# EXHIBIT 5

**Case No. C 07 0943 WWA**
**Parrish v. National Football League Players Association, et al.**

One Market Plaza
Spear Tower - Suite 3500
San Francisco, CA 94105
(p) 415 546 1200
(f) 415 293 7719

# I. Overview and Assignment

At the request of counsel for Herbert Adderley, *et al.*, a class of retired NFL players, I have been asked to review the reports of G. Stephen Jizmagian and Roger G. Noll (defendants' experts) filed in this matter.[1] I have been further asked to provide comments on the observations made in said reports.

# II. Analysis and Commentary

For purposes of this report I have summarized the observations made by defendants' experts, as well as my comments, into three general categories:

a. The role of the damages expert in this matter, given the specific issues of this matter;
b. The identification of the appropriate value proposition, or more specifically pool of license revenues, to be analyzed for purposes of damages; and
c. The application of damage models based on certain determinations by the trier of fact.

My analysis of these categories follows below.

### *a. The role of the damages expert in this matter*

In assessing potential damages in this matter, I started by gaining an understanding of the liability and causation elements in dispute and made certain assumptions accordingly. Briefly, as it relates to the causes of action, it is my understanding that plaintiffs allege that (1) defendants breached their contractual obligations to retired players who had signed GLAs by, among other things, failing to appropriately share relevant licensing revenues with those

[1] Reports submitted on June 12, 2008.

players; and (2) defendants breached their fiduciary duties to the retired players in a number of ways, including among them excluding the retired players from the equal share pool through the management of eligibility requirements and by failing to report fully and consistently the "equal share" royalty payments that were actually made.

This matter, and, more specifically, both causes of action, focus upon the determination by the trier of fact as to the interpretation and corresponding obligation of the defendants associated with several key phrases within the GLAs that were signed by the retired players. It is my understanding that the key language includes, "Group licensing programs are defined as programs in which a licensee utilizes a total of six (6) or more present of former NFL player images," and "moneys generated by such licensing of retired player group rights will be divided between the player and an escrow account for all eligible NFLPA members."[2]

Firstly, the fundamental interpretation of this language appears to call for a legal opinion and therefore is not the subject of any expert testimony by Dr. Jizmagian, Dr. Noll or myself. Secondly, as part of my analysis and as stated in my report, I was asked to "assume that liability has been established."[3] Any analysis of damages in a legal setting must of course presume that liability is found, else there are no damages. Based on the following, I have assumed that the trier of fact will determine liability in accordance with the language discussed above and the final definition of the pool to be distributed (discussed in greater detail below), and I have defined causation as the fact that the retired players did not receive any payments from the general licensing pool (further definition below).

I am advised by Plaintiffs' counsel that the measure of damages for breach of contract under applicable law is designed to place the party injured in the same position as the party would have been in if the contract had been performed. From an economic perspective, this means that I should measure what the Plaintiffs would have received under the GLAs, assuming that they prevail on liability. I have done so in Exhibits 1 through 3.

---

[2] See for example, PI029135.
[3] Report of Philip Y. Rowley, May 23, 2008, p. 1.

I am advised that damages for breach of fiduciary duty under applicable law should bear a reasonable connection to the defendants' wrongful act or that the damages are the natural and probable consequence of the wrongful act. I have been further advised that the Plaintiff Class alleges that Defendants repeatedly breached their fiduciary duties to the GLA Class by (i) defining "eligibility" in such a way as to deprive the retired players of their shared escrow, (ii) failing to accurately report group licensing revenues to members of the GLA Class, (iii) failing to distribute revenues to the members of the GLA Class that should have been distributed and were owed to them, (iv) failing to create an escrow account for the retired players or, alternatively, failing to distribute to retired players their equal share of the fund from which the active players were paid, (v) misappropriating funds totaling eight million dollars or more that should have been paid, in part, to the Class, (vi) misappropriating between 64 and 69 percent of the funds for themselves, and (vii) placing themselves in a position of conflict of interest and acting adversely to the interest of retired NFL players who signed a GLA. Again, from an economic perspective, I am of the opinion that the Exhibits 1 through 3 reflect the damages for the following reasons:

- Theories (i) through (iv), if proven, would entitle Plaintiffs to an equal share royalty payment
- Theory (v) is addressed in the "Adjustment for Changed Market Conditions" calculations
- Theory (vi) is addressed in the "Royalty Distribution" calculations
- Theory (vii) is addressed in the "Original Amount Redistributed" calculations

Therefore, the role of the damages expert in this matter is to develop a "but-for" world, which identifies the potential number of retired players who would have been eligible at different points in time during the class period, and to determine the monies that they should have received.

Based on these assumptions, I have constructed damage models which the trier of fact can apply accordingly, which I will discuss in Section C.

*b. The identification of the appropriate value proposition, or more specifically pool of license revenues, to be analyzed for purposes of damages*

As stated above, this matter (and therefore the damage theory) turns on the decision by the trier of fact as to whether or not a retired player who has signed a GLA during the relevant period is entitled to an equal share of the player pool associated with Gross Licensing Revenues (GLR). Defendants' experts spend an inordinate amount of time discussing business models[4] and providing some irrelevant data points on what certain retired players received for apparently individually negotiated *ad hoc* license agreements for premium and player appearances. At this juncture it is unclear to me what point defendants' experts are attempting to make as it relates to "business models."

If the comments go to the effectiveness of an organized labor compensation structure for NFL players based on years of playing, performance or merit metrics, salary cap consideration, rookie salaries or perceived market value, that goes beyond the appropriate scope of my analysis. Furthermore, under a specific breach of contract claim, it is not relevant.

I am aware that NFLPA/PI defined eligibility requirements and modified the distribution of GLAs to retired players, which could have addressed perceived issues with the business model. Again, based on the analysis at hand, it is unclear to me the relevance of this discussion.

Related to actual royalty payments, the appearance fees or *ad hoc* license agreement pool of revenues are not the monies in question. Defendants' experts appear to be confused regarding the nature of the revenue pools in question in this matter (or they deliberately conflate them). Regardless, there are two completely separate pools - one for general licensing revenues and one for *ad hoc* agreements - and they each serve different purposes. As far as I could ascertain through the information produced in discovery, at no point in time did the

[4] Report of G. Stephen Jizmagian, June 13, 2008, pp. 7-10.

NFLPA/PI attempt to reconcile, enhance or offset an individual player's royalty amounts between the two pools.

Therefore although the retired Joe Montana received approximately $2 million and the retired Grady Richardson received nothing,[5] the disparity is irrelevant to my analysis. Defendants themselves apply a separate two-tiered approach to payments made to active players. For example, in 2007, within the premium and player appearance pool, Edgerrin James of the Arizona Cardinals received more than 30 payments totaling over $100,000, while Gerald Hayes received one payment for $22.36.[6] At the same time, both of these players received identical equal share royalty payments of $10,000. There is no reason why both active and retired players cannot receive both equal share payments and individually negotiated *ad hoc* payments. Defendants' suggestion to the contrary makes no sense.

From the GLA royalties, every eligible active player received an equal share, regardless of market value, team, tenure or any other factor. It is not necessary or relevant for the damages experts in this matter to opine on the economic rationale for this financial agreement – it is what it is, and the contract language (and the existence of only one escrow fund) spells it out. Defendants' experts appear to want to take issue with the agreement, and seek to argue that this arrangement is somehow economically irrational. However, that is certainly not the issue of this case, nor, as I understand it, is it what the trier of fact will be asked to decide. Assuming liability, the pool of monies to be further analyzed in calculating damages for distribution to eligible retired players for equal distribution is the GLR, not to be confused with monies generated through individually negotiated *ad hoc* agreements. This is consistent with what the NFLPA/PI did for active players, and it is consistent with what I have done, in calculating the equal shares due retired players.

There is no need to consider the individual merits of the various players, their respective contributions to the size of the GLR pool, and so on. GLR revenues are equally shared, regardless of these individual issues. The fact that certain players are more in demand by the

[5] Report of G. Stephen Jizmagian, p. 5.
[6] See for example PI090685-90953.

licensor market is obvious – and is handled by the individually negotiated *ad hoc* arrangements.

c. The application of damage models based on certain determinations by the trier of fact.

As discussed above, from the fundamental question of what constitutes liability flows additional determinations and nuances, in particular the definition of the general licensing revenue player pool for ultimate distribution. Defendants' experts imply that there must be significant uncertainty in my approach to damages since I provide such widely divergent estimates of damages. This characterization is incorrect – there are a number of "decision tree" points for a trier of fact in reaching the ultimate structure of any possible liability finding. As the damages expert, I have attempted to provide estimates that are conditional on which branch of the tree the trier of fact ends up following. This is consistent with any damages model.

The expert attempts to identify possible liability "nodes," and seeks to provide damages estimates for each of these nodes. It is therefore not true that the figures are widely divergent – what is divergent is the range of possible liability outcomes.

Thus, the reason to provide multiple models to the trier of fact is that there are legal, in addition to economic, issues as to what should be included in the royalty pool for equal share distribution to eligible retired players. I have provided the trier of fact ways to model damages for the following key questions:

- *Who is entitled to an equal share of GLR based on the GLAs signed by the retired players?* To this end, I have summarized the number of retired players who have signed GLAs during the relevant class period. Upon further review, as suggested by

Dr. Noll, I have revised my total count of eligible retired players. A revised analysis is attached as Exhibits 1 through 3.[7]

- *If eligible retired players are entitled to an equal share royalty, should only those licenses that include specific language be included in the pool? Or, should all licenses be included as part of GLR?* I understand that Plaintiffs have argued that all licenses should be included because of the reference to both active and retired players in the GLA. For purposes of constructing the damage model, I provided to the trier of fact the royalties associated with a subset of those agreements which contain specific language pertaining to retired players,[8] as well as a model that looks at revenues from all licenses. This is a clear example of the point made above – while the numbers obtained here are widely divergent, there is absolutely no divergence in my damages approach. It is simply a matter of what group of licenses the trier of fact ultimately determines is relevant. Upon determining the relevant population of licenses, the trier of fact will then be in a position to choose the corresponding damages number from my analysis. This is also why the revenues associated specifically with the NFL Sponsorship and Internet agreement, which the NFLPA/PI includes in its GLR calculation and equal share distribution, are segregated in my analysis.[9]

- *The NFLPA/PI made an $8 million adjustment to the GLR, based on "changed market conditions." Was it appropriate to exclude that amount from the GLR?* Neither of defendants' experts is able to explain why or how the $8 million adjustment was determined. To date, I still have not seen a valuation analysis or comparables, and I note that Defendants conceded that they did not perform the

[7] In addition, I have updated the interest rate to be 6 percent through June 27, 2008. I understand from Plaintiffs' counsel 6 percent is the correct rate in Virginia and DC. (VA Code Ann. 6.10339.54 and D.C. Code 28-3302 respectively.) In using the 10 percent previously, I was again following the advice of counsel.

[8] As stated in footnote 1 of my original report, my understanding is that in general, the specific language is included in sections 1(A) and 2(A) of the respective license agreements.

[9] Further, I have left in royalties associated with fantasy football, because, based on a review of certain websites, it appears companies such as STATS LLC do in fact incorporate statistics of retired players into their business models. It is my understanding that at least some of the specific revenues to which Dr. Jizmagian points, such as Rookie card revenues, are considered shared revenues and thus shared equally among all eligible active players, even if they are not Rookies. http://biz.stats.com/historicaldata.asp

follow-up assessment they originally planned to do.[10] Although Glenn Eyrich in his deposition references a "peer review" of other sports organizations logo use revenue,[11] one of defendants' experts, Dr. Noll, has attacked this comparison, stating, "This comparison is meaningless..."[12] Ultimately, no documentation has been produced to back up the peer review. As far as I can tell, the best documentation that defendants can reference is a Duff and Phelps opinion letter dated January 13, 1995.[13] However, this still appears to be an arbitrary adjustment by NFLPA/PI, for which the trier of fact will have to assess the validity. It is important to note that in the model I have created for the trier of fact, I have only allocated the share that would be due eligible players, not the entire $8 million.

- *What is a customary percentage of licensing revenues to be retained by an entity such as the NFLPA/PI?* During the class period, the NFLPA/PI kept approximately 64 percent of the GLR. If it is determined by the trier of fact that NFLPA/PI should have retained a lesser amount,[14] I have provided models for the trier of fact to apply in determining damages due those retired players who signed GLAs.[15]

[10] Deposition of Glenn M. Eyrich, February 12, 2008, p. 108.
[11] Deposition of Glenn M. Eyrich, February 12, 2008, p. 94.
[12] Expert Report of Roger G. Noll, June 12, 2008, p. 10.
[13] Defendants' Motion for Summary Judgment, p. 16, footnote 50.
[14] The revised percentage is based on the analysis of Dr. Rascher as provided in his Expert Report, dated May 23, 2008.
[15] Dr. Noll asserts that my report relies on Dr. Rascher for much of its foundation. (Expert Report of Roger G. Noll, June 12, 2008, p. 17, pp. 61-64.) This is false. Other than my use of Dr. Rascher's findings on a customary percentage retained by professional sports entities and associations, my work is independent of his and stands on its own.

[redacted]

[redacted]

[redacted]