party. See Evangelista, 777 F.2d at  
1398 (finding inadmissible a declaration opining on the correct interpretation of the grievance  
procedures in a collective bargaining agreement); Christiansen, 683 F.2d at 529 (finding  
inadmissible a board resolution stating that a fiduciary relationship existed between Blue  
Cross/Blue Shield (BC/BS) subscribers and defendant nonprofit corporation member of BC/BS).

1 license agreements to which Mr. Adderley was not a party (most of which, in any event, were  
2 entered into after he signed his Retired Player GLAs) could have any bearing on Mr. Adderley's  
3 understanding of the meaning and scope of his Retired Player GLAs at the time he entered into  
4 them. Indeed, Mr. Adderley's understanding of the Retired Player GLAs he entered into – which  
5 is a critical fact in the case – could not be affected by third-party license agreements that he did  
6 not review.

7  
8 Mr. Adderley's admissions about the only licensing complaints he had against  
9 Defendants at the time this action was filed – i.e., that they were limited to complaints about his  
10 ad hoc license with Reebok-- also are not legal conclusions. Indeed, a review of this testimony  
11 reveals that Mr. Adderley simply explained his factual understanding at the time the First  
12 Amended Complaint was filed. See Mot. No. 6 at 3. This factual testimony of Mr. Adderley is  
13 highly relevant to the credibility of his change of position that he now believes that he was not  
14 properly paid under his Retired Player GLAs for the EA, Topps, and other active player license  
15 agreements.<sup>2</sup>

16  
17 There is similarly no basis for Plaintiffs' argument that Mr. Adderley's testimony  
18 about his understanding of the meaning of his Retired Player GLAs should be excluded because  
19 it "may supplant the instructions given by the Court in the jury's mind." Mot. No. 6 at 3.  
20 Plaintiffs offer no authority for the unfounded proposition that a jury cannot be trusted to hear  
21 testimony as to a party's understanding of the meaning of an ambiguous contract he has entered  
22 into, the interpretation of which is directly at issue in this action. See Jaime v. Tilton, No. 2:05-  
23 cv-00933-JKS (HC), 2007 WL 4239504, \*12 (E.D. Cal. Nov. 30, 2007) (the court should  
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25  
26 <sup>2</sup> In this connection, Plaintiffs completely mischaracterize Mr. Adderley's deposition testimony.  
27 Mr. Adderley was asked to "[i]dentify any situation" within his knowledge where his rights were  
28 licensed without payment. He was not asked, as Plaintiffs claim, "to opine as to all agreements  
in which money was legally due him . . . ." Mot. No. 6 at 5 (emphases added).

1 “assume that the jurors are intelligent persons and capable of understanding and correlating all  
2 jury instructions which are given.”) (citation omitted).

3 As for Mr. Adderley’s testimony regarding the comparable value of individual  
4 retired players’ licensing rights, and whether he believed the Retired Player GLA provided for an  
5 “equal share” royalty for each retired player who signed it, this too does not involve any  
6 inadmissible legal conclusion. Rather, it is clear from his testimony that Mr. Adderley was  
7 simply explaining his factual understanding of the different values of retired players’ licensing  
8 rights and the meaning of the ambiguous terms of his Retired Player GLAs. Mot. No. 6 at 6-7.  
9 Such testimony and admissions clearly qualify as relevant factual evidence in this case and there  
10 is no basis to exclude this evidence from trial.

11 Finally, the same conclusion applies to Mr. Adderley’s testimony regarding his ad  
12 hoc license agreement with the Pro Football Hall of Fame and EA. See Mot. No. 6 at 4-5, 6.  
13 Once again, a reading of the transcript shows that what Plaintiffs mischaracterize as legal  
14 opinion is actually Mr. Adderley’s factual understanding of whether he had previously licensed  
15 his rights to EA through his Retired Player GLAs at the time he entered into this ad hoc license  
16 agreement with EA. This testimony goes directly to Mr. Adderley’s understanding of the  
17 meaning of his Retired Player GLA, which the Court has found to be ambiguous, and why he  
18 received all of the payments from his ad hoc license with the Pro Football Hall of Fame and EA,  
19 rather than divide this money into an escrow account for other retired players who signed GLAs.  
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### 23 CONCLUSION

24 For all of the foregoing reasons, Plaintiffs’ Motion in Limine No. 6 should be  
25 denied in its entirety. Mr. Adderley’s testimony about his factual understanding of the Retired  
26 Player GLAs he entered into is not a legal conclusion. Instead, his factual admissions constitute  
27 clearly relevant and admissible evidence.  
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