

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

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

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

Plaintiffs,

v.

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

Defendants.

Case No. C 07 0943 WHA

**[PROPOSED] ORDER
SUMMARIZING RULINGS MADE
BY THE COURT AT THE
PRETRIAL CONFERENCE HELD
ON OCTOBER 15, 2008¹**

Date:
Time:
Ctrm: 9
Judge: William H. Alsup

¹ Plaintiffs worked with Defendants in the drafting of this [Proposed] Order, but were unable to agree because of a fundamental difference concerning its contents. Unlike Plaintiffs, who believe this Order should only incorporate express rulings by this Court, Defendants sought to include issues that were discussed by the parties, but that were not ultimately decided.

1 The Court, having considered Defendants' Motions in Limine Nos. 1, 2, 3, 4, 5, 6
2 and 7 and Plaintiffs' Motions in Limine Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in addition to other
3 matters raised by the parties at the Pretrial Conference held on October 15, 2008, hereby orders
4 as follows:

5 **MOTIONS IN LIMINE**

6 The parties preserve their rights to approach the Court outside the presence of the
7 jury or to submit further briefing to the Court to obtain permission to admit evidence that was
8 excluded, as a preliminary matter, by the rulings made by the Court at the pretrial conference. In
9 particular, in the event one party opens the door to evidence preliminarily excluded at the pretrial
10 conference, the other party may approach the Court outside the presence of the jury to obtain
11 permission to admit such evidence. In addition, the parties preserve their rights to object to the
12 admissibility of any evidence, document or testimony for reasons not before the Court at the
13 pretrial conference.

14 **DEFENDANTS' MOTIONS IN LIMINE**

15 **Defendants' Motion in Limine No. 1.** Granted in part and denied in part.
16 Evidence relating to the compensation of Gene Upshaw shall be excluded. Evidence relating to
17 Defendants' economic wealth shall be excluded unless and until any supplemental jury
18 proceeding on punitive damages. Evidence relating to the specific salaries or economic wealth
19 of individual employees of the Defendants or of active NFL players shall also be excluded,
20 subject to the terms and preservation of rights in the parties' Stipulation Regarding Motions in
Limine (Paragraph 3). Plaintiffs may submit evidence regarding any flow of funds from
licensees through Defendants to active players, retired players, and anyone else, subject to Rule
403.

21 **Defendants' Motion in Limine No. 2.** Denied.. Gene Upshaw's statements in
22 the July 28, 2006 Charlotte Observer article shall not be excluded.

23 Defendants have submitted additional briefing on the issue of whether Mr.
24 Upshaw's statements in that newspaper article related solely to the representation of retired
players in collective bargaining and should, on that basis, be excluded. The Court has not ruled
on this supplemental submission.

25 **Defendants' Motion in Limine No. 3.** Granted. Plaintiffs may not introduce
26 evidence relating to Plaintiffs' complaints about ad hoc license agreements, including but not
27 limited to such evidence relating to the license agreement between Electronic Arts, Inc. ("EA"),
the Pro Football Hall of Fame, and Players Inc.

1 **Defendants' Motion in Limine No. 4.** Granted in part and denied in part.
2 Plaintiffs' expert economist, Dr. Daniel A. Rascher, will be permitted to offer his opinion
3 expressly disclosed on pages 4 and 5 of his expert report. Dr. Rascher's opinion that the share of
4 the gross licensing revenue ("GLR") pool retained by Defendants exceeds a "customary" amount
5 shall be permitted. Dr. Rascher's opinion that the "custom" is for group licensing revenues to be
6 shared equally by organizations other than the NFLPA shall be excluded. Dr. Rascher's opinion
7 that Defendants have leverage akin to market power shall be permitted.

8 **Defendants' Motion in Limine No. 5.** Denied.. Plaintiffs' expert, Mr. Phillip Y.
9 Rowley, shall be permitted to testify as to his arithmetic calculation of different damages
10 amounts based upon various assumptions provided to him as to liability.

11 **Defendants' Motion in Limine No. 6.** The Court reserves ruling and will hold
12 an evidentiary hearing at a date to be determined to decide whether Mr. Rhee may testify. The
13 Court will separately determine whether Mr. Rhee's Trial Exhibit 1240 ("Samples of 'Scrambled'
14 Class Members") constitutes a compilation under F.R.E. 1006. Trial Exhibit 1239 may be
15 introduced as a compilation.

16 **Defendants' Motion in Limine No. 7.** Denied. Plaintiffs will be permitted to
17 introduce evidence with respect to the alleged "scrambling" of GLA Class members in EA's
18 Madden NFL video games.

19 Defendants plan to submit a proposed curative instruction directing the jury that
20 such alleged "scrambling" of GLA Class members did not violate any retired player's intellectual
21 property rights.

22 **PLAINTIFFS' MOTIONS IN LIMINE**

23 **Plaintiffs' Motion in Limine No. 1.** Granted. Evidence and testimony regarding
24 Bernard Parrish, including deposition testimony, documents authored by Mr. Parrish, and
25 communications authored or received by Mr. Parrish, shall be excluded

26 **Plaintiffs' Motion in Limine No. 2.** Denied. Evidence regarding the possibility
27 or propriety of Plaintiffs suing additional parties for relief shall not be excluded.

28 **Plaintiffs' Motion in Limine No. 3.** Granted in part and denied in part.
Defendants shall not refer to payments to RFPFJ allegedly withheld by Mr. Parrish. In all other
respects, the motion is denied and evidence relating to Herbert Adderley's relationship with
RFPFJ shall not be excluded.

Plaintiffs' Motion in Limine No. 4. The Court reserves ruling and the parties
submitted further briefing on October 17, 2008.

Plaintiffs' Motion in Limine No. 5. Granted. References to the putative class
that was not certified, or any superseded or dismissed claim in this action, shall be excluded.

1 **Plaintiffs' Motion in Limine No. 6.** Denied. Testimony by Mr. Adderley
2 regarding how he signed his GLA and the circumstances, as well as his expectations as to the
3 GLA, shall not be excluded.

4 **Plaintiffs' Motion in Limine No. 7.** Granted in part and denied in part.
5 Defendants may not introduce into evidence any document responsive to Document Request No.
6 31 to Players Inc and/or Document Request No. 33 to the NFLPA, other than the documents
7 responsive thereto that Defendants produced (i.e., the NFL Sponsorship and Internet
8 Agreements). Exclusion of any testimony is denied.

9 **Plaintiffs' Motion in Limine No. 8.** Pursuant to the attached stipulation,
10 evidence and argument about Plaintiffs' counsel's contingent interest shall not be admissible.
11 Exhibits 160, 307, and 321 shall be redacted to remove references to counsel and their law firms.

12 **Plaintiffs' Motion in Limine No. 9.** Pursuant to the attached stipulation,
13 evidence or testimony by any party relating to the Justin v. Players Inc lawsuit shall be excluded.

14 **Plaintiffs' Motion in Limine No. 10.** Granted. Evidence of homages to Gene
15 Upshaw, including the "GU 63" patches, shall be excluded.

16 OTHER RULINGS

17 **Joint binder of exhibits.** The parties shall provide a joint binder to the Court
18 with the exhibits they believe would be most helpful to the Court, including samples of the most
19 significant contracts. Plaintiffs shall highlight portions of the documents in pink, defendants in
20 yellow.

21 **Trial brief on parol evidence.** Each side provided further briefing on Motion in
22 Limine No. 4 by Friday, October 17, at noon.

23 **Doug Allen.** Mr. Allen shall appear on Wednesday, October 22, at 7:30 am. Mr.
24 Allen's testimony shall start early enough that day so that it concludes on October 22 with both
25 sides having a full and fair opportunity to examine Mr. Allen. Either party may seek to interrupt
26 the pending witness's examination if that party believes that putting Mr. Allen on at the
27 beginning of the day is necessary in order to assure that Mr. Allen's testimony will be completed
28 on that day.

Number of Jurors. The Court will seat ten jurors.

Time for evidence. The Court will allow eighteen hours of evidence per side
(which excludes the time for openings and closings, and any sidebars not in the presence of the
jury).

Time for opening statement. The Court will allow forty-five minutes per side.

Original Exhibits. The parties must use the original trial exhibits filed with the
Court for examination of each witness.

1 **Statement of the Case.** The parties shall provide a joint, one-page Statement of
the Case to the Court on the first day of trial.

2 **Trial Exhibit 1184.** Plaintiffs shall not be permitted to introduce or refer to
unredacted Trial Exhibit 1184 unless and until the Court rules otherwise.

3 Plaintiffs will submit a brief to the Court as to the admissibility an unredacted
4 Trial Exhibit 1184.

5 **Trial Exhibit 1320.** The Court stated that Trial Exhibit 1320 constitutes an
admission of a party-opponent, and that there is a foundation for it.

6 Defendants plan to make further submissions to the Court regarding the
7 admissibility of Trial Exhibit 1320.

8 Respectfully Submitted,

9 Date:

Manatt, Phelps & Phillips, LLP

10 BY: /s/

11 *Attorneys for Plaintiffs*

12
13
14
15
16
17 IT IS SO ORDERED.

18
19 Dated: _____

20 _____
HON. WILLIAM H. ALSUP
United States District Court

21 Judge