

Exhibit 5
to the
Clark Declaration

1 revenue, Defendants retained additional amounts of such revenue in violation of the GLAs, and
2 improperly re-allocated \$8 million in licensing revenue, keeping such revenue for themselves
3 rather than distributing it, as they were required to do, to NFLPA members who signed a GLA,
4 including retired players.

5 37. The NFLPA-PLAYERS Agreement does not specifically provide for the
6 distribution of the remaining forty percent (40%) of gross licensing revenue. In accordance with
7 the GLAs signed by Adderley and other retired players, this remaining revenue should have been
8 paid directly to players or paid out as additional royalty to NFLPA members. Adderley does not
9 know the disposition of such funds and will need an accounting to determine what has happened to
10 those funds. Adderley's legal remedies are not sufficient to obtain this information.

11 38. However, in an amendment to the NFLPA-PLAYERS Agreement dated February
12 28, 2006, but effective as of March 1, 2005 (the "2005 Amendment"), the NFLPA and PLAYERS
13 INC agreed, unilaterally and without notice to retired players, that eight million dollars
14 (\$8,000,000) of gross licensing revenue should be "reallocated" among the NFLPA and PLAYERS
15 INC. This amendment (attached as **Exhibit I** and incorporated herein by reference) notes that "the
16 NFLPA and Players Inc currently retain 30% and 33% respectively of marginal amounts of gross
17 licensing revenue", and then goes on to provide that:

18 Notwithstanding the other provisions of this Section 4, \$8,000,000
19 of the amount described in Section 4(A) [gross licensing revenue]
20 shall be paid out of the licensing revenue depository account
21 established to disburse amounts payable to the NFLPA and Players
22 Inc. with the depository account paying 60% of such amount to the
23 NFLPA and 40% of such amount to Players Inc. See **Exhibit I**.

24 39. Thus, instead of complying with the express terms of the GLAs signed by Adderley
25 and other retired members of the NFLPA, PLAYERS INC has, on information and belief, with the
26 concurrence of or at the direction of the NFLPA, diverted millions of dollars from the licensing
27 revenue depository account to PLAYERS INC and the NFLPA. On information and belief, this
28 money was used to support the overhead, substantial salaries and perquisites of those entities.

1 **F. THE NFLPA AND PLAYERS INC HAVE BREACHED FIDUCIARY**
2 **OBLIGATIONS TO THOSE RETIRED PLAYERS WHO, LIKE**
3 **ADDERLEY, JOINED THE NFLPA AND ASSIGNED THEIR GROUP**
4 **LICENSING RIGHTS TO THE NFLPA**

4 40. As detailed in Section V(A) above, the NFLPA and PLAYERS INC have solicited
5 retired players, including Adderley and other members of the GLA Class, to participate in the
6 Retired Players Group Licensing Program through execution of GLAs. Although the GLA signed
7 by Adderley and, on information and belief, other GLA Class members, contains language
8 indicating it is a “non-exclusive” license, as stated on PLAYERS INC’s website dated February 6,
9 2007, the group licensing program actually operates in practice like an “exclusive” license:

10 When a player signs an NFLPA Group Licensing Assignment (GLA) or assigns his
11 group licensing rights to the NFLPA, *he gives the NFLPA the exclusive right to*
12 *use his name, number, likeness, voice, facsimile signature, photograph, picture,*
13 *and/or biographical information (collectively “image”) in licensed programs*
14 *involving six or more players.* The NFLPA has assigned, and will continue to
15 assign, those rights to PLAYERS INC. (emphasis added). *See Exhibit E.*

14 41. The language on PLAYERS INC’s website does not distinguish between active and
15 retired players.

16 42. In fact, the most recent agreement between PLAYERS INC and EA, the EA 2005
17 Agreement, contains a provision that the licensee “shall not secure or seek to secure, directly from
18 any player who ... at any time in the past was under contract to an NFL club, or from such player’s
19 agent, permission or authorization for the use of such player’s name, facsimile signature, image,
20 likeness (including without limitation, number) photograph or biography in conjunction with the
21 [licensed products].” *See, e.g., Exhibit G* attached hereto and incorporated herein by reference.
22 On information and belief, most, if not all other agreements between PLAYERS INC and licensees
23 of PLAYERS INC contain this same language.

24 43. In a memorandum to NFLPA Contract Advisors in 2006 (a copy of which is
25 attached hereto as **Exhibit J** and incorporated by reference), Doug Allen also confirmed how
26 broadly the GLAs were interpreted by PLAYERS INC:

1 “Exclusive Sponsorship Agreement between Players Inc and NFL

2 • Provides exclusive player group licensing rights and exclusive use of
 3 Players Inc logo to NFL national sponsors...

* * *

4 • Provides that all contact with any NFL player regarding player’s
 5 participation in NFL sponsorship program (including contact with player’s
 6 agent or marketing representative) must be through Players Inc....”

7 “Effect of Sponsorship Agreement on NFL Club or Local Sponsor Use of Players

* * *

8 • Player group licensing rights are defined as the use of six or more player
 9 names and/or images in commonly branded retail licensed products,
 10 promotions, or sponsorship programs, calculated on a national basis during
 11 an annual period from March 1-February 28. Player group licensing does
 12 not require that six players be utilized on the same product or
 13 advertisement at the same time;

14 • For example, if Coca Cola utilized a different player identity in each of six
 15 team cities to activate local sponsorship programs, Players Inc.’s exclusive
 16 group licensing rights threshold would be crossed and Coca Cola would
 17 require a Players Inc license for such use, even though in any of the six
 18 cities only one player from that cities’ team would be used;

* * *

19 44. Although Allen has claimed that his memorandum dealt specifically with active
 20 NFL players and not retired NFL players, his interpretation of key provisions of the GLA form
 21 apply equally to retired players. For example, the extremely broad definition of the “six player”
 22 threshold for group licensing would be applied in the same way to retired players as it would to
 23 active players and would preclude retired players such as Adderley from making *individual* deals
 24 with many national or local NFL sponsors. When asked to explain the restrictions of the GLA as
 25 interpreted by the NFLPA and PLAYERS INC, Allen could not provide a clear explanation of how
 26 the six player restrictions would operate, suggesting instead that each situation would depend on a
 27 host of variables that would have to be discussed and negotiated between the retired player and
 28 PLAYERS INC. In other words, PLAYERS INC retained the right and power to claim that the
 retired player’s effort to market would in some way impinge on the authorization granted to the
 NFLPA or a license restriction between PLAYERS INC and potential sponsors or licensees.

1 Against this backdrop, Adderley alleges the following bases for his breach of fiduciary
2 duty claims against Defendants:

3 **1. The GLAs Create an Express Agency Relationship**

4 45. As the representative of the retired players who have signed a GLA during the class
5 period, Defendants have created, and accepted, an express agency relationship between themselves
6 and the retired players. Defendants had the ability to negotiate and ultimately execute licensing
7 agreements on behalf of Adderley and the GLA Class by virtue of the GLAs. According to Allen's
8 testimony, Adderley and other retired players retained control over PLAYERS INC's conduct by
9 having the ability to approve all personal appearances and additional services that might be
10 requested by a licensee. Adderley and other retired players also retained control over PLAYERS
11 INC's conduct under the GLA by having the ability to withdraw their participation in Defendants'
12 Group Licensing Program, and to terminate the relationship. As the documents and testimony
13 detailed herein confirm, PLAYERS INC requested retired players like Adderley to sign specific
14 contracts for such events as promotional appearances and card signings. Nevertheless, the annual
15 GLAs signed by Adderley and, on information and belief, other GLA Class members, granted
16 Defendants the express right to market the image of Adderley and other GLA Class members.

17 **2. The GLAs and Surrounding Circumstances Create an Agency
18 Relationship by Operation of Law And/Or As Can Be Inferred or
19 Implied by the Conduct of the Parties and Surrounding Circumstances**

20 46. The GLAs also create an agency relationship, either by operation of law and/or as
21 can be inferred or implied based on the conduct of the parties and the circumstances of the case.
22 Upon information and belief, Defendants have enjoyed substantial benefits from these agency
23 relationships, and Defendants should now be estopped from disavowing their resulting obligations.
24 The NFLPA entered into the GLAs with retired players and then assigned the rights to PLAYERS
25 INC who enforced and acted upon them, on information and belief, with the consent and approval
26 of the NFLPA.

27 47. In addition, Defendants have assumed a fiduciary relationship with the retired
28 players who signed GLAs and are obligated to act with the highest duty of loyalty and regard for
the interests of those retired players. These duties include fiduciary obligations that arise, among

1 other ways, from the NFLPA's role as an association in which those retired players who signed
2 GLAs were also members. On information and belief, any retired player who signed a GLA was
3 also a member of the NFLPA.

4 48. Adderley and, on information and belief, other members of the GLA Class, relied
5 on the Defendants to act in good faith and to represent their best interests in connection with group
6 licensing opportunities. Because of this, Adderley and other members of the GLA Class did not
7 pursue licensing opportunities on their own behalf. Even if they had, however, their efforts would
8 have been highly unlikely to succeed. As noted above, although the GLAs signed by Adderley,
9 and by other members of the GLA Class during the limitations period, are purportedly "non-
10 exclusive", the actual operation of the GLAs and other agreements, and the interpretation of them
11 by the NFLPA and PLAYERS INC, effectively rendered Adderley and the other class members
12 powerless to market themselves in connection with football or with many potential sponsors.

13 49. Adderley and other members of the GLA Class also relied on language of the GLAs
14 – which provided for distribution of licensing revenue to all eligible NFLPA members who have
15 signed a GLA – in deciding to participate in the Retired Players Group Licensing Program, and in
16 authorizing Defendants to represent them in connection with group licensing opportunities. In
17 doing so, Adderley and other GLA Class members reasonably expected that the NFLPA and
18 PLAYERS INC would act in good faith towards them, and would distribute to them a portion of
19 group licensing revenue received as promised, *regardless of whether their individual images were*
20 *ever used.*

21 50. Defendants owed Adderley and each represented NFLPA member a fiduciary duty
22 to act in a fair and equitable manner consistent with the best interests of retired players. Instead,
23 Defendants have acted in an arbitrary, capricious and inequitable manner, contrary to their
24 fiduciary obligations. In addition to admitting that they did not provide an accounting to the retired
25 players other than the payments themselves, Defendants actively hid such information from the
26 retired players, such as the NFLPA-PLAYERS Agreement (see paragraphs 14, 29-35 above).

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3. Defendants Breached the Fiduciary Duties Owed to Adderley and Other Retired Players Who Signed GLAs

51. Without the knowledge of retired players such as Adderley, PLAYERS INC licensed the rights of retired players to licensees such as EA in exchange for very substantial guaranteed minimum payments totaling millions of dollars per year. These licensee payments were not segregated between active and retired players and were paid to PLAYERS INC and the NFLPA regardless of whether the images of any individual players were used.

52. Without the knowledge of retired players such as Adderley, PLAYERS INC and the NFLPA have arbitrarily, wrongfully and in violation of the rights of retired players, excluded retired players from the “equal share royalty” paid to active players from such funds and have failed to distribute group licensing revenue to retired players that they were obligated, in good faith, to distribute. Defendants unfairly and wrongfully excluded retired players (without their knowledge) from any “equal share royalty” by, among other things, defining “gross licensing revenues” and/or “eligibility” in a way that excludes the retired players, even though there is no valid basis on which to do so and even though such conduct breaches the GLA.

53. The NFLPA has placed itself in a position of conflict of interest in violation of its fiduciary duty by choosing to pay active players (who vote on the management of the NFLPA) and appropriating or “re-allocating” substantial sums of money for itself from such funds, while excluding retired players from a share of the equal share, guaranteed royalties. The actions of PLAYERS INC and the NFLPA are particularly egregious because Defendants kept secret from, and refused to provide to, Adderley and other retired players the pertinent and critical information that would have revealed their actions, leaving such players unable to know what was happening and unable to protect themselves.

54. More specifically, Defendants have violated fiduciary duties to Adderley and the putative class in at least the following ways:

- PLAYERS INC and the NFLPA have violated a continuing duty to GLA Class members to accurately report such revenues to members of the GLA Class, and they

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have violated a duty to report such revenues to the members of the GLA Class in a timely fashion;

- PLAYERS INC and the NFLPA have not, on information and belief, distributed revenues to the members of the GLA Class that should have been distributed and were owed to them;
- PLAYERS INC and the NFLPA have arbitrarily, capriciously and wrongfully excluded retired players from the “equal share” royalty paid from sixty percent (60%) of gross licensing revenue;
- PLAYERS INC and the NFLPA have misappropriated funds totaling eight million dollars (\$8,000,000) or more that should have been paid, in part, to Adderley and the GLA Class; and
- PLAYERS INC and the NFLPA have placed themselves in a position of conflict of interest and have acted adversely to the interest of retired NFL players who signed a GLA.

55. As a result of the unlawful conduct complained of above, Adderley seeks an accounting of the funds received and distributed by PLAYERS INC in connection with its claimed representation of retired players who signed a GLA. Adderley also seek damages on behalf of the putative class, in an amount to be proven at trial, which, on information and belief, will exceed the jurisdictional amount of \$5 million.

1 **VI. SUBSTANTIVE ALLEGATIONS OF PARRISH AND THE NFLPA MEMBERS**
2 **WHOM THE RECORDS OF THE NFLPA SHOW DID NOT SIGN A GLA**

3 **A. THE NFLPA AND PLAYERS INC HAVE A FIDUCIARY OBLIGATION**
4 **TO PARRISH AND THOSE RETIRED PLAYERS WHO WERE**
5 **MEMBERS OF THE NFLPA, BUT, ACCORDING TO THE NFLPA,**
6 **DID NOT SIGN A GLA**

7 56. The NFLPA provides for membership of retired NFL players, and solicits the
8 membership of such retired NFL players in exchange for dues. In particular, the NFLPA's
9 Constitution, enacted in March 1994 and, on information and belief, in effect during the relevant
10 limitation period until it was amended in March of 2007, recognizes that that because ". . . retired
11 players still have a stake in the actions of the NFLPA, the Board of Player Representatives has
12 authorized a retired players organization." See **Exhibit K** (NFLPA Constitution dated March
13 1994), Art. II, p. 6, attached hereto and incorporated by reference.

14 57. On information and belief, in the fall of 2003, the NFLPA solicited retired NFL
15 players to join (or renew their membership) in the NFLPA, including Parrish and other members of
16 the Retired NFLPA Member Class. See letter from Douglas F. Allen to "NFLPA Member" in the
17 fall of 2003, (attached hereto as **Exhibit L** and incorporated herein by reference). See also March
18 15, 2006 Letter from NFLPA Retired Players Steering Committee to Bernie Parrish attached hereto
19 as **Exhibit M**. Parrish and Adderley received this Fall 2003 letter.

20 58. Parrish paid membership dues to the NFLPA at least in 2005, and his membership
21 expired in April 2006. The NFLPA does not have any record of Parrish signing a GLA within the
22 statute of limitations period.

23 59. Among other things, the NFLPA Constitution provided that all retired members had
24 a right to . . . :

25 *Receive NFLPA publications, the retired player publications, and other*
26 *information which may affect his retirement benefits or other benefits he may*
27 *be entitled to as an NFL player.*

28 **Exhibit K** (NFLPA Constitution), Art. II, p.7 (emphasis added).

56. On various occasions, PLAYERS INC has made inconsistent, misleading, and
ambiguous representations about the number of retired players that it purports to represent and the
rights it has licensed on behalf of retired players. As of February 6, 2007 (before the original

1 complaint in this matter was filed), PLAYERS INC's website stated that PLAYERS INC
2 represents "over 3000 retired players." See **Exhibit E**. Shortly after this complaint was filed,
3 however, PLAYERS INC changed its website to say that PLAYERS INC represents "many
4 memorable retired NFL players."

5 61. PLAYERS INC has now conceded that it "represents" all retired NFLPA members,
6 *whether or not they ever signed a GLA*, because those players were "available" to PLAYERS INC
7 *by virtue of their membership in the NFLPA*:

8 PLAYERS INC admits that it has previously made statements
9 regarding "representing" specific numbers of retired players but a
10 reasonable inquiry has not disclosed any statements in which
11 Players Inc. purported to represent "all" retired players. With
12 respect to its previous statements regarding "representing" specific
13 numbers of retired layers, Players Inc was indicating that it had
14 access to certain numbers of retired players via the NFLPA Retired
15 Players Association, and that Players Inc had the ability to solicit
16 the participation of such players in licensing activities to the extent
17 that potential third-party licensees indicated an interest in pursuing
18 licensing opportunities with such players.

14 See **Exhibit N** (Responses to Requests for Admission, No. 1), attached hereto and incorporated by
15 reference.

16 62. Indeed, Doug Allen similarly confirmed (as stated on PLAYERS INC's website)
17 that PLAYERS INC represented *all* retired members of the NFLPA:

18 Q. So you, as President of PLAYERS INC believed it was accurate to say that
19 PLAYERS INC represented all retired members of the NFLPA?

20 A. Yes.

21 See **Exhibit O** (Allen Tr., 58:2-5)

22 63. He verified that retired players, like active players, "became available to NFL
23 sponsors exclusively through PLAYERS INC", and explained that PLAYERS INC's
24 representation of retired NFLPA members was "[f]or the purpose of providing access to them for a
25 number of opportunities. Group licensing was part of it, but not all of it." *Id.*, **Exhibit O** (Allen
26 Tr., 34:22-24, 36:19-37:4, 58:13-15).

27 64. By virtue of offering membership in the NFLPA after retirement in exchange for
28 dues and/or in order to gain access to retired players' rights by virtue of their membership in the

1 NFLPA, the NFLPA and PLAYERS INC stand in a fiduciary relationship to Parrish and other
2 members of the Retired NFLPA Member Class.

3 **1. Membership in the NFLPA and Surrounding Circumstances Create**
4 **an Agency Relationship by Operation of Law And/Or As Can Be**
5 **Inferred or Implied by the Conduct of the Parties and Surrounding**
6 **Circumstances**

6 65. The NFLPA and PLAYERS INC have entered into an agency relationship, either by
7 operation of law and/or as can be inferred or implied based on the conduct of the parties and the
8 circumstances of the case, with retired NFLPA members who did not sign a GLA, according to the
9 records of the NFLPA. The NFLPA solicited the membership from these retired NFL players, and
10 by virtue of their membership in the NFLPA, PLAYERS INC has admitted that it represented
11 these retired players.

12 66. Upon information and belief, Defendants have enjoyed substantial benefits from
13 these agency relationships, including receipt of dues and access to these retired players for
14 purposes of pursuing commercial and marketing opportunities with existing and potential NFL
15 sponsors, and Defendants should now be estopped from disavowing their resulting obligations.

16 67. When deciding to join the NFLPA and in paying dues, Parrish, and, on information
17 and belief, other Retired NFLPA Members, relied on the NFLPA's membership solicitation and
18 promises (as set forth in correspondence and in the NFLPA Constitution). They reasonably
19 expected that in exchange for their payment of dues and membership in the NFLPA, Defendants,
20 including their Chairman, would act in good faith on their behalf and/or refrain from disavowing
21 any obligation to work for or on behalf of retired NFLPA members.

22 68. By virtue of its purported representation of Parrish, PLAYERS INC and the NFLPA
23 undertook a duty to inform them of potential benefits owing to them in connection with
24 opportunities that were pursued on behalf of retired members.

25 69. Parrish and, on information and belief, other Retired NFLPA Members would not
26 have paid dues had they known that Defendants would not have undertaken to act on their behalf in
27 good faith or to provide them with accurate and complete information regarding benefits to which
28 they might be entitled.

1 70. The NFLPA and PLAYERS INC have actively solicited retired membership in the
2 NFLPA from retirees, not only in exchange for payment of dues, but to provide Defendants with
3 the desired access to these players for purposes of pursuing commercial activities, including, but not
4 limited to, licensing of retired players' rights. More specifically, Defendants have a complete
5 monopoly over information relevant to retired NFLPA benefits, including “. . . information which
6 may affect [their] retirement benefits or other benefits [they] may be entitled to as [] NFL
7 player[s].” See **Exhibit K** (NFLPA Constitution), Art. II, p. 7. For example, Defendants did not
8 inform retired NFL players of such significant agreements as the NFLPA-PLAYERS Agreement.
9 See **Exhibit D**.

10 71. Under the terms of the NFLPA Constitution, retired players pay membership dues
11 and are acknowledged to “have a stake in the actions of the NFLPA”. Nevertheless, retired players
12 receive no information from PLAYERS INC regarding commercial or other opportunities pursued
13 on their behalf.

14 72. Indeed, Gene Upshaw, Executive Director of the NFLPA and Chairman of
15 PLAYERS INC, has repeatedly stated that “he does not work for retired players.” In an article
16 dated January 15, 2006 in the *Charlotte Observer* (attached hereto as **Exhibit P** and incorporated
17 by reference), Mr. Upshaw was quoted as saying about the retired players:

18 The bottom line is, I don't work for them. They don't hire me, and they
19 can't fire me. They can complain about me all day long. They can have
20 their opinion. But the active players have the vote. That's who pays my
21 salary.

22 73. Shortly after making such comments, Mr. Upshaw addressed the issue of retiree
23 benefits in a January 20, 2006 memo to the NFLPA Retired Members. See **Exhibit Q**, attached
24 hereto and incorporated by reference.

25 74. In that memo, Mr. Upshaw noted that “[m]uch has been made of my recent
26 comments to the *Charlotte Observer*.” See **Exhibit Q**. He further confirmed that “I stand by what
27 I said.” *Id.*

28 75. Parrish received a copy of the January 20, 2006 memo from Mr. Upshaw, and
believed that his statements were a confirmation that the Defendants had breached their obligations

1 to retired members. These statements were exacerbated by Mr. Upshaw in a quote in a February
2 16, 2007 *New York Times* article that he has admitted making about retired player licensing: “We
3 could have the greatest dog food in the world, but if the dogs don’t like it, we can’t sell it.”

4 **Exhibit R.**

5
6 **B. THE NFLPA AND PLAYERS INC HAVE BREACHED THEIR FIDUCIARY OBLIGATIONS TO PARRISH AND THOSE RETIRED PLAYERS WHO WERE MEMBERS OF THE NFLPA BUT DID NOT, ACCORDING TO THE NFLPA, SIGN GLAS**

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9 76. As confirmed by Mr. Upshaw, the NFLPA and PLAYERS INC have breached their
10 fiduciary obligations to Parrish and other members of the Retired NFLPA Member Class by
11 admitting that they do not work for these retirees at all. At a minimum, Mr. Upshaw’s statements
12 reflect a lack of good faith representation on those admittedly represented by Defendants. In
13 addition, Mr. Upshaw’s statements reflect the exploitation of those retired members who joined the
14 NFLPA.

15 77. Defendants have also failed to provide Parrish, and on information and belief, other
16 members of the Retired NFLPA Member Class, with information affecting other benefits to which
17 they may be entitled, including but not limited to the fact that PLAYERS INC was licensing retired
18 player rights to licensees like EA, regardless of whether those players’ images were ever used.
19 Defendants’ failure to provide such information directly and plainly contravenes relevant
20 provisions of the NFLPA Constitution, and further violates Defendants’ obligation to act on behalf
21 of retired NFLPA members in good faith.

22 78. More specifically, Defendants have breached their fiduciary duties to Parrish, and
23 other members of the Retired NFLPA Member Class, in at least the following ways:

- 24
- 25 • By failing to provide them with accurate and complete information relevant to benefits to
26 which they might be entitled, including licensing and marketing benefits;
 - 27 • By failing to act in good faith towards retired NFLPA members by acknowledging that
28 they do not work for retired members; and