

Exhibit K
to the Joint Pretrial Order

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

11 *Attorneys for Plaintiffs.*

12 DEWEY & LEBOEUF LLP
13 MARK MALIN (Bar No. 199757)
14 *mmalin@DeweyLeBoeuf.com*
15 1950 University Avenue, Suite 500
16 East Palo Alto, CA 94303
17 Tel: (650) 845-7000; Fax: (650) 845-7333

18 JEFFREY L. KESSLER (pro hac vice)
19 *jkessler@DeweyLeBoeuf.com*
20 DAVID G. FEHER (pro hac vice)
21 *dfeher@DeweyLeBoeuf.com*
22 1301 Avenue of the Americas
23 New York, NY 10019-6092
24 Tel: (212) 259-8000; Fax: (212) 259-6333

25 *Attorneys for Defendants*

26 UNITED STATES DISTRICT COURT
27 NORTHERN DISTRICT
28 SAN FRANCISCO DIVISION

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

23 Plaintiffs,

24 v.

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.

MCKOOL SMITH,
LEWIS T. LECLAIR (Bar No. CA 077136)
lleclair@mckoolsmith.com
JILL ADLER NAYLOR (Bar No. CA
150783)
jnaylor@mckoolsmith.com
300 Crescent Court
Dallas, TX 75201
Tel: (214) 978-4984; Fax: (214) 978-4044

WEIL, GOTSHAL & MANGES LLP
KENNETH L. STEINTHAL (pro hac vice)
kenneth.steinthal@weil.com
CLAIRE E. GOLDSTEIN (Bar No. 237979)
claire.goldstein@weil.com
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Tel: (650) 802-3000; Fax: (650) 802-3100

BRUCE S. MEYER (pro hac vice)
bruce.meyer@weil.com
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000; Fax: (212) 310-8007

CIVIL ACTION NO. C07 0943 WHA

JOINT PROPOSED JURY INSTRUCTIONS

Judge: Honorable William H. Alsup
Trial Date:
Time:
Place: Courtroom 9, 19th Floor

1 The parties respectfully request that the Court give the following jury instructions at the
2 trial in this matter.

3 Dated: October 8, 2008

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

7 By: s/s Ronald S. Katz

Ronald S. Katz (SBN 085713)

Ryan S. Hilbert (SBN 210549)

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)

300 Crescent Court

Dallas, TX 75201

Telephone: (214) 978-4984

Facsimile: (214) 978-4044

Attorneys for Plaintiffs

DEWEY & LEBOEUF LLP

Mark Malin (Bar No. 199757)

1950 University Avenue, Suite 500

East Palo Alto, CA 94303

Tel: (650) 845-7000; Fax: (650) 845-7333

Jeffrey L. Kessler (pro hac vice)

David G. Feher (pro hac vice)

1301 Avenue of the Americas

New York, NY 10019-6092

Tel: (212) 259-8000; Fax: (212) 259-6333

WEIL, GOTSHAL & MANGES LLP

Bruce S. Meyer (pro hac vice)

767 Fifth Avenue

New York, NY 10153

Tel: (212) 310-8000; Fax: (212) 310-8007

Attorneys for Defendants

1 **DISPUTED INSTRUCTION NO. 1 OFFERED BY PLAINTIFFS**
2 **RE DESCRIPTION OF GLA CLASS CLAIMS AND PARTIES**

3 I will now instruct you on the specific claims in this case. This is a class action lawsuit.
4 A class action is a form of a lawsuit where the class representative seeks to bring a claim on
5 behalf of a large group of people. A class consists of a group of individuals whom the class
6 representative asserts have suffered harm in a common way.

7 Mr. Adderley is the representative of a class of 2,056 retired NFL players who, like Mr.
8 Adderley, signed Group Licensing Authorization forms, which I will refer to as GLAs. The
9 GLAs signed by the members of the class were in effect sometime from February 2004 to
10 February 2007. Mr. Adderley and the class he represents are referred to in these instructions as
11 “Plaintiffs” or the “GLA Class members.”

12 There are two defendants in this case. The first is the National Football League Players
13 Association (the “NFLPA”). The second defendant is Players Inc.

14 Plaintiffs assert on behalf of the GLA Class two claims against Defendants - breach of
15 contract and breach of fiduciary duty. Defendants, on the other hand, claim that there is no
16 breach of contract or breach of fiduciary duty.

17 You must apply the following instructions in deciding whether Plaintiffs have proven that
18 Defendants' conduct in this case constitutes a breach of contract and/or a breach of fiduciary
19 duty.

20
21
22
23
24
25
26
27
28

1 **DISPUTED INSTRUCTION NO. 1 OFFERED BY DEFENDANTS**

2 **RE DESCRIPTION OF GLA CLASS CLAIMS AND PARTIES**

3 I will now instruct you on the specific claims in this case. This is a class action lawsuit.
4 A class action is a form of a lawsuit where the class representative seeks to bring a claim on
5 behalf of a large group of people. A class consists of a group of individuals whom the class
6 representative asserts have suffered harm in a common way.

7 Mr. Adderley is the representative of a class of 2,056 retired NFL players who, like Mr.
8 Adderley, signed **[Retired Player]** * Group Licensing Authorization forms, which I will refer to
9 as **[Retired Player]** GLAs. The **[Retired Player]** GLAs signed by the members of the class
10 were in effect sometime from February 2004 to February 2007. Mr. Adderley and the class he
11 represents are referred to in these instructions as “Plaintiffs” or the “GLA Class members.”

12 There are two defendants in this case. The first is the National Football League Players
13 Association (the “NFLPA”), **[which is a labor union]**. The second defendant is Players Inc,
14 **[which is a subsidiary of the NFLPA]**.

15 Plaintiffs assert on behalf of the GLA Class two claims against Defendants - breach of
16 contract and breach of fiduciary duty. Defendants, on the other hand, claim that there is no
17 breach of contract or breach of fiduciary duty.

18 **[Plaintiffs are not asserting any complaint or claim against Defendants regarding**
19 **what have been referred to as the “ad hoc” license agreements for retired player rights,**
20 **under which the retired players whose rights were licensed were paid. Plaintiffs are also**
21 **not seeking any damages in connection with the ad hoc agreements.]**

22 You must apply the following instructions in deciding whether Plaintiffs have proven that
23 Defendants' conduct in this case constitutes a breach of contract and/or a breach of fiduciary
24 duty.

25 **Throughout these instructions, the bolded and bracketed language is the only language that*
26 *the parties dispute. The parties have stipulated to all language in normal typeface that is not*
27 *bracketed. If any part of an instruction is disputed, the parties have designated it a “disputed*

1 *instruction” notwithstanding the fact that some, or even most, of the instruction might be*
2 *stipulated.*

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **DISPUTED INSTRUCTION NO. 2 OFFERED BY PLAINTIFFS**
2 **RE BURDEN OF PROOF – BREACH OF CONTRACT¹**

3 On Plaintiffs’ breach of contract claim, Plaintiffs have the burden of establishing by a
4 preponderance of the evidence the facts necessary to prove the following elements:

5 1. That Defendants breached the terms of the Retired Player GLAs entered into with
6 GLA Class members; and if so

7 2. That **[the GLA Class members]** suffered damages resulting from Defendants’
8 breach of the Retired Player GLAs.

9 **[To establish a fact by a preponderance of the evidence is to prove that it is more**
10 **likely so than not so. In other words, a preponderance of the evidence means that the**
11 **evidence produces in your mind the belief that the thing in question is more likely true than**
12 **not true.**

13 **If, after considering all of the evidence, the evidence favoring the plaintiff’s side of**
14 **an issue is more convincing to you, and causes you to believe that the probability of truth**
15 **favours the plaintiff on that issue, then the plaintiff will have succeeded in carrying the**
16 **burden of proof on that issue.**

17 **The term “preponderance of the evidence” does not mean that the proof must**
18 **produce absolute or mathematical certainty. For example, it does not mean proof beyond a**
19 **reasonable doubt as is required in criminal cases.**

20 **Whether there is a preponderance of the evidence depends on the quality, and not**
21 **the quantity, of evidence. In other words, merely having a greater number of witnesses or**
22 **documents bearing on a certain version of the facts does not necessarily constitute a**
23 **preponderance of the evidence.^{2]}**

24
25 ¹ *Greenwich Ins. Co. v. Ice Contrs., Inc.*, 541 F. Supp. 2d 327, 333 (D.D.C. 2008) (setting forth
26 elements of breach of contract under D.C. law); Standardized Civil Jury Instructions for the District of
27 Columbia § 208.

28 ² Standardized Civil Jury Instructions for the District of Columbia § 2.08.

1 **DISPUTED INSTRUCTION NO. 2 OFFERED BY DEFENDANTS**
2 **RE BURDEN OF PROOF – BREACH OF CONTRACT³**

3 On Plaintiffs' breach of contract claim, Plaintiffs have the burden of establishing by a
4 preponderance of the evidence the facts necessary to prove the following elements:

5 1. That Defendants breached the terms of the Retired Player GLAs entered into with
6 GLA Class members; and if so

7 2. The [amount of damages, if any, suffered by each individual GLA Class
8 member] resulting from Defendants' breach of the Retired Player GLAs.

9 **[When a party has the burden of proof on any claim by a preponderance of the**
10 **evidence, it means you must be persuaded by the evidence that the claim is more probably**
11 **true than not true.**

12 **You should base your decision on all of the evidence, regardless of which party**
13 **presented it.**

14 **If you find that Plaintiffs have not met their burden of proof on any single element**
15 **of the claim, then you must find for Defendants on that claim.]**

16
17
18
19
20
21
22
23
24
25 ³ Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* § 104.01 (5th ed. 2001) (Modified);
26 *Ninth Circuit Manual of Model Instructions - Civil*, No. 1.3 (1007); *Fifth Circuit Pattern Jury Instructions -*
27 *Civil*, No. 2.20 (2006) modified); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 236 n.8 (9th Cir. 1974)
28 (Rule 23 “does not eliminate the ultimate need for individual proof of damages by each member of the
class.”); *Abuan v. General Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993) (Plaintiffs are required at some point
in the litigation to prove individual damages).

1 **DISPUTED INSTRUCTION NO. 3 OFFERED BY PLAINTIFFS**

2 **RE BREACH OF CONTRACT CLAIM ⁴**

3 In this case, Plaintiffs, the GLA Class members, claim that the GLAs they signed
4 constituted contracts between Plaintiffs and Defendants. Defendants do not dispute this
5 assertion. As a result, you do not have to determine if a contract between the parties was formed.

6 Plaintiffs also claim that Defendants failed to perform certain obligations under the
7 GLAs. If one party fails to perform a duty owed under a contract, then that party has breached
8 the contract.

9 If you find that Defendants breached the GLA, then Defendants are liable to the GLA
10 Class members for damages in an amount Plaintiffs must prove as I will later instruct you.

11 I will now instruct you on the law of interpretation of contracts.

12
13
14
15
16
17
18
19
20
21
22
23
24
25

26 ⁴ Standardized Civil Jury Instructions for the District of Columbia §§ 11.02, 11.17 (2007) (Modified;
27 *George Washington University v. Weintraub*, 458 A.2d 43, 47 (D.C. 1983); *Fowler v. A & A Company*, 262
28 A.2d 344,347 (D.C. 1970).

1 **DISPUTED INSTRUCTION NO. 3 OFFERED BY DEFENDANTS**

2 **RE BREACH OF CONTRACT CLAIM⁵**

3 In this case, Plaintiffs, the GLA Class members, claim that the **[Retired Player]** GLAs
4 they signed constituted contracts between Plaintiffs and Defendants. Defendants do not dispute
5 this assertion. As a result, you do not have to determine if a contract between the parties was
6 formed.

7 Plaintiffs also claim that Defendants failed to perform certain obligations under the
8 **[Retired Player]** GLAs. If one party fails to perform a duty owed under a contract, then that party
9 has breached the contract. **[However, damages beyond nominal damages can be awarded only**
10 **if a material breach occurred. A material breach of contract occurs if a party fails to do**
11 **something which is so important that it affects the central purpose of the contract.]**

12 If you find that Defendants **[materially]** breached the GLA, then Defendants are liable to
13 the GLA Class members for damages in an amount Plaintiffs must prove as I will later instruct
14 you.

15 I will now instruct you on the law of interpretation of contracts.

16
17
18
19
20
21
22
23
24
25
26

27 ⁵ Standardized Civil Jury Instructions for the District of Columbia §§ 11.02, 11.17 (2007) (Modified);
28 *Fowler v. A & A Co.*, 262 A.2d 344, 347 (D.C. 1970).

1 **DISPUTED INSTRUCTION NO. 4 OFFERED BY PLAINTIFFS**
2 **RE BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING** ⁶

3 **[In every contract or agreement, there is an implied promise of good faith and fair**
4 **dealing. This means that each party will not do anything which will interfere with the right**
5 **of any other party to receive the benefits of the contract.**

6 **Plaintiffs claim that Defendants, in addition to breaching the actual terms of the**
7 **GLA, also violated their duty to act fairly and in good faith in carrying out their obligations**
8 **under the GLA, such that the GLA Class members were not able to receive the benefits of**
9 **the GLA. To establish a breach of the covenant of good faith and fair dealing, Plaintiffs**
10 **must prove the following:**

- 11 **1. That the Plaintiffs did all, or substantially all of the significant things that the**
12 **GLAs required them to do, or that they were excused from having to do those things;**
- 13 **2. That all conditions required for the Defendants' performance under the GLA**
14 **had occurred;**
- 15 **3. That the Defendants evaded the spirit of the GLA or unfairly interfered with**
16 **the GLA class members' right to receive the benefits of the GLA; and**
- 17 **4. That the GLA Class members were harmed by Defendants' conduct.]**

18
19
20
21
22
23
24
25
26
27 ⁶ *Paul v. Howard University*, 754 A.2d 297, 310 (D.C. 2000); *Hais v. Smith*, 547 A.2d 986, 987 (D.C.
28 1988); *Kerrigan v. Britches of Georgetowne, Inc.*, 705 A.2d 624, 626 n.2 (D.C. 1997).

1 **DISPUTED INSTRUCTION NO. 4 OFFERED BY DEFENDANTS**

2 **RE BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**

3 **[As set forth in Defendants' accompanying Memorandum, Defendants submit that**
4 **the jury should not be given any instruction regarding breach of covenant of good faith and**
5 **fair dealing. However, if the Court overrules this objection and an instruction is given on**
6 **this subject, Defendants propose the following alternative instruction:**

7 **In every contract or agreement, there is an implied promise of good faith and fair**
8 **dealing. This means that each party will not do anything to unfairly interfere with the right**
9 **of any other party to receive the benefits of the contract that had been bargained; however,**
10 **the implied promise of good faith and fair dealing cannot create obligations that were not**
11 **contemplated by the parties to the contract.⁷**

12 **Plaintiffs claim that Defendants violated their duty to act fairly and in good faith by**
13 **not granting each GLA Class member an equal share of revenues from the GLR pool.**
14 **Defendants deny that there was any breach of an implied covenant of good faith and fair**
15 **dealing and claim that the GLR pool contained moneys that were generated by and related**
16 **to active player licensing only, and thus it is unrelated to the Retired Player GLA.**

17 **To establish their claim for breach of the covenant of good faith and fair dealing,**
18 **Plaintiffs must prove by a preponderance of the evidence all of the following:**

19 **1. That Plaintiffs did all, or substantially all of the significant things that the**
20 **Retired Player GLAs required them to do, or that they were excused from having to do**
21 **those things;**

22 **2. That all conditions required for Defendants' performance had occurred;**

23 **3. That Defendants unfairly interfered with Plaintiffs' right to receive the**
24 **benefits of the Retired Player GLA; and**

25 _____
26 ⁷ Judicial Counsel of California Civil Jury Instructions No. 325 (2007) (modified); *Monotype Corp.*
27 *PLC v. Int'l Typeface Corp.*, 43 F.3d 443, 453 (9th Cir. 1994); *Paul v. Howard Univ.*, 754 A.2d 297, 310
28 (D.C. 2000). *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 349-50 (2000); *Racine & Laramie, Ltd. v. Dept. of*
Parks & Recreation, 11 Cal. App. 4th 1026, 1032 (Cal. Ct. App. 1992).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4. That Plaintiffs were harmed by Defendants' conduct.]

1 **DISPUTED INSTRUCTION NO. 5 OFFERED BY PLAINTIFFS**
2 **RE INTERPRETING THE TERMS OF THE RETIRED PLAYER GLA CONTRACT-**
3 **CONTRACT CLAIM**

4 Interpretation of a contract is primarily a determination of what the parties intended. In
5 determining the parties' intent with respect to **[a contract,]** you should first consider the words
6 they used in the contract.⁸ Words used by the parties in a contract should be given their ordinary,
7 usual, and popular meaning.⁹ **[It is well established that the plain and unambiguous meaning**
8 **of a contract is controlling.¹⁰ Intent is construed by an objective standard and evidenced**
9 **from the words of the contract itself. The subjective intent of the parties is not**
10 **controlling.¹¹]**

21 ⁸ Standardized Jury Instructions for the District of Columbia, § 11:14 (modified).
22

23 ⁹ Restatement (Second) of Contracts § 202(3) (a) (1981) (words are to be given their generally
24 prevailing meaning).

25 ¹⁰ Standardized Jury Instructions for the District of Columbia, § 11:14 (modified); *United States v.*
26 *Baroid Corp.*, 346 F. Supp. 2d 138, 142-43 (D.D.C. 2004) (citing *WMATA v. Mergentime Corp.*, 200 U.S.
27 App. D.C. 95, 626 F.2d 959, 961 (D.C. Cir. 1980)); *Lucas v. U.S. Army Corps of Eng'rs*, 789 F. Supp. 14,
28 16 (D.D.C. 1992); *see also Quadros & Assocs., P.C. v. City of Hampton*, 268 Va. 50, 597 S.E.2d 90, 93 (Va.
2004).

¹¹ *Haralson v. Federal Home Loan Bank Board*, 655 F. Supp. 1550, 1554-55 (D.D.C. 1987).

1 **DISPUTED INSTRUCTION NO. 5 OFFERED BY DEFENDANTS**
2 **RE INTERPRETING THE TERMS OF THE RETIRED PLAYER GLA CONTRACT –**
3 **CONTRACT CLAIM¹²**

4 Interpretation of a contract is primarily a determination of what the parties intended. In
5 determining the parties' intent with respect to **[the Retired Player GLA,]** you should first
6 consider the words they used in the contract. Words used by the parties in a contract should be
7 given their ordinary, usual, and popular meaning **[unless you find that the parties clearly**
8 **intended such words to have another meaning.**

9 **In determining the meaning of the terms of the Retired Player GLA, you should next**
10 **consider what a reasonable person in the position of the parties would have believed was**
11 **their meaning. Then, you may consider the circumstances that existed at the time the**
12 **contract was made, including the apparent purpose of the parties in entering into the**
13 **contract, the history of negotiations leading up to the contract, and the statements of the**
14 **parties about their understanding of the contract.**

15 **In determining the meaning of the terms of the Retired Player GLA, you may also**
16 **consider the conduct of the parties under the contract with respect to the disputed**
17 **provisions. You may consider the parties' interpretation of the contract and how the parties**
18 **acted with respect to the disputed contract provisions.**

19 **The Retired Player GLA should be considered as a whole; no part of it should be**
20 **ignored. The Retired Player GLA should be interpreted to give effect to each of the**
21 **provisions in it. No word or phrase in a contract should be treated as meaningless if any**
22 **meaning which is reasonable and consistent with other parts of the contract can be given to**
23 **it.**

24 **Finally, you should interpret the language of the agreements in a manner that is**

25
26 ¹² Restatement (Second) of Contracts § 202(3) (a) (1981) (words are to be given their generally
27 prevailing meaning); Standardized Civil Jury Instructions for the District of Columbia §§ 11.12, 11.13, 11.14
28 (2007) (modified); *Nello L. Teer Co. v. Wash. Metropolitan Area Transit Authority*, 921 F.2d 300, 302
(C.D.D.C. 1990); *A/S Ivarans Rederi v. U.S.*, 938 F.2d 1365, 1369 (C.A.D.C. 1991).

1 **commercially reasonable and does not lead to results that are contrary to the expectations of**
2 **the parties.]**

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **DISPUTED INSTRUCTION NO. 6 OFFERED BY PLAINTIFFS**
2 **RE CONTRACT INTERPRETATION – CONSTRUCTION**
3 **AGAINST DRAFTER¹³**

4 **[As set forth in Plaintiffs' accompanying Memorandum, Plaintiffs submit that the**
5 **jury should not be given any instructions regarding extrinsic evidence in connection with**
6 **the parties' agreements. However, should the Court disagree, Plaintiffs offer the following**
7 **language.**

8 **If you have doubt about the meaning of the terms of a contract, the conduct of the**
9 **parties under the contract may furnish the proper interpretation.¹⁴ In interpreting a**
10 **contract, you should resolve any doubts about the meaning of a word or phrase against the**
11 **party that drafted the contract, in this case, the Defendants, and in favor of the party that**
12 **did not draft the contract, in this case, the GLA Class members.¹⁵ However, any**
13 **interpretation suggested or supported by the acts of the parties must be reasonable and not**
14 **in conflict with the actual terms of the contract.¹⁶**

15 **A contract should be considered as a whole; no part of it should be ignored. A**
16 **contract should be interpreted to give effect to each of the provisions in it. No word or**
17 **phrase in a contract should be treated as meaningless if any meaning which is reasonable**
18 **and consistent with other parts of the contract can be given to it.]**

19
20
21
22 ¹³ *Restatement (Second) of Contracts*, § 206 (a) (1981); *Intercountry Constr. Corp. v. District of*
23 *Columbia*, 443 A.2d 29, 32-33 (D.C. 1982); *1901 Wyoming Ave. Coop. Assoc. v. Lee*, 345 A.2d 456, 461-462
(D.C. 1975); *Cowal v. Hopkins*, 229 A.2d 452, 454 (D.C. App. 1967).

24 ¹⁴ Standardized Jury Instructions for the District of Columbia, § 11:14 (modified).

25 ¹⁵ *Restatement (Second) of Contracts*, § 206 (a) (1981); *Intercountry Constr. Corp. v. District of*
26 *Columbia*, 443 A.2d 29, 32-33 (D.C. 1982); *1901 Wyoming Ave. Coop. Assoc. v. Lee*, 345 A.2d 456, 461-462
(D.C. 1975); *Cowal v. Hopkins*, 229 A.2d 452, 454 (D.C. App. 1967).

27 ¹⁶ Virginia Model Jury Instructions - Civil Instruction No. 45.330 (cited in support of Standardized Jury
28 Instructions for the District of Columbia, § 11:14.

1 **DISPUTED INSTRUCTION NO. 6 OFFERED BY DEFENDANTS**
2 **RE CONTRACT INTERPRETATION – CONSTRUCTION**
3 **AGAINST DRAFTER**

4 **[As set forth in Defendants' accompanying Memorandum, Defendants submit that**
5 **the jury should be given one instruction on construing the terms of the Retired Player**
6 **GLAs. See Disputed Instruction No. 5 Offered by Defendants for Defendants' proposed**
7 **single instruction. Defendants further submit that the jury should receive no instruction at**
8 **all on construing the terms of the GLAs against the drafter. However, if the Court**
9 **overrules this objection and an instruction is given on construing the terms of the GLAs**
10 **against the drafter, Defendants propose the following alternative instruction, which should**
11 **be added at the end of Disputed Instruction No. 5 Offered by Defendants:**

12 **If, after you have considered how a reasonable person would understand the**
13 **ordinary meaning of the GLA, the circumstances that existed when the GLA was made, and**
14 **the conduct of the parties in performing the GLA,¹⁷ you still have not decided how the GLA**
15 **should be applied,¹⁸ you may resolve any doubts about the meaning of a word or phrase**
16 **against the party who prepared the contract, so long as the interpretation you adopt is**
17 **reasonable.**

18 **You may not resolve doubts against the party who prepared the contract in a way**
19 **that would lead to an unreasonable interpretation of the contract.^{19]}**

20
21
22
23
24
25 ¹⁷ Standard Instructions §§ 11.13, 11.14 (modified).

26 ¹⁸ *See e.g., In re Bailey*, 883 A.2d 106, 118 (2005); *Capital City Mortg. Corp. v. Habana Village Art*
27 *& Folklore, Inc.*, 747 A.2d 564, 567 (D.C. 2000).

28 ¹⁹ *See* Restatement (Second) of Contract § 206 (1981).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DISPUTED INSTRUCTION NO. 7 OFFERED BY PLAINTIFFS
RE CONTRACT INTERPRETATION – DEFENDANTS’ LICENSE AGREEMENTS

[As set forth in Plaintiffs' accompanying Memorandum, Plaintiffs submit that the jury should not be given a separate instruction about contract interpretation that is specific to Defendants' license agreements.]

1 **DISPUTED INSTRUCTION NO. 7 OFFERED BY DEFENDANTS**
2 **RE CONTRACT INTERPRETATION – DEFENDANTS’ LICENSE AGREEMENTS²⁰**

3 **[In order to rule for Plaintiffs on their breach of contract claim, you must find that**
4 **the GLR pool contained licensing revenues that were owed to the GLA Class members. To**
5 **determine this issue, you will be required to interpret the terms of the license agreements**
6 **whose royalties were placed in the GLR pool for distribution to the active NFL players**
7 **(such as the 2005 license agreement between EA and Players Inc).**

8 **If you determine that the parties to Defendants' license agreements share the same**
9 **understanding of the meaning of their license agreements, you must accept that**
10 **interpretation and reject any conflicting interpretation presented to you by Plaintiffs, who**
11 **are strangers to the license agreements. The only parties to Defendants' license agreements**
12 **are Defendants (the NFLPA or Players Inc) and Defendants' licensees (such as EA or**
13 **Topps).**

14 **If you don't find the testimony of the parties to the license agreements to be uniform,**
15 **you may also consider the conduct of the parties under the agreements. You should**
16 **interpret the language of the agreements in a manner that is commercially reasonable and**
17 **does not lead to results that are contrary to the expectations of the parties to the license**
18 **agreements.**

19 **Finally, Defendants' license agreements should be considered as a whole. No word or**
20 **phrase in a contract should be treated as meaningless if any meaning which is reasonable**
21 **and consistent with other parts of the contract can be given to it.]**

22
23
24 ²⁰ *Reliance Standard Life Ins. Co. v. Matula*, No. 05-C-0788, 2077 U.S. Dist. LEXIS 24523, *25 (E.D.
25 Wis. Mar. 30, 2007); *Waddy v. Sears, Roebuck & Co.*, No. C-92-2903-VRW, 1994 WL 392483, *11 (N.D.
26 Cal. July 8, 1994); *Williams Title & Marble Co., Inc. v. Ra-Lin & Assocs.*, 426 S.E.2d 598, 6000 (Ga. Ct.
27 App. 1992); *Combs v. Hunt*, 140 Va. 627, 640 (1924); *Matsushita Elec. Corp. v. Lorai Corp.*, No. 93-1435,
28 1994 WL 497955, *2 (Fed. Cir. Sept. 23, 1994); *Miller & Long Co., Inc. v. John J. Kirilin, Inc.*, 908 A.2d
 1158, 1160-61 (D.C. 2006); *In re Lipper Holdings, LLC*, 1 A.D.3d 170, 171 (N.Y. 1st Dep’t 2003); *Transit*
 Cas. Co. v. Hartman’s, Inc., 218 Va. 703, 708 (1978); Standardized Civil Jury Instructions for the District
 of Columbia §§ 11.12, 11.14 (2007) (modified).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**DISPUTED INSTRUCTION NO. 8 OFFERED BY PLAINTIFFS
RE BREACH OF CONTRACT – STATUTE OF LIMITATIONS²¹**

The District of Columbia Code provides that a contract claim must be brought within three years of the time when the breach occurred.

Plaintiffs filed their action against Defendants on February 14, 2007. To recover on their breach of contract claim, Defendants' breach must have occurred after February 14, 2004.

²¹ D.C. Code § 12-301(7) (2008); *Gandal v. Telemundo Group*, 23 F.3d 539, 541 (D.C. Cir. 1994); *Capitol Place I Assoc. L.P. v. George Hyman Constr. Co.*, 672 A.2d 194, 198 (D.C. 1996); *Material Supply Int'l, Inc. v. Sunmatch Indus. Co.*, 146 F.3d 983, 992 (D.D.C. 1998).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DISPUTED INSTRUCTION NO. 8 OFFERED BY DEFENDANTS
RE BREACH OF CONTRACT – STATUTE OF LIMITATIONS ²²

The District of Columbia Code provides that a contract claim must be brought within three years of the time when the breach occurred.

Plaintiffs filed their action against Defendants on February 14, 2007. To recover on their breach of contract claim, Defendants' breach must have occurred after February 14, 2004. **[In addition, Plaintiffs can seek damages only for the period after February 14, 2004].**

²² D.C. Code § 12-301(7) (2008); *Gandal v. Telemundo Group*, 23 F.3d 539, 541 (App. D.C. 1994); *Capitol Place I Assoc. L.P. v. George Hyman Constr. Co.*, 673 A.2d 194, 198 (D.C. 1996); *Material Supply Int'l, Inc. v. Sunmatch Indus. Co.*, 146 F.3d 983, 992 (D.D.C. 1998); *John McShain, Inc. v. L'Enfant Plaza Prop., Inc.*, 402 A.2d 1222, 1230 (D.C. 1979).

1 **DISPUTED INSTRUCTION NO. 9 OFFERED BY PLAINTIFFS**
2 **RE BURDEN OF PROOF – BREACH OF FIDUCIARY DUTY**²³

3 Plaintiffs also claim that Defendants breached the fiduciary duty that the Defendants owed
4 to the GLA Class members. On Plaintiffs’ breach of fiduciary duty claim, Plaintiffs have the
5 burden of establishing by a preponderance of the evidence the facts necessary to prove the
6 following elements:

- 7 1. **[That Defendants owed a fiduciary duty to the GLA Class members;]**
8 2. That Defendants breached their duty to the GLA Class members;
9 3. That **[the GLA Class members suffered damages]** resulting from Defendants’
10 breach of fiduciary duty.

11 **[As you will recall from Instruction No. 2, to establish a fact by a preponderance of**
12 **the evidence is to prove that it is more likely so than not so. In other words, a**
13 **preponderance of the evidence means that the evidence produces in your mind the belief**
14 **that the thing in question is more likely true than not true. It does not mean proof beyond a**
15 **reasonable doubt as is required in criminal cases.**

16 As you will also recall from Instruction No. 2, whether there is a preponderance of
17 the evidence depends on the quality, and not the quantity, of evidence. In other words,
18 merely having a greater number of witnesses or documents bearing on a certain version of
19 the facts does not necessarily constitute a preponderance of the evidence.²⁴]

24
25 ²³ Standardized Civil Jury Instructions for the District of Columbia, § 5.12; *Kevin F. O’Malley et al.*,
26 *Federal Jury Practice and Instructions* §§ 104.01 (5th ed. 2001) (modified); *Shapiro, Lifschitz & Schram, P.C.*
27 *v. Hazard*, 24 F. Supp.2d 66, 74 (D.D.C. 1998); *Paul v. Judicial Watch, Inc.*, 543 F. Supp. 2d 1, 5-6 (D.D.C.
28 2008).

24 ²⁴ Standardized Civil Jury Instructions for the District of Columbia § 2.08.

1 **DISPUTED INSTRUCTION NO. 9 OFFERED BY DEFENDANTS**
2 **RE BURDEN OF PROOF – BREACH OF FIDUCIARY DUTY**²⁵

3 Plaintiffs also claim that Defendants breached the fiduciary duty that **[Plaintiffs allege]**
4 Defendants owed to the GLA Class members. On Plaintiffs' breach of fiduciary duty claim,
5 Plaintiffs have the burden of establishing by a preponderance of the evidence the facts necessary
6 to prove the following elements:

7 1. That **[the Retired Player GLAs provided for sufficient control by the GLA**
8 **Class members over Defendants' licensing activities to give rise to an agency relationship**
9 **between Plaintiffs and Defendants; and, if so;]**

10 2. That Defendants breached their duty to the GLA Class members; **[and, if so]**

11 **[3. That Plaintiffs were injured by Defendants' breach of their fiduciary duty;**
12 **and, if so**

13 4. **The amount of damages, if any, suffered by each individual GLA Class**
14 **member]** resulting from Defendants' breach of fiduciary duty.

15 **[When a party has the burden of proof on any claim by a preponderance of the**
16 **evidence, it means you must be persuaded by the evidence that the claim is more probably**
17 **true than not true.**

18 **You should base your decision on all of the evidence, regardless of which party**
19 **presented it.**

20
21
22 ²⁵ Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* § 104.01 (5th ed. 2001) (modified);
23 *Ninth Circuit Manual of Model Instructions –Civil*, No. 1.3 (2007); *Fifth Circuit Pattern Jury Instructions -*
24 *Civil*, No. 2.20 (2006) (modified); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238 n.8 (9th Cir. 1974)
25 (Rule 23 “does not eliminate the ultimate need for individual proof of damages by each member of the
26 class.”); *Abuan v. General Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993) (Plaintiffs are required at some point
27 in the litigation to prove individual damages); *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp.2d
28 66, 74 (D.D.C. 1998); *Paul v. Judicial Watch, Inc.*, 543 F. Supp. 2d 1, 5-6 (D.D.C. 2008); *Kline v. Coldwell,*
Banker & Co., 508 F.2d 226, 238 n.8 (9th Cir. 1974) (Rule 23 “does not eliminate the ultimate need for
individual proof of damages by each member of the class.”); *Jackson v. Loews Wash. Cinemas, Inc.*, 944
A.2d 1088, 1097 (D.C. 2008); *Judah v. Reiner*, 744 A.2d 1037, 1040 (D.C. 2000); *Ames v. Yellow Cab of*
D.C., Inc., No. 00-3116 (RWR) (DAR), 2006 WL 2711546, *5 (D.D.C. Sept. 21, 2006).

1 **If you find that Plaintiffs have not met their burden of proof on any single element of**
2 **this claim, then you must find for Defendants on this claim.]**

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **DISPUTED INSTRUCTION NO. 10 OFFERED BY PLAINTIFFS**

2 **RE FIDUCIARY RELATIONSHIP**

3 Plaintiffs claim that Defendants owed Plaintiffs a fiduciary duty arising out of the Retired
4 Player GLA. A fiduciary duty exists only in certain relationships of special trust and confidence.
5 The mere existence of a contract does not give rise to a fiduciary relationship.

6 **[Plaintiffs claim that Plaintiffs and Defendants had a fiduciary relationship based on**
7 **a principal and agent relationship. Plaintiffs also claim that Plaintiffs and Defendants had a**
8 **fiduciary relationship based on surrounding circumstances.**

9 **With respect to the first of these theories,]** Plaintiffs claim that Plaintiffs and
10 Defendants had an agency relationship, which is a fiduciary relationship. Plaintiffs have the
11 burden to prove that Plaintiffs and Defendants had an agency relationship.²⁶ **[In this case the**
12 **Plaintiffs would be the principals and the Defendants would be their agents.]**

13 An agency relationship results when one person, called the principal, agrees that another
14 person, called the agent, shall act on the principal's behalf and subject to the principal's control,
15 and the agent agrees to do so. **[One factor in determining whether an agency relationship**
16 **exists is whether the GLA Class had the ability to control and direct Defendants in the**
17 **performance of their duties under the Retired Player GLAs; however, it is not necessary for**
18 **the principal to exercise that control and the level of control necessary depends on the**
19 **nature and context of the parties' relationship.]**

20 To determine whether an agency relationship exists, you may also look at the terms of any
21 contract, and the actual course of dealing between the parties.²⁷

23 ²⁶ *Restatement (Third) of Agency*, § 1.01 comment e (2006); *Jenkins v. Strauss*, 931 A.2d 1026, 1033
24 (2007); *C&E Servs. v. Ashland, Inc.*, 498 F. Supp. 2d 242, 264, (D.D.C. 2007); *Lott v. Burning Tree Club,*
25 *Inc.*, 516 F. Supp. 913, 917 (D.D.C. 1980); *Metro. Life Ins. Co. v. Barbour*, 2008 U.S. Dist. LEXIS 40273,
*19 (D.D.C. May 19, 2008); *Ulico Cas. Co. v. Professional Indem. Agency, Inc.*, 1999 U.S. Dist. LEXIS
8591, *19 (D.D.C. Mat 5, 2999).

26 ²⁷ *Restatement (Third) of Agency*, § 1.01 (2006); *Rose v. Silver*, 394 A.2d 1368, 1371 (1978); *Judah*
27 *v. Reiner*, 744 A.2d 1037, 1040 (D.C. 2000); *Jenkins v. Strauss*, 931 A.2d 1026, 1033 (D.C. 2007); *Johnson*
28 *v. Betchel*, 717 F.2d 575, 580 (D.C. Cir. 1983); *Smith v. Jenkins*, 452 A.2d 333 (D.C. 1982).

1 [As explained above, Plaintiffs also claim that Plaintiffs and Defendants had a
2 fiduciary relationship based on surrounding circumstances. A fiduciary relationship may
3 be inferred from the nature of the relationship, the promises made, the type of services or
4 advice given, and the legitimate expectations of the parties. A fiduciary relationship also
5 may be based in part on a contract if, through the past history of their relationship and
6 conduct, the parties extended their relationship beyond the limits of the contractual
7 obligations.²⁸]

8 If you find that Plaintiffs have proved the existence of a fiduciary relationship with
9 Defendants, then Defendants owed a fiduciary duty to Plaintiffs, and you must next determine
10 whether Defendants breached their fiduciary duty.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

26 ²⁸ *Church of Scientology, Int'l v. Eli Lilly & Co.*, 848 F. Supp. 1018, 1028 (D.D.C. 1994) (applying
27 D.C. law); *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 741, 769-70 (S.D.N.Y. 1990); *Schmidt v. Bishop*,
28 779 F. Supp. 321, 325 (S.D.N.Y. 1991); *Brown v. Coates*, 253 F.2d 36, 38 (D.C. Cir. 1958); *Int'l
Brotherhood of Teamsters v. Wirtz*, 346 F.2d 827, 832 (D.C. Cir. 1965).

1 **DISPUTED INSTRUCTION NO. 10 OFFERED BY DEFENDANTS**

2 **RE FIDUCIARY RELATIONSHIP**

3 Plaintiffs claim that Defendants owed Plaintiffs a fiduciary duty arising out of the Retired
4 Player GLA. A fiduciary duty exists only in certain relationships of special trust and confidence.
5 The mere existence of a contract does not give rise to a fiduciary relationship.

6 Plaintiffs claim that Plaintiffs and Defendants had a principal and agent relationship,
7 which is a fiduciary relationship. Plaintiffs have the burden to prove that Plaintiffs and
8 Defendants had a principal and agent relationship.²⁹

9 An agency relationship results when one person, called the principal, agrees that another
10 person, called the agent, shall act on the principal's behalf and subject to the principal's control,
11 and the agent agrees to do so.³⁰ **[To prove that the Retired Player GLA created a principal
12 and agent relationship, Plaintiffs must prove that the members of the GLA Class, such as
13 Mr. Adderley, had the right to control and direct Defendants in the performance of their
14 licensing activities.]**

15 **[The level of control necessary for Plaintiffs to prove that Defendants were Plaintiffs'**
16 **agents is whether the GLA Class Members had control over the day-to-day licensing**
17 **operations, and the methods and details, of the NFLPA and Players Inc's licensing**
18 **activities].³¹ To determine whether an agency relationship exists, you may look at the terms of**
19 **any contract, and the actual course of dealing between the parties.³²**

20 _____
21 ²⁹ *Restatement (Third) of Agency*, § 1.01 comment e (2006); *Metro. Life Ins. Co. v. Barbour*, 555 F.
22 Supp. 2d 91, 99 (D.>D.C. 2008); *H.G. Smithy Co. v. Washington Medical Center, Inc.*, 374 A.2d 891, 893
(D.C. 1977).

23 ³⁰ *C&E Servs. V. Ashland, Inc.*, 498 F. Supp. 2d 242, 264, (D.D.C. 2007); *Lott v. Burning Tree Club,*
24 *Inc.*, 516 F. Supp. 913, 917 (DD.C. 1980).

25 ³¹ *Jackson v. Loews Wash. Cinemas, Inc.*, 944 A.2d 1088, 1097 (D.C. 2008); *Judah v. Reiner*, 744 A.2d
26 1037, 1040 (D.C. 2000); *Ames v. Yellow Cab of D.C., Inc.*, No. 00-3116 (RWR)(DAR), 2006 WL 2711546,
*5 (D.D.C. Sept. 21, 2006).

27 ³² *Restatement (Third) of Agency*, § 1.01 (2006); *Rose v. Silver*, 394 A.2d 1368, 1371 (1978); *Judah*
28 *v. Reiner*, 744 A.2d 1037, 1040 (D.C. 2000); *Johnson v. Betchel*, 717 F.2d 575, 580 (D.C. Cir. 1983); *Smith*

1 If you find that Plaintiffs have proved the existence of an agency relationship with
2 Defendants, then Defendants owed a fiduciary duty to Plaintiffs, and you must next determine
3 whether Defendants breached their fiduciary duty.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

27 *v. Jenkins*, 452 A.2d 333 (D.C. 1982).

1 **DISPUTED INSTRUCTION NO. 11 OFFERED BY PLAINTIFFS**

2 **RE DUTIES OF A FIDUCIARY**

3 **[A fiduciary owes several duties to his principal. A fiduciary must exercise good**
4 **faith to his principal. A fiduciary is held to a standard of conduct stricter than the morals**
5 **of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is**
6 **the unbending and inveterate standard of behavior.³³**

7 **A fiduciary must also exercise the highest loyalty toward his principal, and act**
8 **loyally in the principal's interest as well as on the principal's behalf.³⁴ This means that the**
9 **fiduciary must put the principal's interests ahead of his own, as to all matters connected**
10 **with the relationship.³⁵ The fiduciary is also required to refrain from conduct that is**
11 **adverse to or likely to damage the principal's interests.³⁶]**

12 A fiduciary has a duty to act reasonably and with the care, competence and diligence
13 normally exercised by fiduciaries in similar circumstances. Special skills or knowledge possessed
14 by a fiduciary are circumstances to be taken into account in determining whether the fiduciary
15 acted with due care and diligence. **[If a fiduciary claims to possess special skills or knowledge,**
16 **the fiduciary has a duty to the principal to act with the care, competence and diligence**
17 **normally exercised by fiduciaries with such skill or knowledge.³⁷**

18 **A fiduciary has a duty to disclose all material facts relating to the relationship that**
19

20 ³³ *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928); *Johnson v. American Gen. Ins. Co.*, 296 F. Supp
21 802, 809 (D.D.C. 1969).

22 ³⁴ *Restatement (Third) of Agency*, §§ 8.01 and 8.11 (2006); *Restatement (Second) of Agency*, § 387
23 (1958); *Vicki Bagley Realty, Inc. v. Laufer*, 482 A.2d 359, 365 (D.C. App. 1984); *Jenkins v. Strauss*, 93 A.2d
1026, 1033 (D.C. App. 2007).

24 ³⁵ *Restatement (Third) of Agency*, §§ 13, 282 (1958); *Government of Rwanda v. Johnson*, 409 F.3d 368,
25 372 (D.D.C. 2005); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Cheng*, 901 F.2d 1124, 1128 (D.D.C.
1980).

26 ³⁶ *Restatement (Third) of Agency*, §§ 8.10 (2006); *Restatement (Second) of Agency*, § 380 (1958).

27 ³⁷ *Restatement (Third) of Agency*, §§ 8.08 (2006); *Restatement (Second) of Agency*, § 379 (1958);
28 *Restatement (Second) of Torts*, §§ 4, 323 (1965); *Aronoff v. Lenkin Co.*, 618 A.2d 669, 687 (D.C. App. 1992).

1 are unknown to his principal, all material facts the fiduciary believes the principal does not
2 know, and every material development affecting the principal's interest. It is not a defense
3 to a fiduciary's breach of duty to disclose material information that his principal could,
4 through investigation, have discovered independently.³⁸

5 A fiduciary has a duty not to acquire a material benefit from a third party in
6 connection with transactions conducted or other actions taken on behalf of the principal or
7 otherwise through the fiduciary's use of his position.³⁹]

8 Finally, a fiduciary has a duty to act in accordance with the express and implied terms of
9 any contract between the fiduciary and the principal.⁴⁰

10
11
12
13
14
15
16
17
18
19
20
21
22
23

24 ³⁸ *Restatement (Third) of Agency*, §§ 8.11 and comment d (2006); *Restatement (Second) of Agency*, §
25 381 (1958); *Vicki Bagley Realty, Inc. v. Laufer*, 482 A.2d 359, 365 (D.C. App. 1984); *Aronoff v. Lenkin Co.*,
26 618 A.2d 669, 687 (D.C. App. 1992); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Cheng*, 901 F.2d 1124,
1128 (D.D.C. 1980).

27 ³⁹ *Restatement (Third) of Agency*, §§ 8.02 (2006); *Restatement (Second) of Agency*, § 388 (1958).

28 ⁴⁰ *Restatement (Third) of Agency*, § 8.07 (2006); *Restatement (Second) of Agency*, §§ 376-378 (1958).

1 **DISPUTED INSTRUCTION NO. 11 OFFERED BY DEFENDANTS**

2 **RE DUTIES OF A FIDUCIARY**

3 **[A fiduciary must exercise good faith and loyalty to his principal.⁴¹]** A fiduciary has a
4 duty to act with the care, competence and diligence normally exercised by fiduciaries in similar
5 circumstances. Special skills or knowledge possessed by a fiduciary are circumstances to be taken
6 into account in determining whether the fiduciary acted with due care and diligence.⁴²

7 A fiduciary has a duty to act in accordance with the express and implied terms of any
8 contract between the fiduciary and the principal.⁴³

9 **[Plaintiffs must prove that Defendants' conduct constituted a breach of a fiduciary**
10 **duty.]**

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

⁴¹ *Halvonik v. Dudas*, 398 F.Supp.2d 115, 130 n.30 (D.D.C. 2005).

⁴² *Restatement (Third) of Agency*, § 8.08 (2006).

⁴³ *Id.* at § 8.07.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DISPUTED INSTRUCTION NO. 12 OFFERED BY PLAINTIFFS
RE BREACH OF FIDUCIARY DUTY - STATUTE OF LIMITATIONS⁴⁴

The District of Columbia Code provides that a claim for breach of fiduciary duty must be brought within three years of the time when the injury actually occurs. Plaintiffs filed their action against Defendants on February 14, 2007. **[To recover on their breach of fiduciary duty claim, Plaintiffs must have been injured or damaged after February 14, 2004.]**

⁴⁴ D.C. Code § 12-301(8) (2008); *Tolbert v. National Harmony Memorial Park*, 520 F. Supp. 2d 209, 212 (2007); *Mullin v. Washington Free Weekly, Inc.*, 785A.2d 298-88 (D.C. 2001); *Colbert v. Georgetown University*, 641 A.2d 469, 473 (D.C. 1994); *Burtoff v. Faris*, 935 A.2d 1086, 1088 (D.C. 2007).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**DISPUTED INSTRUCTION NO. 12 OFFERED BY DEFENDANTS
RE BREACH OF FIDUCIARY DUTY - STATUTE OF LIMITATIONS⁴⁵**

The District of Columbia Code provides that a claim for breach of fiduciary duty must be brought within three years of the time when the injury actually occurs. **[Plaintiffs filed their action against Defendants on February 14, 2007. If you decide to award damages, you may award Plaintiffs only those damages actually suffered after February 14, 2004.]**

⁴⁵ D.C. Code § 12-301(8) (2008); *Tolbert v. Nat'l Harmony Memorial Park*, 520 F. Supp. 2d 209, 212 (2007); *Mullin v. Wash. Free Weekly, Inc.*, 785 A.2d 296, 298 (D.C. 2001); *Colbert v. Georgetown Univ.*, 641 A.2d 469, 473 (D.C. 1994); *Burtoff v. Faris*, 935 A.2d 1086, 1088 (2007); *John McShain, Inc. v. L'Enfant Plaza Prop., Inc.*, 402 A.2d 1222, 1230 (D.C. 1979).

1 **DISPUTED INSTRUCTION NO. 13 OFFERED BY PLAINTIFFS**

2 **RE DAMAGES – INTRODUCTION** ⁴⁶

3 I will now instruct you on damages. It is the duty of the Court to instruct you about the
4 measure of damages. By instructing you on damages, the Court does not mean to suggest for
5 which party your verdict should be rendered.

6 If you find for Plaintiffs, the GLA Class members, on a particular claim, you must
7 determine the amount of damages they suffered. Damages means the amount of money which
8 will compensate the GLA Class members for any injury you find was caused by Defendants for a
9 particular claim. You may award the plaintiff damages that are based on a just and reasonable
10 estimate derived from relevant evidence.

11 The burden is on Plaintiffs to prove by a preponderance of the evidence that they sustained
12 damages for each item of damages claims, and it is for you to determine what damages, if any,
13 have been proved. Although Plaintiffs need not prove damages with mathematical certainty, there
14 must be some reasonable basis on which to estimate damages. Plaintiffs are not entitled to
15 recover damages which are speculative, remote, imaginary, contingent, or merely possible.

16 You should now consider the following further instructions I will give you.
17
18
19
20
21
22
23
24
25

26 ⁴⁶ *Ninth Circuit Manual of Model Jury Instruction (Civil)*, § 7.1 (modified); Devitt, Blackmar & Wolff,
27 *Federal Jury Instructions and Practice*, § 104.06 (4th ed., 1995 supp.); *Garcia v. Llerena*, 599 A.2d 1138,
28 1142 (D.C. 1991); *Bedell v. Inver. Housing, Inc.*, 506 A.2d 202, 205 (1986).

1 **DISPUTED INSTRUCTION NO. 13 OFFERED BY DEFENDANTS**

2 **RE DAMAGES – INTRODUCTION** ⁴⁷

3 I will now instruct you on damages. It is the duty of the Court to instruct you about the
4 measure of damages. By instructing you on damages, the Court does not mean to suggest for
5 which party your verdict should be rendered.

6 If you find for Plaintiffs, the GLA Class members, on a particular claim, you must
7 determine [**whether each individual class member suffered injury and, if so,**] the amount of
8 damages they suffered. Damages means the amount of money which will compensate the GLA
9 Class members for any injury you find was caused by Defendants for a particular claim. You may
10 award Plaintiffs damages that are based on a just and reasonable estimate derived from relevant
11 evidence.

12 The burden is on Plaintiffs to prove by a preponderance of the evidence that they sustained
13 damages for each item of damages claims, and it is for you to determine what damages, if any,
14 have been proved. Plaintiffs are not entitled to recover damages which are speculative, remote,
15 imaginary, contingent, or merely possible. On the other hand, the law does not require that
16 Plaintiffs prove the amount of their losses with mathematical precision, but only with reasonable
17 certainty.

18 You should now consider the following further instructions I will give you.
19
20
21
22
23
24

25 ⁴⁷ *Ninth Circuit Manual of Model Jury Instruction (Civil)*, § 5.1 (modified); *Modern Federal Jury*
26 *Instructions—Civil* No. 77-3 (modified); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238 n.8 (9th Cir.
27 1974) (Rule 23 “does not eliminate the ultimate need for individual proof of damages by each member of
28 the class.”); *Abuan v. General Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993) (Plaintiffs are required at some point
in the litigation to prove individual damages).

1 **DISPUTED INSTRUCTION NO. 14 OFFERED BY PLAINTIFFS**
2 **RE COMPENSATORY DAMAGES – BREACH OF CONTRACT CLAIM⁴⁸**

3 If you decide that Plaintiffs have proved their breach of contract claim against Defendants,
4 then the GLA Class members are entitled to recover as damages the sum of money that would put
5 the GLA Class members in the same economic position as they would have been if the contract
6 had not been breached by the Defendants.

7 The Plaintiffs have the burden to prove by a preponderance of the evidence the amount of
8 damages suffered by the GLA Class members. You may not award damages based on sympathy,
9 conjecture, speculation, guess work or punishment. On the other hand, the law does not require
10 that Plaintiffs prove the amount of damages with mathematical precision, but with reasonable
11 certainty.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

⁴⁸ Standardized Jury Instructions for the District of Columbia, § 11.31 (modified).

28

1 **DISPUTED INSTRUCTION NO. 14 OFFERED BY DEFENDANTS**
2 **RE COMPENSATORY DAMAGES – BREACH OF CONTRACT CLAIM⁴⁹**

3 If you decide that Plaintiffs have proved their breach of contract claim against Defendants,
4 then **[you must next determine whether each member of the GLA Class is entitled to a**
5 **proven amount of damages].**

6 **[The measure of damages is]** the sum of money that would put the GLA Class members
7 in the same economic position as they would have been if the contract had not been breached by
8 the Defendants. **[If proven, the GLA Class members are entitled to damages that were**
9 **foreseeable at the time the contract was made. Damages are foreseeable if they are the sort**
10 **that the parties would have reasonably envisioned, or are the sort that would flow naturally**
11 **and obviously from the breach of the contract.]**

12 The Plaintiffs have the burden to prove by a preponderance of the evidence the amount of
13 damages suffered by the GLA Class members. You may not award damages based on sympathy,
14 conjecture, speculation, guess work or punishment. On the other hand, the law does not require
15 that Plaintiffs prove the amount of damages with mathematical precision, but with reasonable
16 certainty.

25 ⁴⁹ Standardized Jury Instructions for the District of Columbia, § 11.31 (modified); *Kline v. Coldwell,*
26 *Banker & Co.*, 508 F.2d 226, 238 n.8 (9th Cir. 1974) (Rule 23 “does not eliminate the ultimate need for
27 individual proof of damages by each member of the class.”); *Abuan v. General Elec. Co.*, 3 F.3d 329, 334
28 (9th Cir. 1993) (Plaintiffs are required at some point in the litigation to prove individual damages); *Sears,*
Roebuck & Co. v. Goudie, 290 A.2d 826, 832-33 (D.C. 1972).

1 **DISPUTED INSTRUCTION NO. 15 OFFERED BY PLAINTIFFS**
2 **RE COMPENSATORY DAMAGES – BREACH OF FIDUCIARY DUTY⁵⁰**

3 The purpose of the law of damages is to compensate a plaintiff for the loss, if any, which
4 results from a defendant's conduct. If you find that the Plaintiffs have proven that Defendants
5 breached any fiduciary duty to Plaintiffs, then you should determine whether the GLA Class is
6 entitled to a proven amount of damages. Plaintiffs have the burden of proving damages by a
7 preponderance of evidence.

8 The measure of damages for breach of fiduciary duty is the amount of money necessary to
9 place the GLA Class in the same economic position it would have been in if Defendants had not
10 breached their fiduciary duty. In other words, the purpose of awarding damages to the GLA Class
11 for breach of fiduciary duty is to make them whole for any injuries they suffered.

12 Plaintiffs must first prove that they suffered economic injury as a result of Defendants'
13 breach of fiduciary duty. If Plaintiffs fail to meet their burden, then you may not award any
14 damages for that claim. If, however, you find that Plaintiffs suffered economic injury as a result
15 of Defendants' breach of fiduciary duty, then you may next consider whether Plaintiffs have
16 proven the amount of such damages.

17 In determining the amount of any such damages that you decide to award, you should be
18 guided by common sense and sound judgment, drawing reasonable inferences from the facts and
19 circumstances in evidence. You may not award damages based on sympathy, conjecture,
20 speculation, guess work or punishment. On the other hand, the law does not require that Plaintiffs
21 prove the amount of damages with mathematical precision, but with reasonable certainty.

22
23
24
25
26 ⁵⁰ Standardized Jury Instructions for the District of Columbia, §§ 12.1, 12.2, 12.3 (modified); *Modern*
27 *Federal Jury Instructions* No. 77-3; *West Federal Jury Practice and Instructions*, Vol. 3C, §§171.90, 171.92
28 (5th ed.); *Restatement (Third) of Agency*, § 8.01 comment d (2006); *Bedell v. Inver Housing, Inc.*, 506 A.2d
202, 205 (D.C. 1986).

1 **DISPUTED INSTRUCTION NO. 15 OFFERED BY DEFENDANTS**
2 **RE COMPENSATORY DAMAGES – BREACH OF FIDUCIARY DUTY⁵¹**

3 The purpose of the law of damages is to compensate a plaintiff for the loss, if any, which
4 results from a defendant's conduct. If you find that the Plaintiffs have proven that Defendants
5 breached any fiduciary duty to Plaintiffs, then you should determine whether **[each member of**
6 **the]** GLA Class is entitled to a proven amount of damages. Plaintiffs have the burden of proving
7 damages by a preponderance of evidence.

8 The measure of damages for breach of fiduciary duty is the amount of money necessary to
9 place **[each injured GLA Class member]** in the same economic position he would have been in
10 if Defendants' fiduciary duty had not been breached. In other words, the purpose of awarding
11 damages to the GLA Class for breach of fiduciary duty is to make them whole for any injuries
12 they suffered.

13 Plaintiffs must first prove that they suffered economic injury as a result of Defendants'
14 breach of fiduciary duty. If Plaintiffs fail to meet their burden, then you may not award any
15 damages for that claim. If, however, you find that **[individual]** Plaintiffs suffered economic
16 injury as a result of Defendants' breach of fiduciary duty, then you may next consider whether
17 Plaintiffs have proven the amount of such damages.

18 In determining the amount of any such damages that you decide to award, you should be
19 guided by common sense and sound judgment, drawing reasonable inferences from the facts and
20 circumstances in evidence. You may not award damages based on sympathy, conjecture,
21 speculation, guess work or punishment. On the other hand, the law does not require that Plaintiffs
22 prove the amount of damages with mathematical precision, but with reasonable certainty.

23
24
25 ⁵¹ *Modern Federal Jury Instructions—Civil No. 77-3 (modified); Standardized Jury Instructions for*
26 *the District of Columbia, §§ 12.01, 12.02, 12.03 (modified); Kline v. Coldwell, Banker & Co., 508 F.2d 226,*
27 *236 n.8 (9th Cir. 1974) (Rule 23 “does not eliminate the ultimate need for individual proof of damages by*
28 *each ember of the class.”); Abuan v. General Elec. Co., 3 F.3d 329, 334 (9th Cir. 1993) (Plaintiffs are required*
at some point in the litigation to prove individual damages); Peyton v. DiMario, 287 F.3d 1121, 1126-27
(D.C. Cir. 2002); Herbin v. Hoeffel, 806 A.2d 186, 196 (D.C. 2002); Bedell v. Inver Housing, Inc., 506 A.2d
202, 205 (D.C. 1986).

1 **DISPUTED INSTRUCTION NO. 16 OFFERED BY PLAINTIFFS**

2 **RE NOMINAL DAMAGES⁵²**

3 **[If you find that Defendants breached the Retired Player GLA, or that they breached**
4 **their fiduciary duties to the GLA Class, Plaintiffs are entitled to damages. However, if you**
5 **find that Plaintiffs have not proved any actual damages, or that Plaintiffs' proof is vague or**
6 **speculative, then you may award nominal damages to Plaintiffs. Nominal damages are a**
7 **small amount of money, such as one dollar, awarded without regard to the amount of loss.]**

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

⁵² *Standardized Jury Instructions for the District of Columbia*, § 1132 (modified); *Garcia v. Llerena*, 599 A.2d 1138, 1142 (D.C. 1991); *Roth v. Speck*, 126 A.2d 153, 155 (D.C. 1956).

1 **DISPUTED INSTRUCTION NO. 16 OFFERED BY DEFENDANTS**

2 **RE NOMINAL DAMAGES**⁵³

3 [If Plaintiffs have not met their burden to prove the amount of damages suffered by
4 each GLA Class member without resort to speculation or guesswork, then you may award
5 only nominal damages to the Plaintiffs. Further, if you find that Defendants breached the
6 Retired Player GLA, but such breach was immaterial, then you may award only nominal
7 damages to Plaintiffs for such an immaterial contract breach. Nominal damages are a very
8 small, symbolic amount of money, such as one dollar.

9 In this case, Plaintiffs have presented to you a damages claim based on their sharing
10 equally in distributions from the so-called GLR pool, which Defendants contend contained
11 revenues generated solely by, and belonging only to, active NFL players. Accordingly, you
12 cannot award more than nominal damages for breach of contract unless you find that
13 Defendants promised, pursuant to the terms of the Retired Player GLAs, to pay Plaintiffs an
14 equal share of the licensing revenues in the GLR pool and that these equal shares were owed
15 to the GLA Class members, as opposed to just active NFL players.

16 Similarly, you cannot award more than nominal damages for breach of fiduciary
17 duty unless you find that Plaintiffs have proven that Plaintiffs' damages claim based on
18 their receiving equal shares to the GLR pool reasonably estimates the injuries actually
19 incurred by each individual GLA Class member as a result of any breach of fiduciary duty
20 that you conclude took place.]

21
22
23
24
25
26
27 ⁵³ *Garcia v. Llerena*, 599 A.2d 1138, 1142 (D.C. 1991); Standardized Civil Jury Instructions for the
28 District of Columbia § 11.32 (2007).

1 **DISPUTED INSTRUCTION NO. 17 OFFERED BY PLAINTIFFS**

2 **RE DAMAGES – DISGORGEMENT**

3 **BREACH OF FIDUCIARY DUTY CLAIM ⁵⁴**

4 **[An additional form of damages available to Plaintiffs for Defendants' breach of**
5 **fiduciary duty is disgorgement. A fiduciary (here, the Defendants) who has acquired a**
6 **benefit by a breach of his duty as a fiduciary is under a duty of disgorgement to his**
7 **principal (here, the GLA Class members). The GLA Class members are entitled to obtain**
8 **the benefits derived by the Defendants through the breach of their fiduciary duties,**
9 **including, for example, any excess commission to which Defendants may not have been**
10 **entitled. For each violation of duty of loyalty, Plaintiffs need only to prove only that**
11 **Defendants breached their duty of loyalty, not that their breach proximately caused them**
12 **injury. Disgorgement is designed to deter fiduciary misconduct, a goal worth furthering**
13 **regardless of whether a particular client has been harmed. Unlike other forms of**
14 **compensatory damages, however, forfeiture reflects not the harms clients suffer from the**
15 **tainted representation, but the decreased value of the representation itself.]**

16
17
18
19
20
21
22
23
24
25
26
27 ⁵⁴ *In re Estate of Corriea*, 719 A.2d 1234, 1241 (D.C. 1998); *Sheldon v. Metro-Goldwyn Pictures*,
28 *Corp.*, 309 U.S. 390, 399 (1940); *Restatement (First) of Restitution*, (2008) § 138 and comment a; *Hendry*
v. Pelland, 73 F.3d 397, 402 (D.C. Cir. 1996).

1 **DISPUTED INSTRUCTION NO. 17 OFFERED BY DEFENDANTS**

2 **RE DAMAGES – DISGORGEMENT**

3 **BREACH OF FIDUCIARY DUTY CLAIM⁵⁵**

4 **[As set forth in Defendants' accompanying Memorandum, Defendants submit that**
5 **the jury should not be given any instruction regarding disgorgement. However, if the Court**
6 **overrules this objection and an instruction is given on this subject, Defendants propose the**
7 **following alternative instruction:**

8 **Disgorgement is an alternative form of damages available to Plaintiffs if a breach of**
9 **fiduciary duty is proven. Plaintiffs are not entitled to both compensatory damages and**
10 **disgorgement.**

11 **If you find that: (i) Plaintiffs proved that a fiduciary relationship existed and was**
12 **breached, and (ii) Plaintiffs cannot prove with required specificity the amount of damages**
13 **suffered, then you should next determine whether disgorgement is an appropriate remedy.**

14 **Disgorgement may be a remedy if the Defendants received a benefit from the breach**
15 **which unjustly enriched the Defendants. Disgorgement is not a penalty on the Defendant**
16 **and must be limited to the amount of any such benefit. Disgorgement is not an available**
17 **remedy if: (i) the Defendants did not retain some benefit to be disgorged or (ii) the principal**
18 **received the expected benefits from the fiduciary relationship.**

19 **Plaintiffs have the burden of proving all elements of their disgorgement damages by**
20 **a preponderance of the evidence.]**

21
22
23
24
25
26
27 ⁵⁵ *In re Estate of Corriea*, 719 A.2d 1234, 1240 (D.C. 1998); *Restatement (First) of Restitution*, (2008)
28 § 138 cmt. a; *Breezevale Ltd. v. Dickinson*, 879 A.2d 957, 970 n.12 (D.C. 2005).

1 **DISPUTED INSTRUCTION NO. 18 OFFERED BY PLAINTIFFS**
2 **RE PLAINTIFF MAY NOT RECOVER DUPLICATE CONTRACT AND TORT**
3 **DAMAGES**

4 **[As set forth in Plaintiffs' accompanying Memorandum, Plaintiffs submit that the**
5 **jury should not be given a separate instruction about duplicate contract and tort damages.]**

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**DISPUTED INSTRUCTION NO. 18 OFFERED BY DEFENDANTS
RE PLAINTIFF MAY NOT RECOVER DUPLICATE CONTRACT AND TORT
DAMAGES⁵⁶**

**[Plaintiffs have made claims against Defendants for breach of contract and breach of
fiduciary duty. If you decide that Plaintiffs have proved more than one of these causes of
action, the same damages that resulted from multiple claims can be awarded only once.]**

⁵⁶ *Doe v. Georgetown Center (II), Inc.*, 708 A.2d 255, 258 (D.C. 1998); *Franklin Inv. Co., Inc. v. Smith*,
383 A.2d 355, 358 (D.C. 1978).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STIPULATED INSTRUCTION NO. 19

RE DAMAGES – MITIGATION ⁵⁷

Plaintiffs have a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages. The efforts taken need not be successful, so long as they are reasonable. The duty to mitigate damages begins when the Plaintiffs knew, or should have known, of the breach.

The Defendants have the burden of proving by a preponderance of the evidence:

1. That Plaintiffs failed to use reasonable efforts to mitigate their damages; and
2. The amount of damages which could or should have been avoided by Plaintiffs.

⁵⁷ Standardized Jury Instructions for the District of Columbia, § 12.07 (modified); *Ninth Circuit Manual of Model Jury Instruction (Civil)*, 7.3; *Edward M. Crough, Inc. v. Department of General Services*, 542 A.2d 457, 466-67 (D.C. 1990); *Obelisk Corp. v. Riggs National Bank*, 668 A.2d 847, 856-57 (D.C. 1995).

1 **DISPUTED INSTRUCTION NO. 20 OFFERED BY PLAINTIFFS**
2 **RE GENERAL PUNITIVE DAMAGES – BREACH OF FIDUCIARY DUTY⁵⁸**

3 **[In addition to compensatory damages, the GLA Class members also seek an award**
4 **of punitive damages against Defendants. Punitive damages are damages above and beyond**
5 **the amount of compensatory damages you may award. Punitive damages are awarded to**
6 **punish a defendant for its conduct and to serve as an example to prevent others from acting**
7 **in a similar way.**

8 **You may award punitive damages only if the plaintiff has proved with clear and**
9 **convincing evidence⁵⁹ that the Defendants' conduct was willful and outrageous, exhibits**
10 **reckless disregard for the rights of others, or is aggravated by evil motive, actual malice, or**
11 **deliberate violence or oppression.⁶⁰ You may conclude that the defendant acted with a state**
12 **of mind justifying punitive damages based on direct evidence or based on circumstantial**
13 **evidence from the facts of the case.⁶¹**

14 **Breach of fiduciary duty can support a claim for punitive damages.⁶²]**

23 ⁵⁸ Standardized Jury Instructions for the District of Columbia, § 16.01 (modified).

24 ⁵⁹ Standardized Jury Instructions for the District of Columbia, § 16.01

25 ⁶⁰ *Cambridge Holdings Grp., Inc. v. Federal Ins. Co.*, 357 F. Supp.2d 89, 96 (D.D.C. 2004).

26 ⁶¹ Standardized Jury Instructions for the District of Columbia, § 16.01.

27 ⁶² *Wagman v. Lee*, 457 A.2d 401 (D.C.), *cert. denied*, 464 U.S. 849 (1983).

1 **DISPUTED INSTRUCTION NO. 20 OFFERED BY DEFENDANTS**
2 **RE GENERAL PUNITIVE DAMAGES – BREACH OF FIDUCIARY DUTY**

3 **[As set forth in Defendants’ accompanying Memorandum, Defendants submit that**
4 **the jury should not be given any instruction at all regarding punitive damages. However, if**
5 **the Court overrules this objection and an instruction is given on this subject, Defendants**
6 **propose that there should be only one instruction (not two, as Plaintiffs suggest) on punitive**
7 **damages. Defendants propose the following as their single alternative instruction:**

8 **In addition to compensatory damages, Plaintiffs also seek an award of punitive**
9 **damages against Defendants for their breach of fiduciary duty claim.**

10 **Plaintiffs are not seeking an award of punitive damages for their breach of contract**
11 **claim, and you may not award punitive damages for that claim.⁶³**

12 **Punitive damages are damages above and beyond the amount of compensatory or**
13 **nominal damages you may award. Punitive damages are awarded to punish a defendant for**
14 **his or her conduct and to serve as an example to prevent others from acting in a similar**
15 **way.**

16 **You may award punitive damages for breach of fiduciary duty only if Plaintiffs**
17 **prove with clear and convincing evidence that Defendants acted with evil motive, actual**
18 **malice, deliberate violence or oppression, or with intent to injure, or in willful disregard for**
19 **the rights of Plaintiffs, and that Defendants’ conduct itself was outrageous, grossly**
20 **fraudulent, or reckless toward the safety of Plaintiffs.⁶⁴**

21 **When a party has the burden of proving an issue by clear and convincing evidence,**
22 **he must produce evidence that creates in your minds a firm belief or conviction that he has**
23 **proved the issue.⁶⁵**

24 _____
25 ⁶³ *Cambridge Holdings Grp., Inc. v. Federal Ins. Co.*, 357 F. Supp.2d 89, 96 (D.D.C. 204); *Bragdon*
26 *v. Twenty-Five Twelve Assoc. Ltr. Partnership*, 856 A.2d 1165, 1173 (D.C. 2004).

27 ⁶⁴ Standard Instructions, § 16.01 (modified).

28 ⁶⁵ *In re Ingersoll Trust*, 950 A.2d 672, 693 (D.C. 2008).

1 **Punitive damages should be considered only in cases which present circumstances of**
2 **outrageous, grossly fraudulent or reckless conduct or extreme aggravation.**⁶⁶

3 **There is no rigid standard for measuring punitive damages, but the amount of**
4 **punitive damages awarded should bear some reasonable and proportionate relationship to**
5 **the actual damages Plaintiffs sustained and to the measure of punishment required for**
6 **Defendants.**⁶⁷

7 **If you do not award Plaintiffs compensatory or nominal damages, you cannot award**
8 **Plaintiffs punitive damages.**⁶⁸

9 **If you award punitive damages, you must state separately in you verdict the amount**
10 **you allow as compensatory damages and the amount you allow as punitive damages.]**

11
12
13
14
15
16
17
18
19
20
21
22
23
24

25 ⁶⁶ *Dist. Cablevision Ltd. P'shp v. Bassin*, 828 A.2d 714, 725-26 (D.C. 2003).

26 ⁶⁷ *Daka, Inc. v. McCrae*, 839 A.2d 682, 697-699 (D.C. 2003).

27 ⁶⁸ *Maxwell v. Gallagher*, 709 A.2d 100, 102 (D.C. 1998); *Bernstein v. Fernandez*, 649 A.2d 1064, 1073
28 (D.C. 1991).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DISPUTED INSTRUCTION NO. 21 OFFERED BY PLAINTIFFS
RE COMPUTATION OF PUNITIVE DAMAGES – BREACH OF FIDUCIARY DUTY⁶⁹

[If you find that the GLA Class members are entitled to an award of punitive damages, then you must decide the amount of the award. To determine the amount of the award you may consider the relative wealth of the Defendants at the time of trial, the nature of the wrong committed, the state of mind of the Defendants when the wrong was committed, the cost and duration of the litigation, and any attorney's fees that the GLA Class members have incurred in this case. Your award should be sufficient to punish Defendants for their conduct and to serve as an example to prevent others from acting in a similar way.]

⁶⁹ Standardized Jury Instructions for the District of Columbia, § 16.03.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DISPUTED INSTRUCTION NO. 21 OFFERED BY DEFENDANTS
RE COMPUTATION OF PUNITIVE DAMAGES – BREACH OF FIDUCIARY DUTY

[As set forth in Defendants' accompanying Memorandum, Defendants submit that the jury should not be given any instructions regarding punitive damages. However, if the Court overrules this objection and an instruction is given on this subject, Defendants propose that there should be only one instruction (not two, as Plaintiffs suggest) on punitive damages. See Disputed Instruction No. 20 Offered by Defendants for Defendants' proposed single alternative instruction.]